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# The Return Directive 2008/115/EC

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## European Implementation Assessment

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# The Return Directive 2008/115/EC

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## European Implementation Assessment

In November 2019, the European Parliament's Committee on Civil Liberties, Justice and Home Affairs (LIBE) launched an implementation report on *Directive 2008/115/EC on common standards and procedures in Member States for returning illegally staying third-country nationals (the 'Return Directive')*. The Return Directive aims at ensuring that the return of non-EU nationals without legal grounds to stay in the EU is carried out effectively, through fair and transparent procedures that fully respect the fundamental rights and dignity of the people concerned. Tineke Strik (Greens/EFA, the Netherlands) was appointed as rapporteur.

Implementation reports by European Parliament committees are routinely accompanied by European Implementation Assessments, drawn up by the Ex-Post Evaluation Unit of the European Parliament's Directorate-General for Parliamentary Research Services (EPRS).

This EPRS European Implementation Assessment is based on two external studies: 1) a study evaluating the *implementation of the Return Directive in ten selected Member States*; 2) a study examining *the external dimension of the Return Directive*. It finds several protection gaps and shortcomings regarding the four key measures of the Return Directive – return decision, enforcement of the return decision, entry ban, and detention – which may lead to fundamental rights violations for irregular migrants. Moreover, EU return and readmission policy has increasingly resorted to informal cooperation in the external policy dimension. There have been, and continue to be, rule of law, fundamental rights, budgetary and external affairs implications flowing from the pursuit, conclusion and implementation of EU readmission agreements and agreements having equivalent effect with third countries.

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## Executive summary

The return and readmission of irregular migrants in Europe has been a key priority for the EU institutions and the Member States alike, including in the context of unsuccessful asylum claims. Return and readmission of irregular migrants to third countries has been an integral part of the EU's immigration and asylum policy since the 1999 Tampere Council Conclusions and the adoption of the Treaty of Amsterdam.

On 16 December 2008, the European Parliament and the Council of the EU adopted *Directive 2008/115/EC on common standards and procedures in Member States for returning illegally staying third-country nationals (the 'Return Directive')*.

The objective of the Return Directive is to ensure that the return of third-country nationals (non-EU nationals) without legal grounds to stay in the EU is carried out effectively through fair and transparent procedures that fully respect the fundamental rights and dignity of the people concerned. The fundamental rights obligations under primary and secondary EU law (including under the EU Charter of Fundamental Rights) and international law include, in particular, the principle of *non-refoulement*; the right to an effective remedy; the prohibition on collective expulsion; the right to liberty; and the right to the protection of personal data.

The European Commission first evaluated the Return Directive in 2013. It found that the Return Directive had an overall positive effect on return policy in Europe, because it streamlined Member States' practices with regard to: the maximum length of detention; the promotion of voluntary departures and return monitoring; as well as harmonising the length and conditions of entry bans. However, the evaluation also found that the Return Directive did not seem to have much influence on the postponement of removal and on procedural safeguards. It furthermore concluded that there is a lack of data availability at the national level, and that common definitions around data collection are missing.

No further Commission evaluation of the Return Directive was conducted after that evaluation, which is contrary to Article 19 of the Directive and the principles of better law-making.

In September 2018, the Commission published a recast proposal of the Return Directive without an accompanying impact assessment. Given the lack of a Commission impact assessment, the European Parliament's Committee on Civil Liberties, Justice and Home Affairs (LIBE) asked the European Parliamentary Research Service (EPRS) to conduct an EP targeted substitute impact assessment. This impact assessment concluded, inter alia, that there is no clear evidence that the Commission proposal would lead to more effective returns of irregular migrants.

Considering the lack of a Commission implementation assessment, in November 2019, the LIBE Committee launched an implementation report on the Return Directive. Tineke Strik (Greens/EFA, the Netherlands) was appointed as the rapporteur.

This EPRS European Implementation Assessment is based on two external studies: 1) a study evaluating the *implementation of the Return Directive in ten selected Member States*; 2) a study examining the *external dimension of the Return Directive*. It finds several protection gaps and shortcomings regarding the four key measures of the Return Directive – return decision, enforcement of the return decision, entry ban, and detention – which may lead to fundamental rights violations for irregular migrants. Moreover, EU return and readmission policy has increasingly resorted to informal cooperation in the external policy dimension. There have been, and continue to be, rule of law, fundamental rights, budgetary and external affairs implications flowing from the pursuit, conclusion and implementation of EU readmission agreements and agreements having an equivalent effect with third countries.

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## Part I – Introduction

### 1. Background: the 2008 Return Directive

#### 1.1. Scope and content

The return and readmission of irregular migrants<sup>1</sup> in Europe has been a key priority for the EU institutions and the Member States alike, including in the context of unsuccessful asylum claims. Return and readmission are an integral part of the EU's immigration and asylum policy since the 1999 Tampere European Council Conclusions<sup>2</sup> and the adoption of the Treaty of Amsterdam.

On 16 December 2008, the European Parliament and the Council of the EU adopted *Directive 2008/115/EC on common standards and procedures in Member States for returning illegally staying third-country nationals (the 'Return Directive')*.<sup>3</sup> The Return Directive was one of the first legislative instruments in the area of EU immigration and asylum that fell under the co-decision procedure (today: ordinary legislative procedure) at that time.

The objective of the Return Directive is to ensure that the return of third-country nationals (non-EU nationals) without legal grounds to stay in the EU is carried out effectively through fair and transparent procedures that fully respect the fundamental rights and dignity of the people concerned. The fundamental rights obligations under primary and secondary EU law (including under the EU Charter of Fundamental Rights) and international law include in particular the principle of *non-refoulement*;<sup>4</sup> the right to an effective remedy; the prohibition on collective expulsion; the right to liberty; and the right to the protection of personal data.

Return and asylum policies are interlinked. Through the Common European Asylum System (CEAS), the EU has developed legal and policy instruments for the management of asylum in the EU that apply from the moment someone has lodged an asylum application until the moment the application has been recognised or rejected upon appeal, at which stage the individual becomes eligible for return.<sup>5</sup> Importantly, the European Border and Coast Guard Agency (Frontex) plays a key role in the implementation of return policy, as well as its cooperation with third countries on return.<sup>6</sup>

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<sup>1</sup> Irregular migrants are non-EU nationals who are rejected asylum seekers, and those who enter, stay or work in a country without the necessary authorisation or documents required under immigration regulations, see International Organization for Migration (IOM) key migration terms.

<sup>2</sup> Tampere European Council Presidency Conclusions, 15-16 October 1999.

<sup>3</sup> [Directive 2008/115/EC](#) of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals.

<sup>4</sup> See Article 33(1) of the Refugee Convention; this principle prohibits the expulsion or return of a person to the frontiers of territories where the person's life or freedom would be threatened.

<sup>5</sup> See Van Ballegooij, W., with Navarra, C., [The Cost of non-Europe in Asylum Policy](#), EPRS, European Parliament, 2018; see also Scherrer A., [Dublin Regulation on international protection applications](#), European Implementation Assessment, EPRS, European Parliament, 2020.

<sup>6</sup> See Part III – Study on the external dimension of the Return Directive.

It took the EU legislator three years to agree on the text of the Return Directive; the negotiations were difficult.<sup>7</sup> The European Parliament presented its report<sup>8</sup> on the Commission proposal<sup>9</sup> in September 2007. Some of the contentious points concerned the personal scope of the directive, the period of voluntary departure, re-entry bans, detention, procedural rights and the situation of children. After several informal negotiations (trilogues) between the Council, Parliament and Commission, a compromise text was agreed, which was subsequently approved by the Parliament and by the Council in 2008.<sup>10</sup>

Despite the European Parliament's involvement in the negotiation process, the final text of the Directive offers overall weaker protection than the original Commission proposal. The Parliament was criticised for approving the text, negotiated by the Parliament's rapporteur with the Council, without introducing any amendments.<sup>11</sup> This was ascribed, inter alia, to the Parliament's pragmatic stance (acting for the first time as co-legislator), the subsequent French Council Presidency, and pressure from national governments.<sup>12</sup>

The Return Directive applies to third-country nationals without legal grounds to stay in the territory of the EU (excluding Denmark, Ireland and the United Kingdom), or the four Schengen-associated states (Iceland, Liechtenstein, Norway and Switzerland).

The **Return Directive is structured in five chapters**. Its main provisions include:

- **scope of the Directive in border cases (Article 2(2)(a)):** Member States may decide not to apply this Directive to third-country nationals who: (a) are subject to a refusal of entry in accordance with Article 13 of the Schengen Borders Code, or who are apprehended or intercepted by the competent authorities in connection with the irregular crossing by land, sea or air of the external border of a Member State and who have not subsequently obtained an authorisation or a right to stay in that Member State.
- **more favourable provisions (Article 4(4)):** With regard to third-country nationals excluded from the scope of this Directive in accordance with Article 2(2)(a), Member States shall: (a) ensure that their treatment and level of protection are no less favourable than as set out in Article 8(4) and (5) (limitations on use of coercive measures), Article 9(2)(a) (postponement of removal), Article 14(1) (b) and (d) (emergency health

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<sup>7</sup> See Lutz F., 'The negotiations of the Return Directive: comments and materials', Wolf Legal Publishers, 2010; see also Pollet K., 'The Negotiations on the Returns Directive: Challenges, Outcomes and Lessons learned from an NGO perspective', in: Zwaan K., 'The Returns Directive. Central themes, problem issues, and implementation in selected Member States', Wolf Legal Publishers, 2011, p. 25.

<sup>8</sup> European Parliament, Report on the 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 ([A6-0339/2007](#)), 20 September 2007 (rapporteur Manfred Weber, EPP, Germany).

<sup>9</sup> European Commission, proposal for a directive of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third-country nationals, [COM\(2005\) 391](#), 1 September 2005.

<sup>10</sup> See also Acosta D., 'The good, the bad and the ugly in EU migration law: Is the European Parliament becoming bad and ugly? (The Adoption of Directive 2008/15: The Returns Directive)', *European Journal of Migration and Law*, Vol. 11(1), Brill | Nijhoff, 2009, pp. 19-39.

<sup>11</sup> Majcher I., 'The European Union Returns Directive and Its Compatibility with International Human Rights Law', Brill | Nijhoff, 2020, pp. 10-11.

<sup>12</sup> See Ripoll Servent A., 'Co-Decision in the European Parliament: Comparing Rationalist and Constructivist Explanations of the Returns Directive', *Journal of Contemporary European Research*, Vol. 7(1), UACES, pp. 3-22; Acosta D., 'The good, the bad and the ugly in EU migration law: Is the European Parliament becoming bad and ugly? (The Adoption of Directive 2008/15: The Returns Directive)', *European Journal of Migration and Law*, Vol. 11(1), Brill | Nijhoff, 2009, pp. 19-39.

care and taking into account needs of vulnerable persons), and Articles 16 and 17 (detention conditions); and (b) respect the principle of *non-refoulement*;

- **Non-refoulement, best interests of the child, family life and state of health (Article 5):** When implementing the Directive, Member States shall take due account of the best interests of the child, family life, state of health and respect the principle of *non-refoulement*;
- **return decision (Article 6):** Member States shall issue a return decision to any third-country national staying illegally on their territory, without prejudice to the exceptions referred to Articles 6(2) to (5);
- **voluntary departure (Article 7):** A return decision shall provide for an appropriate period for voluntary departure of between seven and thirty days, without prejudice to the exceptions referred to in Article 7(2) and (4);
- **removal (Article 8):** Member States shall take all necessary measures to enforce the return decision if no period for voluntary departure has been granted in accordance with Article 7(4), or if the obligation to return has not been complied with within the period for voluntary departure granted in accordance with Article 7;
- **postponement of removal (Article 9):** Member States shall postpone removal: (a) when it would violate the principle of *non-refoulement*, or (b) for as long as a suspensory effect is granted in accordance with Article 13(2);
- **return and removal of unaccompanied minors (Article 10):** Before deciding to issue a return decision in respect of an unaccompanied minor, assistance by appropriate bodies other than the authorities enforcing return shall be granted with due consideration being given to the best interests of the child.
- **entry ban (Article 11):** Return decisions shall be accompanied by an entry ban: (a) if no period for voluntary departure has been granted, or (b) if the obligation to return has not been complied with. In other cases, return decisions may be accompanied by an entry ban;
- **procedural safeguards, including on form (Article 12):** Return decisions and, if issued, entry ban decisions and decisions on removal shall be issued in writing and give reasons in fact and in law as well as information about available legal remedies;
- **remedies (Article 13):** The third-country national concerned shall be afforded an effective remedy to appeal against or seek review of decisions related to return, as referred to in Article 12(1), before a competent judicial or administrative authority or a competent body composed of members who are impartial and who enjoy safeguards of independence;
- **safeguards pending return (Article 14):** Member States shall, with the exception of the situation covered in Articles 16 and 17, ensure that the following principles are taken into account as far as possible in relation to third-country nationals during the period for voluntary departure granted in accordance with Article 7 and during periods for which removal has been postponed in accordance with Article 9: family unity with family members present in their territory is maintained; (b) emergency health care and essential treatment of illness are provided; (c) minors are granted access to the basic education system subject to the length of their stay; (d) special needs of vulnerable persons are taken into account;
- **detention (Article 15):** Unless other sufficient but less coercive measures can be applied effectively in a specific case, Member States may only keep in detention a third-country national who is the subject of return procedures in order to prepare the return and/or carry out the removal process, in particular when: (a) there is a risk of absconding; or (b) the third-country national concerned avoids or hampers the preparation of return or the removal process.

- **conditions of detention (Article 16):** Detention shall take place as a rule in specialised detention facilities. Where a Member State cannot provide accommodation in a specialised detention facility and is obliged to resort to prison accommodation, the third-country nationals in detention shall be kept separated from ordinary prisoners.
- **Detention of minors and families (Article 17):** Unaccompanied minors and families with minors shall only be detained as a measure of last resort and for the shortest appropriate period of time.

The study on the **evaluation of the implementation of the Return Directive in the EPRS European Implementation Assessment (Part II)** provides a critical analysis of the **four key measures – return decision, enforcement of the return decision (by means of voluntary return or forcible return), entry ban, and detention** – as implemented in ten Member States.

The Return Directive laid down, for the first time at the EU level, mandatory return decisions for irregularly staying third-country nationals, the preference for voluntary return, the mandatory issuance of entry bans together with return decisions, procedural safeguards in the return process (such as remedies and safeguards pending return), and grounds for pre-removal detention, for a maximum period of 18 months.<sup>13</sup>

The Return Directive and its negotiation attracted a lot of criticism from many organisations, experts, academics and other stakeholders. In a 2008 position paper, the United Nations High Commissioner for Refugees (UNHCR) stated that it could not support the directive, because of, among other things, inadequate safeguards to ensure safe and dignified returns, the 18 month detention period and mandatory entry bans.<sup>14</sup> Several non-governmental organisations, including Migreurop, Association Européenne pour la défense des Droits de l'Homme (AEDH), Pro Asyl and Statewatch, had already signed the appeal 'No to the Outrageous Directive!' addressed to the Members of the European Parliament (MEPs) in December 2007.<sup>15</sup> At that time, the appeal was supported by 400 European organisations and more than 8 000 citizens.

Despite diverging views, leading academic experts on EU immigration and asylum law also took a critical stance on the directive overall.<sup>16</sup> Academics questioned the compatibility of the draft text of the directive with human right commitments under international and EU law.<sup>17</sup> In particular, the maximum pre-removal detention period of 18 months and mandatory re-entry bans were criticised.<sup>18</sup> Another issue highlighted relates to migrants in an irregular situation who cannot be

<sup>13</sup> See Lutz F. and Mananashvili S., 'Return Directive 2008/115/EC' in Hailbronner, K. and Thym, D. (eds.), *EU Immigration and Asylum Law. A Commentary*, 2nd edition, Munich/Oxford/Baden-Baden: C.H. Beck/Hart/Nomos, 2016, p. 658.

<sup>14</sup> UNHCR, [UNHCR Position on the Proposal for a Directive on Common Standards and Procedures in Member States for Returning Illegally Staying Third-Country Nationals](#), 16 June 2008.

<sup>15</sup> Migreurop and others, ['No to the Outrageous Directive!'](#), 7 November 2007.

<sup>16</sup> Majcher I., 'The European Union Returns Directive and Its Compatibility with International Human Rights Law', Brill | Nijhoff, 2020, p. 64.

<sup>17</sup> Ibid., quoting Guild E. and Carrera S. in: House of Lords, European Union Committee, [Illegal Migrants: Proposals for a Common EU Returns Policy: Report with Evidence](#), 9 May 2006, pp. 125-126 and 201-203; Peers, S., [Statewatch Analysis: The Returns Directive](#) (Statewatch, 9 June 2008).

<sup>18</sup> See Baldaccini A., 'The EU Directive on Return: Principles and protests', *Refugee Survey Quarterly*, Vol. 28(4), Oxford Academic, 2009, p. 114; see also Baldaccini A., 'The return and removal of irregular migrants under EU law: An analysis of the Returns Directive', *European Journal of Migration and Law*, Vol. 11(1), Brill | Nijhoff, 2009, p. 1; Cornelisse G., 'Immigration detention and human rights: rethinking territorial sovereignty', Brill | Nijhoff, 2010, pp. 271-272; Provera M., 'The Detention of Asylum Seekers in the European Union and in Australia – A Comparative Analysis', Wolf Legal Publishers, 2013.

expelled.<sup>19</sup> Concerns were also raised that the Return Directive introduced common standards for the removal of irregular migrants in the absence of a comprehensive, common policy governing legal admission and stay, despite a clear link between legal and irregular migration.<sup>20</sup>

In a series of judgments, the Court of Justice of the EU (CJEU) provided clarifications regarding several key aspects of the Return Directive, with a significant impact on Member States' implementation of the Directive itself.<sup>21</sup> The CJEU has played an ever-important role in the development of European return law since its initial ruling on this matter in *Kadzoev* in November 2009 (dealing with the time limits on detention).<sup>22</sup>

The CJEU has thus clarified several provisions of the Return Directive with its case law, ruling that it is less restrictive than it initially appeared.<sup>23</sup> This concerned especially the case law restricting the grounds for detention, limiting Member States' custodial penalties for irregular migration as a criminal offence, enhancing voluntary departure, prohibiting removal in *non-refoulement* cases, and widening the scope of the Directive, while clarifying that asylum seekers are not irregular migrants.<sup>24</sup> However, it has also been pointed out that 'some of the Court's rulings are fairly modest', for example, the right to a hearing has no effective content or remedies to enforce it.<sup>25</sup>

## 1.2. The 2013 European Commission evaluation

The European Commission first evaluated the Return Directive in 2013, observing its first reporting obligation as specified in Article 19 of the Directive. This 2013 Commission evaluation was based on an external study prepared by a consortium led by the Matrix consultancy.<sup>26</sup> The consortium included the International Centre for Migration Policy Development (ICMPD), the Odysseus Network, the European Council for Refugees (ECRE) and the Centre for European Policy Studies (CEPS), as well as a number of individual experts.

The Commission evaluation found that the Return Directive had an overall positive effect on return policy in Europe, because it streamlined Member States' practices with regard to: the maximum

<sup>19</sup> Acosta D., 'The Returns Directive: Possible Limits and Interpretation', in: Zwaan K., *The Returns Directive. Central themes, problem issues, and implementation in selected Member States*, Wolf Legal Publishers, 2011, pp. 7-8 and 16-17; for a 2018 analysis on this issue, see Lutz F., 'Non-removable Returnees under Union Law: Status Quo and Possible Developments', *European Journal of Migration and Law*, Vol. 20(1), Brill | Nijhoff, 2018, pp. 25-52.

<sup>20</sup> See Van Ballegooij W. and Thirion E., [The Cost of non-Europe in the area of legal migration](#), EPRS, European Parliament, 2019; Baldaccini A., 'The EU Directive on Return: Principles and protests', *Refugee Survey Quarterly*, Vol. 28(4), Oxford Academic, 2009, p. 114.

<sup>21</sup> Peers S., 'EU Justice and Home Affairs Law', 4th edition, Oxford University Press, 2016, pp. 520-521 (502-521).

<sup>22</sup> Molnár T., '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: *EU External Migration Policies in an Era of Global Mobilities: Intersecting Policy Universes*, Carrera S. et al. (eds), Martinus Nijhoff Publishers 2018, p. 115; CJEU, Case C- 357/ 09 PPU, *Said Shamilovich Kadzoev (Huchbarov)*, Judgment of 30 November 2009, ECLI:EU:C:2009:741.

<sup>23</sup> Peers S., 'EU Justice and Home Affairs Law', 4th edition, Oxford University Press, 2016, pp. 520-521 (502-521).

<sup>24</sup> *Ibid.*, see also Basilien-Gainche M.L., 'Immigration detention under the Return Directive: The CJEU shadowed lights', *European Journal of Migration and Law*, Vol. 17(1), Brill | Nijhoff, 2015, p. 104; Molnár T., '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: *EU External Migration Policies in an Era of Global Mobilities: Intersecting Policy Universes*, Carrera S. et al. (eds), Martinus Nijhoff Publishers 2018, p. 105.

<sup>25</sup> Peers S., 'EU Justice and Home Affairs Law', 4th edition, Oxford University Press, 2016, p. 521 (502-521).

<sup>26</sup> European Commission, [Evaluation on the application of the Return Directive \(2008/115/EC\)](#), Directorate-General for Migration and Home Affairs, 22 October 2013, based on a report prepared by Matrix.

length of detention; the promotion of voluntary departures and return monitoring; as well as harmonising the length and conditions of entry bans.<sup>27</sup>

However, the evaluation also found that the Return Directive did not seem to have much influence on the postponement of removal and on procedural safeguards.<sup>28</sup> It furthermore concluded that there is a lack of data availability at the national level, and that common definitions around data collection are missing. This suggests that, according to the Commission, certain information is not systematically collected by Member States, or systematically disseminated if collected.<sup>29</sup>

In 2014, the European Commission reported on the EU's return policy and the implementation of the Return Directive in the Member States.<sup>30</sup> It highlighted as the remaining issues the following provisions of the Return Directive:

- EU-wide effect of entry bans;
- definition of risk of absconding;
- criteria for prolonging the period of voluntary departure;
- rules to be respected when removing by air;
- forced return monitoring;
- criteria for imposing detention;
- detention conditions.

The Commission emphasised monitoring of the implementation of the Return Directive, systematic follow-up on all shortcomings identified, and promotion of more consistent and fundamental rights-compatible practices as future key priorities.<sup>31</sup>

The Commission also made clear that 'return policy alone cannot deal effectively with the management of irregular migration flows to the EU but needs to be part of a more comprehensive approach', referring to the 2011 Global Approach to Migration and Mobility (GAMM).<sup>32</sup>

Despite further reporting obligations as set out in Article 19 of the Return Directive,<sup>33</sup> the Commission did not present any evaluation after 2013. It should be noted, however, that the implementation of the Return Directive has been analysed by several experts.<sup>34</sup> These find a number of protection gaps and shortcomings in the EU return system, which may lead to fundamental rights'

<sup>27</sup> Ibid.

<sup>28</sup> Some issues regarding the practical application of safeguards were found in relation to the form of the return decision (lack of detail and motivation; translation and interpretation), effective legal remedy, the period of time between adopting a forced return decision and the carrying out of the actual return, as well as means tests applied before granting legal assistance free of charge.

<sup>29</sup> European Commission, [Evaluation on the application of the Return Directive \(2008/115/EC\)](#), Directorate-General for Migration and Home Affairs, 22 October 2013, based on a report prepared by Matrix.

<sup>30</sup> European Commission, On EU return policy, [COM\(2014\) 199](#), 23 March 2014.

<sup>31</sup> Ibid., pp. 7-9.

<sup>32</sup> Ibid., p. 7; the GAMM consists of four pillars: (1) legal migration and mobility; (2) irregular migration and trafficking in human beings; (3) international protection and asylum; and (4) a development nexus.

<sup>33</sup> Article 19 of the Return Directive: 'The Commission shall report every three years to the European Parliament and the Council on the application of this Directive in the Member States and, if appropriate, propose amendments.'

<sup>34</sup> See, inter alia, Zwaan K., 'The Returns Directive. Central themes, problem issues, and implementation in selected Member States', Wolf Legal Publishers, 2011; Severino C., 'La Transposition de La Directive « retour » France, Espagne et Italie', À La Croisée Des Droits - Bruylant, 2015; various 2016 Reports of the Odysseus Network within the scope of the REDIAL research project, such as De Bruycker P. (et al.), European Synthesis Report on the termination of illegal stay (articles 7 to 11 of Directive 2008/115/EC), REDIAL Research Report 2016/01, 2016; Majcher I., 'The European Union Returns Directive and Its Compatibility with International Human Rights Law', Brill | Nijhoff, 2020; Moraru M. (et al.), 'Law and Judicial Dialogue on the Return of Irregular Migrants from the European Union', Hart Publishing, 2020.

violations of irregular migrants. The protection gaps and shortcomings include, among other things, no explicit prohibition to issue return decisions on account of the *non-refoulement* principle; procedural safeguards that fall short of requirements under international human rights law; entry bans, which generally disrespect the principle of proportionality, including the individual assessment of the case; no rules on adequate living standards for non-deportable people; possible detention practices that are contrary to the principles of necessity and proportionality, and potentially even violate the right to liberty.

The study on the **evaluation of the implementation of the Return Directive in the EPRS European Implementation Assessment (Part II) confirms many of these protection gaps and shortcomings** (see key findings in Section 5 below).

### 1.3. EU return policy under the European Agenda on Migration and thereafter

In response to the increase in the number of asylum seekers and irregular migrants arriving in the EU in 2015, the European Commission adopted the European Agenda on Migration.<sup>35</sup> The EU saw a relative increase in asylum applications in 2015, when 1.3 million applications were lodged across the Member States, but these figures decreased in the following years.<sup>36</sup> The objective of returning irregular migrants became more prominent. One of the four pillars of the European Agenda on Migration concerns reducing incentives for irregular migration and effectively returning irregular migrants.<sup>37</sup> The Commission urged Member States to fully comply with the Return Directive and announced its monitoring efforts in this regard. The Commission further highlighted the importance of cooperating with third countries in the field of readmission and return, and of enhancing the role of Frontex.<sup>38</sup>

In September 2015, the Commission put forward an 'EU action plan on return',<sup>39</sup> aimed at increasing the effectiveness of the EU return system of irregular migrants. It also proposed a first Return Handbook providing guidance for national authorities, along with an enhanced role for Frontex, and better cooperation with countries of origin and transit on readmission.<sup>40</sup>

In light of the limited impact of EU actions aiming to return irregular migrants, in 2017, the Commission presented a 'renewed action plan on a more effective return policy in the European Union.'<sup>41</sup> In addition, Member States were given further guidance in a recommendation and a

<sup>35</sup> European Commission, [COM\(2015\) 240](#), 13 May 2015.

<sup>36</sup> Van Ballegoij, W., with Navarra, C., [The Cost of non-Europe in Asylum Policy](#), EPRS, European Parliament, 2018, Annex produced by Milieu, p. 55.

<sup>37</sup> European Commission, [COM\(2015\) 240](#), 13 May 2015, pp. 7-10.

<sup>38</sup> Ibid.

<sup>39</sup> European Commission, [COM\(2015\) 453](#), 9 September 2015.

<sup>40</sup> Ibid.; 2015 [Return Handbook](#), C(2015) 6250, 1 October 2015.

<sup>41</sup> European Commission, [COM\(2017\) 200](#), 2 March 2017, p. 2.

second Return Handbook,<sup>42</sup> – however, the effects of these non-binding tools have not been assessed.<sup>43</sup>

The Commission specified that in 2015, the number of irregular migrants ordered to leave the EU amounted to 533 395 people, compared to 470 080 in 2014. 'With around 2.6 million asylum applications in 2015/2016 alone, and considering that the first instance recognition rate stands at 57 % in the first three quarters of 2016, Member States may have more than 1 million people to return once their asylum applications have been processed.'<sup>44</sup> However, at the same time, return rates at EU level have not improved. 'While the total return rate from 2014 to 2015 increased from 41.8 % to 42.5 %, the rate of effective returns to third countries dropped from 36.6 % to 36.4 %.'<sup>45</sup> In its renewed action plan, the Commission presented initiatives aimed at increasing return rates.

Table 1 below provides an overview of ineffective returns, taken from the EPRS Study on the Cost of Non-Europe in Asylum Policy<sup>46</sup>. These estimates (identified gap/barrier 'rejected claims and failure to leave EU') are based on Eurostat figures for asylum application decisions (*migr\_asydctzy*), the total number of orders to leave the EU (*migr\_eiord*) and the total number of returns following the order (*migr\_eirtn*). The latter two variables are not specific to asylum seekers, but reflect orders to leave the EU for all categories of irregular migrants. The authors assume the return rates based on these orders are comparable for asylum seekers. Table 1 provides the figures for these variables in 2016 and 2017.

The estimated number of irregular migrants was 316 678 ((100 percent-51 percent)\*640 160) in 2016 and 256 874 ((100 percent-41 percent)\*435 380) in 2017.

Table 1 – Overview of ineffective returns

	Eurostat variable name	2016	2017
Number of negative decisions on asylum applications – first and final	<i>migr_asydctzy</i>	640 160	435 380
Overall number of orders to leave	<i>migr_eiord</i>	493 785	516 115
Overall number of returns following order to leave the EU	<i>migr_eirtn</i>	250 015	213 505
Share of orders executed	<i>migr_eiord</i> and <i>migr_eirtn</i>	51 %	41 %

Source: Van Ballegooij, W., with Navarra, C., [The Cost of non-Europe in Asylum Policy](#), EPRS, European Parliament, 2018, Annex produced by Milieu, Table 26, p. 156.

<sup>42</sup> Ibid., [European Commission Recommendation \(EU\) 2017/432](#) of 7 March 2017, on making returns more effective when implementing Directive 2008/115/EC of the European Parliament and of the Council; European Commission, Return Handbook, Annex to [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.

<sup>43</sup> See Eisele K., [The proposed Return Directive \(recast\) – Substitute Impact Assessment](#), EPRS, European Parliament, February 2019, p. 3.

<sup>44</sup> European Commission, [COM\(2017\) 200](#), 2 March 2017, p. 2.

<sup>45</sup> Ibid.

<sup>46</sup> Van Ballegooij, W., with Navarra, C., Study on the [Cost of Non-Europe in Asylum Policy](#), EPRS, European Parliament, 2018.

To prioritise the return rate as the primary indicator for 'effectiveness' of the return of irregular migrants, as the European Commission has done, runs the risk of incentivising 'return at all costs', without taking stock of the full human, foreign relations and other costs.<sup>47</sup>

Reliance on the return rate as the primary indicator of policy effectiveness is also methodologically questionable, particularly in the absence of a qualitative assessment – underscoring the need for post-return monitoring and relevant indicators concerning the circumstances of returned individuals.<sup>48</sup>

In addition, the rate of return is a misleading indicator. The people who received the return decision were not necessarily returned within the same year as some return decisions are implemented in the following year. Moreover, two Member States (Belgium and the Netherlands) have issued more than one return decision to a person in the past if the person was apprehended at a later stage (these Member States have now eliminated this practice).<sup>49</sup>

Little information is available about the costs of various return-related measures. Overall, regardless of the average total cost of return per person, putting this procedure in place with respect to those who cannot be returned is inefficient in itself.<sup>50</sup> The EPRS Substitute Impact Assessment of the Commission's recast proposal provides some estimated costs of implemented returns. Accordingly, Belgium incurs approximately €10 338 250 for around 5 770 returns on an annual basis, Germany €104 222 800 for about 39 515 returns, and Italy €9 879 725 for around 6 950 returns.<sup>51</sup>

Further, the cost-effectiveness of detention clearly calls for this measure to be kept as short as possible. According to the EPRS Substitute Impact Assessment, the evidence suggests that detention periods of over a month do not increase the return.<sup>52</sup>

In 2017, the European Migration Network (EMN)<sup>53</sup>, an EU network of migration and asylum experts coordinated by the European Commission, conducted a study on the effectiveness of return.<sup>54</sup> The study acknowledged the low return rates in the EU, and identified challenges for the effective implementation of returns, as well as good practices. It concluded that Member States increasingly focus on return, but that national practices implementing the EU framework or equivalent standards vary between countries. This is due to different administrative practices and different interpretations of rules and EU case law. Challenges attached to the effectiveness of return relate primarily to the risk that a third-country national absconds; the difficulty in arranging voluntary departures in the timeframe defined in EU rules and standards; the application of rules and standards on detention; the capacity and resources needed to detain third-country nationals in the context of return procedures; and the length of the return procedure.<sup>55</sup>

<sup>47</sup> See Part III – Study on the external dimension of the Return Directive, Sections 1.1 and 8; see also Eisele K., [The proposed Return Directive \(recast\) – Substitute Impact Assessment](#), EPRS, European Parliament, February 2019, p. 40; Carrera S., 'Implementation of EU Readmission Agreements – Identity Determination Dilemmas and the Blurring of Rights', Springer Nature, Switzerland, 2016, p. 58.

<sup>48</sup> See Part III – Study on the external dimension of the Return Directive, Key findings and Section 8.

<sup>49</sup> See Part II – Study on the evaluation of the implementation of the Return Directive, Section 2.2.

<sup>50</sup> See Part II – Study on the evaluation of the implementation of the Return Directive, Section 3.

<sup>51</sup> Eisele K., [The proposed Return Directive \(recast\) – Substitute Impact Assessment](#), EPRS, European Parliament, February 2019, pp. 146-147.

<sup>52</sup> *Ibid.*, pp. 9 and 115.

<sup>53</sup> [European Migration Network](#), 2017.

<sup>54</sup> European Commission, [European Migration Network \(EMN\) study on the effectiveness of return in EU Member States](#), Directorate-General for Migration and Home Affairs, 23 February 2018.

<sup>55</sup> *Ibid.*

The question arises **why the Commission did not conduct a fully fledged evaluation of the implementation of the Return Directive at that time**, gathering data and evidence from all Member States. Having full knowledge of the Directive's transposition and especially its practical application would allow for tackling protection gaps and shortcomings in a targeted and systematic manner.

## 1.4. The external dimension of the Return Directive: formal and informal agreements

The EU's policy on the return of irregularly staying third country nationals consists of both an internal and external dimension. The internal dimension is governed by the operation of the Return Directive.

The external dimension of the return policy is operationalised by EU readmission agreements (EURAs) with third countries and informal agreements having an equivalent effect as well as operational measures carried out by the European Border and Coast Guard Agency (Frontex) that facilitate return.<sup>56</sup>

The purpose of these agreements is to secure cooperation with third countries for 'a swift and efficient readmission procedure'<sup>57</sup> to readmit their nationals and, in some circumstances, non-nationals, from the territories of EU Member States.<sup>58</sup>

The external dimension is based on the premise that for a successful and effective EU return and readmission policy, cooperation with third countries is vital.<sup>59</sup> In 2016, the Commission recognised that cooperation with third countries is essential in ensuring effective returns, in a new Partnership Framework with third countries under the European Agenda on Migration.<sup>60</sup>

The Treaty of Amsterdam conferred the EU with the competence to conclude EURAs with third countries. As of March 2020, 18 such agreements have been concluded (the latest being with Belarus).<sup>61</sup>

However, readmission agreements were notoriously difficult to negotiate and conclude despite the EU's offer to conclude visa facilitation agreements in return.<sup>62</sup> Although cast in terms of reciprocal obligations, in practice, EURAs are asymmetric towards third countries.<sup>63</sup> EURAs are the medium

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<sup>56</sup> See Part III – Study on the external dimension of the Return Directive.

<sup>57</sup> European Commission, Evaluation of EU Readmission Agreements, [COM\(2011\) 76](#), 23 February 2011, p. 11.

<sup>58</sup> See Part III – Study on the external dimension of the Return Directive; see also Schieffer M., 'Readmission and Repatriation of Illegal Residents' in Martenczuk B. and van Thiel, S. (eds), *Justice, Liberty and Security: New Challenges for EU External Relations*, VUB Press, 2008, p. 96.

<sup>59</sup> Coleman N., *European Readmission Policy: Third Country Interests and Refugee Rights*, Brill | Nijhoff, 2009.

<sup>60</sup> European Commission, Establishing a new Partnership Framework with third countries under the European Agenda on Migration, [COM\(2016\) 385](#), 7 June 2016.

<sup>61</sup> For an overview of all EURAs, see Annex I of Part III – Study on the external dimension of the Return Directive.

<sup>62</sup> See Trauner F. and Kruse I., 'EC Visa Facilitation and Readmission Agreements: A New Standard EU Foreign Policy Tool?' (2008) 10, *European Journal for Migration and Law*, 411.

<sup>63</sup> Cassarino J.-P., *Dealing with Unbalanced Reciprocities: Cooperation on Readmission and Implications*, in: Cassarino, J.-P. (ed), *Unbalanced Reciprocities: Cooperation on Readmission in the Euro-Mediterranean Area*, Special Edition Viewpoints, Middle East Institute, 2010, Chapter 1.

through which EU internal return policy meshes with EU external affairs,<sup>64</sup> but which may be operationalised through the role of Frontex.

The first and only European Commission evaluation of EURAs to date is from 2011, in which the Commission assessed the overall result as mixed.<sup>65</sup>

In the last two decades there has been a trend to conclude informal readmission agreements with third countries.<sup>66</sup> This practice raises a lot of questions, including on the avoidance of judicial and democratic accountability.<sup>67</sup>

Informal agreements lack accountability, both to the European Parliament and Court of Justice of the EU, which highlights the limited avenues for Parliament's ex ante budgetary accountability for EU Trust Funds directed towards EU external migration policy, as identified in an earlier study.<sup>68</sup>

Moreover, obstacles to accountability regarding EU external action are apparent, in particular as concerns Frontex.<sup>69</sup> The emergence of informal means of cooperation has witnessed an increased emphasis on operationalising the returns of irregular migrants and the rising prominence of Frontex in the field of return and in the external dimension.<sup>70</sup>

The informalisation of the external dimension of EU return policy has also paralleled an informalisation of the internal dimension of EU return policy.<sup>71</sup>

The study on the **external dimension contained in this EPRS European Implementation Assessment (Part III) finds that there have been, and continue to be, rule of law, fundamental rights, budgetary and external affairs implications flowing from the pursuit, conclusion and implementation of EURAs and agreements having an equivalent effect.**<sup>72</sup> The study identifies four main types of agreements: (1) formal EU readmission agreements (EURAs), (2) informal agreements, (3) Frontex Working Arrangements and (4) Frontex Status Agreements.

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<sup>64</sup> Carrera S., 'Implementation of EU Readmission Agreements – Identity Determination Dilemmas and the Blurring of Rights', Springer Nature, Switzerland, 2016, p. 52.

<sup>65</sup> European Commission, Evaluation of EU Readmission Agreements, [COM\(2011\) 76](#), 23 February 2011, p. 11

<sup>66</sup> Cassarino J.-P., 'Informalising EU Readmission Policy', in: Ripoll Servent A. and Trauner F. (eds.), *The Routledge Handbook of Justice and Home Affairs Research*, Routledge, 2018, pp. 86-94.

<sup>67</sup> Molinari C., 'The EU and its perilous journey through the migration crisis: informalisation of the EU return policy and rule of law concerns', *European Law Review*, Vol. 44, No. 6, 824.

<sup>68</sup> See Part III – Study on the external dimension of the Return Directive.; referring to [Oversight and Management of the EU Trust Funds – Democratic Accountability Challenges and Promising Practices](#), Policy Department for Budgetary Affairs, European Parliament, May 2018; see also Santos Vara J., 'Soft international agreements on migration cooperation with third countries: a challenge to democratic and judicial controls in the EU', in: Carrera S. et al. (eds), *Constitutionalising the External Dimensions of EU Migration Policies in Times of Crisis – Legality, Rule of Law and Fundamental Rights Reconsidered*, Edward Elgar, 2019.

<sup>69</sup> See Rijpma J., 'External Migration and Asylum Management: Accountability for Executive Action outside EU-territory', *European Papers*, 2017, Vol. 2, No. 2, 571.

<sup>70</sup> See Part III – Study on the external dimension of the Return Directive.

<sup>71</sup> Slominski P. and Trauner, F., 'Reforming me softly – how soft law has changed EU return policy since the migration crisis', *West European Politics*, 13 April 2018.

<sup>72</sup> See Part III – Study on the external dimension of the Return Directive.

## 2. Role of the European Parliament

The European Parliament has expressed its views on the need for a holistic EU approach to migration and on return policies for irregular migrants. It has been vocal about protecting the rights of all migrants, providing safe and legal access to the EU asylum system, and return policies which involve sending migrants back to countries where they can be received safely and without being endangered.

In April 2015, the European Parliament expressed its deep regret at the recurring tragic loss of lives in the Mediterranean and urged the EU and the Member States to build on existing cooperation and do everything possible to prevent further loss of life at sea. It further called for the EU and the Member States to provide the necessary resources to ensure that search and rescue obligations were effectively fulfilled and therefore properly funded. In its resolution, the European Parliament also stressed the need to encourage voluntary return policies, while guaranteeing the protection of rights for all migrants and ensuring safe and legal access to the EU asylum system, with due respect for the principle of *non-refoulement*.<sup>73</sup>

The European Parliament has repeatedly called for return policies that involve sending migrants back to countries where they can be received safely and without being exposed to danger, as expressed in its resolution of 25 October 2016, on human rights and migration in third countries.<sup>74</sup>

In April 2016, the European Parliament called for a holistic EU approach to migration to tackle the situation in the Mediterranean Sea. It pointed out that the return of migrants should only be carried out safely, in full compliance with the fundamental and procedural rights of the migrants in question, and where the country to which they are being returned is safe for them. It also reiterated, in that regard, that voluntary return should be prioritised over forced returns.<sup>75</sup>

In 2018, the European Parliament requested that the European Commission table a legislative proposal establishing a European Humanitarian Visa, giving access to European territory – exclusively to the Member State issuing the visa – for the sole purpose of submitting an application for international protection.<sup>76</sup> It emphasised that Member States should be able to issue humanitarian visas at embassies and consulates abroad, so that people seeking protection can access European territory without risking their lives.

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<sup>73</sup> European Parliament resolution of 29 April 2015 on the latest tragedies in the Mediterranean and EU migration and asylum policies ([2015/2660\(RSP\)](#)).

<sup>74</sup> European Parliament resolution of 25 October 2016 on human rights and migration in third countries ([2015/2316\(INI\)](#)).

<sup>75</sup> European Parliament resolution of 12 April 2016 on the situation in the Mediterranean and the need for a holistic EU approach to migration ([2015/2095\(INI\)](#)), para. 60.

<sup>76</sup> European Parliament resolution of 11 December 2018 with recommendations to the Commission on Humanitarian Visas ([2018/2271\(INL\)](#)); see Van Ballegooij, W., with Navarra, C., [Humanitarian Visas: European Added Value Assessment accompanying the European Parliament's legislative own-initiative report](#), EPRS, European Parliament, 2018.

## 3. State of play

### 3.1. The European Commission's 2018 recast proposal

**The Commission published a recast proposal for the Return Directive in September 2018.**<sup>77</sup> This recast proposal was presented **without an accompanying Commission impact assessment**. This drew criticism from many, including the European Parliament's Committee on Civil Liberties, Justice and Home Affairs (LIBE).<sup>78</sup>

Given the lack of an impact assessment, the LIBE Committee asked the European Parliamentary Research Service (EPRS) to conduct an **EPRS targeted substitute impact assessment**. The findings of this impact assessment were presented in a LIBE Committee hearing on 29 January 2019, and published in February 2019.<sup>79</sup> This impact assessment concluded, inter alia, that:

- 1) there is no clear evidence supporting the Commission's claim that its proposal would lead to more effective returns of irregular migrants;
- 2) the Commission proposal complies with the principle of subsidiarity, but some provisions raise proportionality concerns;
- 3) the Commission proposal would have an impact on several of irregular migrants' social and human rights, including likely breaches of fundamental rights;
- 4) the Commission proposal would generate substantial costs for Member States and the EU; and
- 5) the Commission proposal raises questions of coherence with other EU legislation, especially legislation that is pending.

The Commission's recast proposal is currently under negotiation (rapporteur: Tineke Strik, Greens/EFA, the Netherlands). The rapporteur published her draft report on 21 February 2020.<sup>80</sup>

<sup>77</sup> European Commission, proposal for a directive of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third-country nationals (recast) [COM\(2018\) 634](#), 12 September 2018; see also Diaz Crego, M., [Recasting the Return Directive](#), EPRS, European Parliament, June 2019.

<sup>78</sup> See, inter alia, European Economic and Social Committee (EESC), Opinion on the proposal for a directive of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third-country nationals (recast), rapporteur: José Antonio Moreno Díaz, co-rapporteur: Vladimíra Drbalová, adopted in plenary on 23 January 2019, para. 1.5 thereof; EU Agency for Fundamental Rights (FRA), [Opinion 1/2019](#) on the recast Return Directive and its fundamental rights implications, 10 January 2019; EDPS, [Formal comments of the EDPS](#) on the Commission proposal for a directive of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third-country nationals (recast), 10 January 2019; Meijers Committee – standing committee of experts on international immigration, refugee and criminal law, [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, 27 November 2018; European Council on Refugees and Exiles (ECRE), [Comments](#) on the Commission Proposal for a Recast Return Directive COM(2018) 634, 30 November 2018.

<sup>79</sup> Eisele K., [The proposed Return Directive \(recast\) – Substitute Impact Assessment](#), EPRS, European Parliament, February 2019.

<sup>80</sup> [Draft report](#) on the proposal for a directive of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third-country nationals (recast), (COM(2018)0634), Committee on Civil Liberties, Justice and Home Affairs, rapporteur: Tineke Strik, 21 February 2020 (reference in the [EU Legislative Observatory](#)).

## 3.2. The LIBE Committee's request for an implementation report

Given the lack of a recent evaluation of the Return Directive and being of the view that such an evaluation is necessary, **in November 2019 the LIBE Committee requested authorisation to draw up an own-initiative implementation report** on the Return Directive (rapporteur: Tineke Strik, Greens/EFA, the Netherlands). This authorisation was granted by the Parliament's Conference of Committee Chairs.

The LIBE Committee took the view that, for Parliament to adopt a mandate on the proposal to recast the Return Directive, Parliament first needed to undertake its own implementation report for this important piece of legislation in support of a holistic approach to migration.

European Parliament implementation reports are routinely accompanied by European Implementation Assessments, prepared by the Ex-Post Evaluation Unit of the European Parliamentary Research Service (EPRS).

This EPRS European Implementation Assessment is based on two external studies: 1) a study evaluating the implementation of the Return Directive in ten selected Member States; 2) a study examining the external dimension of the Return Directive. The second study was commissioned by EPRS to provide the LIBE Committee with a fuller picture of the externally applicable policy and legal frameworks that operationalise the return and readmission of irregularly staying third-country nationals under the Return Directive. This is also due to considerations of the coherence of EU internal and external policy.

## 3.3. The importance of evaluations for better law-making

Under the 2016 Interinstitutional Agreement on Better Law-Making,<sup>81</sup> the European Commission, the European Parliament and the Council of the EU, recognised their joint responsibility in delivering high-quality Union legislation.<sup>82</sup> The three EU institutions considered that ex-post evaluation of existing legislation, next to public stakeholder consultations, and impact assessments of new initiatives will help achieve the objective of Better Law-Making.<sup>83</sup> In particular, point 20 of the Interinstitutional Agreement provides that the three institutions confirm the importance of the greatest possible consistency and coherence in organising their work to evaluate the performance of EU legislation, including related public and stakeholder consultation.

What is evaluation and why is it important?

According to the European Commission's own Better Regulation Guidelines:<sup>84</sup>

Evaluation is an evidence-based judgement of the extent to which an existing intervention is:

- effective;
- efficient;
- relevant given the current needs;
- coherent both internally and with other EU interventions; and

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<sup>81</sup> [Interinstitutional Agreement between the European Parliament, the Council of the European Union and the European Commission on Better Law-Making](#), OJ L 123, 12.5.2016.

<sup>82</sup> [2016 Interinstitutional Agreement on Better Law-Making](#), OJ L 123/1, 12.5.2016, Recital 2.

<sup>83</sup> Ibid., Recital 6.

<sup>84</sup> [Better Regulation Guidelines](#), European Commission.

➤ has achieved EU added value.<sup>85</sup>

The Commission specifies that 'evaluation is a tool to help the Commission learn about the functioning of EU interventions and to assess their actual performance compared to initial expectations. By evaluating, the Commission takes a critical look at whether EU activities are fit for purpose and deliver their intended objectives at minimum cost.'<sup>86</sup>

Evaluations are important because they 'aim to inform policymaking by assessing existing interventions regularly and ensuring that relevant evidence is available to support the preparation of new initiatives ('evaluate first' principle)'.<sup>87</sup> The European Commission's internal Regulatory Scrutiny Board<sup>88</sup> (which provides central quality control and support for Commission impact assessments and evaluations at early stages of the legislative process), emphasised the importance of evaluations in its 2019 Annual Report. At the same time, it acknowledged that evaluating is not a simple exercise.<sup>89</sup>

Moreover, Commission evaluations must assess all significant economic, social and environmental impacts of EU interventions (with particular emphasis on those identified in a previous impact assessment), or explain why an exception has been made. Commission evaluations also must include a mandatory 12-week public consultation covering the main elements of the evaluation.<sup>90</sup>

The European Parliament underlined the importance of the ex-post evaluation of existing legislation, in accordance with the 'evaluate first' principle, in its resolution of 30 May 2018, on the interpretation and implementation of the Interinstitutional Agreement on Better Law-Making.<sup>91</sup>

When is an evaluation required?

A European Commission evaluation is required where the legal basis of the relevant intervention so requires (e.g. a 'review' clause); is indicated by the Financial Regulation and Rules of Application; or is indicated by Council Regulation (EU) 2015/323 on the financial regulation applicable to the 11th European Development Fund.<sup>92</sup>

In the present case, the European Commission had not conducted an evaluation of the Return Directive after its first evaluation in 2013, despite further reporting obligations under Article 19 of the Return Directive. Nor did the Commission prepare an ex-ante impact assessment for its 2018 recast proposal for a Return Directive.<sup>93</sup>

This is contrary to the principles of Better Law-Making, as stipulated in the 2016 Interinstitutional Agreement on Better Law-Making and the Commission's own Better Regulation Guidelines.

<sup>85</sup> European Commission, [2017 Better Regulation Guidelines](#) (Chapter VI Guidelines on evaluation, including fitness checks, SWD(2017)350, 7 July 2017, p. 52.

<sup>86</sup> Ibid., p. 50.

<sup>87</sup> Ibid.

<sup>88</sup> European Commission, [Regulatory Scrutiny Board Annual Report 2019](#).

<sup>89</sup> European Commission, [Regulatory Scrutiny Board Annual Report 2019](#).

<sup>90</sup> European Commission, [2017 Better Regulation Guidelines](#) (Chapter VI Guidelines on evaluation, including fitness checks, SWD(2017)350, 7 July 2017, p. 50.

<sup>91</sup> European Parliament resolution of 30 May 2018, on the interpretation and implementation of the Interinstitutional Agreement on Better Law-Making ([2016/2018\(INI\)](#)), para. 38.

<sup>92</sup> European Commission, [2017 Better Regulation Guidelines](#) (Chapter VI Guidelines on evaluation, including fitness checks, SWD(2017)350, 7 July 2017, p. 54.

<sup>93</sup> As already criticised in Eisele K., [The proposed Return Directive \(recast\) – Substitute Impact Assessment](#), EPRS, European Parliament, February 2019.

## 4. Methodology

This EPRS European Implementation Assessment is based on two external studies, which are reproduced in full in Part II and Part III. Both studies were prepared within a limited time frame, from January to May 2020.

The first study (**Part II**) **evaluates the implementation of the Return Directive** in the following ten Member States: Belgium (BE), Bulgaria (BG), France (FR), Germany (DE), Greece (EL), Italy (IT), the Netherlands (NL), Poland (PL), Spain (ES), and Sweden (SE). The key selection criterion was the importance of the question of return, as evidenced by Eurostat data.

The lack of comparable and up-to-date data from the selected Member States represented a major challenge for the outcome of this study. Of the ten Member States contacted, only one (Germany) completed a questionnaire and informal interviews were held with three other Member States. The study is based on publications by the European Migration Network (EMN), as well as on Schengen Evaluation Reports, publications by the Odysseus Network (a network of legal experts in immigration and asylum in Europe), the European Union Agency for Fundamental Rights (FRA), and a Council document capturing the Member States' positions on return-related measures. The 2013 European Commission evaluation of the Return Directive provided valuable insight, as well as studies and report of academics and civil society actors.

Moreover, 18 interviews were conducted and two organisations agreed to complete the questionnaire prepared originally for the Member States. The study took the evaluation methodology into account, as described in the European Commission's 2017 Better Regulation Guidelines.

The second study (**Part III**) **examines the external dimension of the Return Directive**. It provides an overview and an analysis of the externally applicable policy and legal frameworks that operationalise the return and readmission of irregularly staying third country nationals under the Return Directive.

This second study has been concluded based on desk research, with reference to primary and secondary law on migration, asylum and fundamental rights, together with the case law of the Court of Justice of the European Union (CJEU), the European Court of Human Rights (ECtHR) and the Special Reports of the European Court of Auditors (ECA).

The research conducted includes a mapping of all EURAs, informal agreements, Frontex Working Arrangements and Status Agreements, followed by a detailed comparative analysis of the agreements within each of those three categories.<sup>94</sup> This analysis paralleled relevant academic research. Furthermore, an analysis of the policy and legal bases of EU return and readmission policy was undertaken.

Both studies display several limitations. These include, inter alia, the limited timeframe in which the studies were conducted; the lack of comparable and up-to-date data; the lack of information provided directly by the Member States; and the lack of public access to documents.

This EPRS European Implementation Assessment does not replace a fully fledged European Commission implementation assessment of the Return Directive in all Member States, as is required under Article 19 of the Return Directive.

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<sup>94</sup> This analysis is contained in Annexes I to III of Part II – Study on the external dimension of the Return Directive.

## 5. Key findings

The key findings presented in this section are based on the two external studies conducted on the evaluation of the implementation of the Return Directive (see Part II) and on the external dimension of the Return Directive (see Part III). The findings presented here are a synthesis. For a full list of the key findings as identified in the two studies, see pages 29 and 133.

### Return decision

1) The risk of *refoulement* is not systematically assessed by the authorities on their own initiative when contemplating the issuing of a return decision. States seem to assume that refused asylum seekers are assessed for their risk of *refoulement* during the asylum procedure. However, such procedures commonly assess only the conditions for granting refugee or subsidiary protection status.<sup>95</sup>

2) The absence of an obligatory *non-refoulement* exception to the Member States' obligation to issue a return decision to every person in an irregular situation not only weakens compliance with human rights but also questions the effectiveness of the return procedure.<sup>96</sup>

3) In most countries, an appeal against return is not automatically suspensive, which may decrease protection from *refoulement* and increase administrative burden (as people must apply for an appeal to be suspensive).<sup>97</sup>

4) Most Member States rely on Article 2(2)(a) of the Return Directive and do not apply the Directive in 'border cases'. The procedure applicable in such contexts affords fewer guarantees to the person concerned and typically involves the deprivation of liberty.<sup>98</sup> This finding underscores the point in the external policy dimension that EU readmission agreements (EURAs) by themselves are not an issue, but rather the fact that they operate in increasingly informal contexts (or are indeed replaced by informal agreements).<sup>99</sup>

5) States provide the possibility of receiving a residence permit on humanitarian or compassionate grounds, but in most countries, these considerations are not automatically assessed in the context of the return procedure.<sup>100</sup>

### Enforcement of the return decision

6) To prioritise the return rate as the primary indicator for 'effectiveness' of the return of irregular migrants, as the European Commission has done, runs the risk of incentivising 'return at all costs', without taking stock of the full human, foreign relations and other costs.<sup>101</sup>

<sup>95</sup> See Part II – Study on the evaluation of the implementation of the Return Directive, Key findings and Section 2.1.

<sup>96</sup> See Part II – Study on the evaluation of the implementation of the Return Directive, Key findings and Section 3.

<sup>97</sup> See Part II – Study on the evaluation of the implementation of the Return Directive, Key findings and Section 2.1.

<sup>98</sup> See Part II – Study on the evaluation of the implementation of the Return Directive, Key findings and Section 2.1.

<sup>99</sup> See Part III – Study on the external dimension of the Return Directive, Key findings and Sections 5.1, 5.2, 6.1 and 6.2.

<sup>100</sup> See Part II – Study on the evaluation of the implementation of the Return Directive, Key findings and Section 2.1.

<sup>101</sup> See Part III – Study on the external dimension of the Return Directive, Sections 1.1 and 8; see also Eisele K., [The proposed Return Directive \(recast\) – Substitute Impact Assessment](#), EPRS, European Parliament, February 2019, p. 40;

7) Reliance on the return rate as the primary indicator of policy effectiveness is also methodologically questionable, particularly in the absence of a qualitative assessment – underscoring the need for post-return monitoring and relevant indicators concerning the circumstances of returned individuals.<sup>102</sup>

In addition, the rate of return is a misleading indicator. The people who received the return decision were not necessarily returned within the same year as some return decisions are implemented in the following year. Moreover, some Member States (Belgium and the Netherlands) issued more than one return decision to a person in the past if the person was apprehended at a later stage (these Member States have now eliminated this practice).<sup>103</sup>

8) Voluntary return is cost-effective and easier to organise than a forced return. Under the principle of proportionality and Article 7(1) of the Return Directive, voluntary return should be prioritised over forced return; however, in most countries, a minority of returns are voluntary.<sup>104</sup>

9) Monitoring of forced returns is carried out by an Ombudsperson/National Preventive Mechanism (NPM), civil society organisations, or bodies affiliated with enforcement staff, whose institutional independence may be questionable.<sup>105</sup> There is a lack of monitoring regarding the fate of persons returned to third countries.<sup>106</sup>

## Entry ban

10) Member States tend to implement Article 11(1) of the Return Directive by automatically imposing entry bans if the voluntary departure is not granted or if the return obligation is not complied with during the period for voluntary departure. The 'shall' provision in Article 11(1) may rule out an individual assessment, disregarding the principle of proportionality.

In some Member States, entry bans are imposed alongside voluntary departure, which can reduce the incentive to comply with the return decision.

The threat of receiving an entry ban may be effective as an incentive to comply with the return decision during the period for voluntary departure. Once imposed, the entry ban may discourage people from leaving.

## Detention

11) Although detention is, in practice, based on an individual assessment, it is easy to justify detention because of a broad legal basis.<sup>107</sup>

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Carrera S., 'Implementation of EU Readmission Agreements – Identity Determination Dilemmas and the Blurring of Rights', Springer Nature, Switzerland, 2016, p. 58.

<sup>102</sup> See Part III – Study on the external dimension of the Return Directive, Key findings and Section 8.

<sup>103</sup> See Part II – Study on the evaluation of the implementation of the Return Directive, Section 2.2.

<sup>104</sup> See Part II – Study on the evaluation of the implementation of the Return Directive, Key findings and Section 2.2.

<sup>105</sup> See Part II – Study on the evaluation of the implementation of the Return Directive, Key findings and Section 2.2.2.

<sup>106</sup> See Part III – Study on the external dimension of the Return Directive, Key findings and Sections 6.1 and 8; see also Van Ballegooij, W., with Navarra, C., [The Cost of non-Europe in Asylum Policy](#), EPRS, European Parliament, 2018.

<sup>107</sup> See Part II – Study on the evaluation of the implementation of the Return Directive, Key findings and Section 2.4.

States have long and sometimes non-exhaustive lists of criteria for establishing a risk of absconding. Certain criteria for establishing the risk of absconding are hardly related to a person's propensity to flee the return process, i.e. lack of identity documents or public order considerations. All states provide alternatives to detention in their legislation. However, in practice, these measures are applied exceptionally because of the broad understanding of the risk of absconding.<sup>108</sup>

In most countries, detention is ordered by administrative authorities and *ex-officio* reviewed by judicial authorities. In several countries, the detention of unaccompanied children is prohibited, but they may however be detained due to an inaccurate age assessment. All countries primarily use dedicated detention centres. Additionally, people may be detained at the border or in police stations for shorter periods.<sup>109</sup>

## Transparency and costs

12) Little information is available about the costs of various return-related measures. Overall, regardless of the average total cost of return per person, putting this procedure in place with respect to those who cannot be returned is inefficient in itself.<sup>110</sup>

13) The cost-effectiveness of detention clearly calls for this measure to be kept as short as possible. According to the EPRS Substitute Impact Assessment, the evidence suggests that detention periods of over a month do not increase the return rate.<sup>111</sup> When compared to alternatives to detention, the cost-effectiveness of detention becomes ever more questionable. The value of detention lies solely in cases where the person represents a genuine and high risk of absconding, which non-custodial measures are unable to diminish.<sup>112</sup>

14) There is a lack of disaggregated and comparable data, in particular, as concerns the use of entry bans and detention.<sup>113</sup>

## The external dimension of return and readmission policy

15) EU return and readmission policy has increasingly resorted to informal cooperation in the external dimension, which has paralleled the emergence of an informalisation of EU return policy in the internal dimension. The emergence of informal means of cooperation has also witnessed an increased emphasis on operationalising returns of irregular migrants and the rising prominence of Frontex in the field of return and in the external dimension.<sup>114</sup>

Four main types of agreements are identified: (1) formal EU readmission agreements ('EURAs'), (2) informal agreements, (3) Frontex Working Arrangements and (4) Frontex Status Agreements.<sup>115</sup>

<sup>108</sup> See Part II – Study on the evaluation of the implementation of the Return Directive, Key findings and Section 2.4.

<sup>109</sup> Ibid.

<sup>110</sup> See Part II – Study on the evaluation of the implementation of the Return Directive, Section 3.

<sup>111</sup> Eisele K., [The proposed Return Directive \(recast\) – Substitute Impact Assessment](#), EPRS, European Parliament, February 2019, pp. 9 and 115.

<sup>112</sup> See Part II – Study on the evaluation of the implementation of the Return Directive, Key findings and Section 3.

<sup>113</sup> See Part II – Study on the evaluation of the implementation of the Return Directive, Key findings and Sections 2.3 and 2.4.

<sup>114</sup> See Part III – Study on the external dimension of the Return Directive, Key findings and Sections 4.3.

<sup>115</sup> See Part III – Study on the external dimension of the Return Directive, Key findings and Sections 4.

16) Although EURAs contain references to international human rights conventions, there is a disjunction in the procedural safeguards available to persons returned to third countries. Although often characterised as 'technical instruments', it is arguable that they cannot be viewed in isolation from EU secondary law and jurisprudence on international protection and return.<sup>116</sup>

Some EURAs may also have an indirect effect on the legality of pre-removal detention. The informal agreements on return contain minimal references to fundamental rights.<sup>117</sup>

### Lack of judicial and democratic accountability

17) Informal agreements also lack accountability, both to the European Parliament and Court of Justice of the EU, and highlight the limited avenues for Parliament's ex ante budgetary accountability for EU Trust Funds directed towards EU external migration policy.<sup>118</sup>

18) The inaccessibility, even to affected persons, of complete Frontex Operational Plans<sup>119</sup> is identified as a significant obstacle to judicial accountability. Indeed, the ECHR and EU public liability mechanisms do not completely provide for the attribution of responsibility or liability in the multiple-actor contexts in which Frontex operates.<sup>120</sup>

### Incentivisation and conditionality in EU external affairs

19) The implications for EU external affairs has seen EU return and readmission policy resort to incentivisation. Conditionality has obscured the lines between international development and humanitarian aid principles. The conclusion of readmission agreements has incentivised other third countries to conclude readmission agreements in a 'domino effect' that shifts, rather than shares, responsibility for forced migrant populations.<sup>121</sup>

20) Funding instruments related to EU external migration subjected to scrutiny by the European Court of Auditors has underscored past challenges to assess impact on account of a lack of specificity of objectives and inadequate monitoring.<sup>122</sup>

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<sup>116</sup> See Part III – Study on the external dimension of the Return Directive, Key findings and Section 5.1.

<sup>117</sup> See Part III – Study on the external dimension of the Return Directive, Key findings and Section 5.2

<sup>118</sup> See Part III – Study on the external dimension of the Return Directive, Key findings.

<sup>119</sup> Frontex Operational Plans include the number and the type of technical equipment (vessels, planes, patrol cars etc.), as well as the number and the specialisation of border guards to be deployed, see Frontex website: <https://frontex.europa.eu/faq/frontex-operations/>.

<sup>120</sup> See Part III – Study on the external dimension of the Return Directive.

<sup>121</sup> Ibid.

<sup>122</sup> Ibid.

## 6. Policy recommendations

The policy recommendations in this section are taken from the two external studies conducted on the evaluation of the implementation of the Return Directive (see pages 113 and 199 of Parts II and III of this EPRS European Implementation Assessment).

### Policy recommendations: evaluation of the implementation of the Return Directive (Part II)

To ensure that the return policy is both effective and compliant with the fundamental rights of the people concerned, Member States should comply with the following recommendations:

- adhere to the principle of *non-refoulement* and conduct an *ex-officio* assessment prior to issuing a return decision;
- repeal the return decision and grant the person concerned a residence title when removal is deemed in violation of the principle of *non-refoulement*;
- ensure that people have access to an effective remedy against return, including adequate time and legal aid to prepare for an appeal, while also allowing for an automatic suspensive effect of appeal;
- prioritise voluntary return by refusing it only in the cases of a clear and genuine risk of absconding and affording adequate time for the person to depart;
- ensure adequate funding for the bodies in charge of monitoring forced returns;
- impose entry bans based on the individual assessment of necessity and avoid imposing them when the person has complied with the obligation to return;
- put straightforward procedures in place to repeal the entry ban when the person has proven to have complied with a return decision;
- use detention only as a measure of last resort, to be imposed only where there is a clear and genuine risk of absconding, which cannot be mitigated by non-custodial alternatives to detention;
- maintain detention for as short a period as possible, when removal is imminent;
- cease the detention of unaccompanied children and families with children as a matter of policy.

### Policy recommendations: external dimension of the Return Directive (Part III)

#### Safeguarding of fundamental rights

- Recommendation 1: Avenues should be explored to obtain commitments from third countries of return that ensure readmitted persons have access to the substantive rights contained in the international human rights treaties identified in EURAs, including access to the asylum procedure if returned under the Safe Third Country concept provisions.
- Recommendation 2: Further research should be undertaken to determine the extent to which time limits contained in EURAs that are linked to a maximum period of detention in requesting states are used in practice and their impact, if any, on the legality of a person's detention.
- Recommendation 3: The European Commission should undertake fundamental rights impact assessments before concluding a EURA with a third country.
- Recommendation 4: Frontex Working Arrangements should contain express references to fundamental rights guarantees that reflect Frontex's obligation to guarantee fundamental rights under the European Border and Coast Guard (EBCG) Regulation.
- Recommendation 5: There should be an obligation to suspend or terminate an action under a Status Agreement in the case of a breach of fundamental rights.

- Recommendation 6: Status Agreements should include a prohibition on the onward transfer of personal data consistent with the obligation under the EBCG Regulation.

#### Accountability

- Recommendation 7: The European Commission should undertake a comprehensive and objective evaluation of EURAs and their implementation.
- Recommendation 8: Post-return monitoring of persons returned to third countries should be undertaken to ensure the fate of returned persons and the challenges they face.
- Recommendation 9: Obstacles to accessing complete Operational Plans by those directly affected should be removed.
- Recommendation 10: The European Parliament should be informed about cooperation instruments, 'delegated' working arrangements and documents of a similar character which emanate from, or consolidate, Frontex Working Arrangements.
- Recommendation 11: The liability of Frontex statutory staff in exercising executive powers in a third country should be expressly contemplated in Frontex Status Agreements.
- Recommendation 12: Avenues should be explored, and reform undertaken, to ensure attribution of responsibility under ECHR and EU public liability law in multiple actor contexts.

#### Implications for EU external affairs

- Recommendation 13: International development and humanitarian aid principles should be subject to greater demarcation from EU funding for migration-related outcomes.

#### Effectiveness

- Recommendation 14: Any quantitative assessment of the performance of EU return and readmission policy should be accompanied by a qualitative assessment.
- Recommendation 15: Avenues should be explored to identify measurable indicators pertinent to the readmitted individual, to enable an evaluation of the circumstances of their return and fate.

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# Part II: Evaluation of the implementation of the Return Directive

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Study

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## Executive summary

This study assesses the implementation of the Return Directive in ten selected Member States, namely, Belgium, Bulgaria, Germany, Greece, Spain, France, Italy, the Netherlands, Poland, and Sweden. It also evaluates the Return Directive against the criteria of the European Commission's Better Regulation Guidelines, including effectiveness, efficiency, relevance, and coherence.

When presenting its proposal of the Directive in 2005, the European Commission stressed that “the objective of this proposal is [...] to provide for clear, transparent and fair common rules concerning return, removal, use of coercive measures, temporary custody and re-entry, which take into full account the respect for human rights and fundamental freedoms of the persons concerned.”<sup>1</sup> More recently, the Court of Justice of the European Union stressed that “the objective of Directive 2008/115 is [...] 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.”<sup>2</sup> The underlying objectives of the Return Directive – effectiveness and compliance with human rights – are still relevant today.

The Return Directive lays down four key measures: return decision, enforcement of the return decision (by means of voluntary return or forcible return), entry ban, and detention. These measures should be implemented in accordance with Member States' human rights obligations. Under Article 5 of the Directive, when implementing the Directive, Member States should observe the best interests of the child, family life, and state of health of the person concerned and respect the principle of *non-refoulement*. In addition, under EU and international human rights law, states should also observe the right to private life.

Further, the principle of proportionality, including the requirement of individual assessment, applies at all stages of the return process. It is in light of these norms and principles that the Member States are supposed to implement the measures laid down in the Directive. From this perspective, Article 6(4) should be interpreted as requiring states not to issue or to withdraw the return decision when fundamental rights are at stake and, consequently, provide the person with a permit of residence.

Further, voluntary departure should be a default option that could be refused only if a genuine risk of absconding is established. Entry ban should only be issued if a person poses a clear risk to public policy or safety. Finally, detention is to be conceived as an exceptional measure to be applied shortly before return when the risk of absconding cannot be prevented by the application of alternatives to detention.

The four key measures should be applied in a manner such that they contribute to the effectiveness of return. Some modalities of these measures may, however, impede the effectiveness of the overall return and, at the same time, require resources.

For instance, a lack of automatic assessment of the principle of *non-refoulement* before starting the return procedure may result in the procedure being applied to people whose return is not possible. In addition, the absence of the obligation to withdraw a return decision when the risk of *refoulement* is established may imply that procedures are postponed for prolonged periods, which is ineffective. Detention extended beyond the initial period is inefficient because most returns take place in the first few weeks. Overly short periods for voluntary departure may preclude departure and entry bans imposed alongside voluntary return may reduce the incentive to comply with the return decision. Hence, efficiency and internal coherence of the measures set forth by the Return Directive may be

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<sup>1</sup> European Commission, Proposal for a Directive of the European Parliament and of the Council on Common Standards and Procedures in Member States for Returning Illegally Staying Third-Country Nationals, COM(2005)391, (September 1, 2005).

<sup>2</sup> CJEU, Bashir Mohamed Ali Mahdi, C-146/14 PPU, (June 5, 2014), para. 38.

questioned. Therefore, Member States should apply them consciously based on the individual assessment of each case.

## Key findings

### Return decision

- Most Member States rely on Article 2(2)(a) of the Return Directive and do not apply the Directive in “border cases”. The procedure applicable in such contexts affords fewer guarantees to the person concerned and typically involves the deprivation of liberty.
- The Directive does not contain an explicit *non-refoulement* exception to the obligation on the states to issue a return decision to any person in an irregular situation. However, this function can be implied from a joint reading of the human rights clause in Article 5 and Article 6(4), under which states may issue a residence permit instead of a return decision.
- The risk of *refoulement* is not systematically assessed by the authorities on their own motion when contemplating the issuing of a return decision.
- There seems to be an assumption among the states that refused asylum seekers have their risk of *refoulement* assessed during the asylum procedure. However, such procedures commonly assess only the conditions for granting the refugee or subsidiary protection status.
- States provide the possibility of receiving a residence permit on humanitarian or compassionate grounds, but in most countries, these considerations are not automatically assessed in the context of the return procedure.
- In most countries, an appeal against return is not automatically suspensive, which may decrease protection from *refoulement* and increase administrative burden (as people must apply for an appeal to be suspensive).
- In some Member States, people in return proceedings continue to face obstacles in accessing legal aid.
- Unaccompanied children are rarely returned, even though few countries have an official policy banning their return.

### Enforcement of the return decision

- Voluntary return is cost-effective and easier to organise than a forced return.
- Under the principle of proportionality and Article 7(1) of the Return Directive, voluntary return should be prioritised over forced return; yet, in most countries, voluntary returns are a minority.
- Monitoring of forced returns is carried out by an Ombudsperson/NPM, civil society organisations, or bodies affiliated with enforcement staff, whose institutional independence may be questionable.
- When removal would violate the principle of *non-refoulement*, the Return Directive solely demands postponement of removal. This is reflected at the domestic level as few states grant a regular or tolerated status to the person concerned.

### Entry bans

- Member States tend to implement Article 11(1) of the Directive by automatically imposing entry bans if the voluntary departure is not granted or if the return obligation is not complied with during the period for voluntary departure.
- In some Member States, entry bans are imposed alongside voluntary departure, which can reduce the incentive to comply with the return decision.
- The length of entry bans is frequently decided based on individual circumstances, as the length often relates to the reason for issuing the return decision.

- The threat of receiving an entry ban may be effective as an incentive to comply with the return decision during the period for voluntary departure. Once imposed, the entry ban may discourage people from leaving.
- In line with the principle of proportionality, the possibility not to issue an entry ban under Article 11(4) should be considered a rule, and the decision to impose it should be based on an individual assessment of the circumstances of the case.
- An entry ban involves costs; hence, its efficiency should be considered.
- There is currently no comparable and disaggregated data on the use of entry bans.

#### Detention

- Although detention is, in practice, based on an individual assessment, it is easy to justify detention because of a broad legal basis.
- States have long and sometimes non-exhaustive lists of criteria for establishing a risk of absconding.
- Certain criteria for establishing the risk of absconding are hardly related to a person's propensity to flee the return process, i.e. lack of identity documents or public order considerations.
- All states provide alternatives to detention in their legislation. However, in practice, these measures are applied exceptionally because of the broad understanding of the risk of absconding.
- In most countries, detention is ordered by administrative authorities and ex-officio reviewed by judicial authorities.
- In several countries, the detention of unaccompanied children is prohibited, but they may be detained due to an inaccurate age assessment.
- All countries primarily use dedicated detention centres. Additionally, people may be detained at the border or in police stations for shorter periods.
- It is impossible to assess impact of detention on the return rate because little disaggregated and comparable data is available.

#### Policy recommendations:

To ensure that the return policy is both effective and compliant with the fundamental rights of the people concerned, Member States should comply with the following recommendations:

- adhere to the principle of *non-refoulement* and conduct an ex officio assessment prior to issuing a return decision;
- repeal the return decision and grant the person concerned a residence title when removal is deemed in violation of the principle of *non-refoulement*;
- ensure that people have access to an effective remedy against return, including adequate time and legal aid to prepare for an appeal, while also allowing for an automatic suspensive effect of appeal;
- prioritise voluntary return by refusing it only in the cases of a clear and genuine risk of absconding and affording adequate time for the person to depart;
- ensure adequate funding for the bodies in charge of monitoring forced returns;
- impose entry bans based on the individual assessment of necessity and avoid imposing it when the person has complied with the obligation to return;
- put in place straightforward procedures to repeal the entry ban when the person has proven to have complied with a return decision;
- use detention only as a measure of last resort, to be imposed only where there is a clear and genuine risk of absconding, which cannot be mitigated by non-custodial alternatives to detention;
- maintain detention for as short a period as possible, when removal is imminent;

- cease the detention of unaccompanied children and families with children as a matter of policy.

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## List of acronyms

<b>AMIF</b>	Asylum, Migration and Integration Fund
<b>ATD</b>	Alternatives to detention
<b>AVR</b>	Assisted voluntary return
<b>CALL</b>	Council for Alien Law Litigation (BE)
<b>CGV</b>	Closed Family Facility (NL)
<b>CJEU</b>	Court of Justice of the European Union
<b>CMW</b>	Committee on Migrant Workers
<b>CRA</b>	Centres de rétention administrative (FR)
<b>CRC</b>	Convention on the Rights of the Child
<b>EMN</b>	European Migration Network
<b>ECHR</b>	European Convention on Human Rights
<b>ECtHR</b>	European Court of Human Rights
<b>EPRS</b>	European Parliamentary Research Service
<b>FEDASIL</b>	Federal Agency for the Reception of Asylum Seekers (BE)
<b>FITT</b>	Family Identification and Return Units (BE)
<b>FRA</b>	European Union Agency for Fundamental Rights
<b>HRC</b>	Human Rights Committee
<b>IOM</b>	International Organization for Migration
<b>JLD</b>	Judge of Liberties and Detention (FR)
<b>LIBE</b>	European Parliament's Committee on Civil Liberties, Justice and Home Affairs
<b>LRA</b>	Locaux de rétention administrative (FR)
<b>MYRIA</b>	Federal Migration Centre (BE)
<b>NPM</b>	National Preventive Mechanism
<b>OFII</b>	French Office for Immigration and Integration (FR)
<b>REAG/GARP</b>	Reintegration and Emigration Programme for Asylum-Seekers in Germany/Government Assisted Repatriation Programme (DE)
<b>REAN</b>	Return and Emigration of Aliens from the Netherlands (NL)
<b>SBC</b>	Schengen Borders Code
<b>UAM</b>	Unaccompanied minors

## List of country codes

<b>AT</b>	Austria
<b>BE</b>	Belgium
<b>BG</b>	Bulgaria
<b>CH</b>	Switzerland
<b>CY</b>	Cyprus
<b>CZ</b>	Czechia
<b>DE</b>	Germany
<b>DK</b>	Denmark
<b>EE</b>	Estonia
<b>EL</b>	Greece
<b>ES</b>	Spain
<b>FI</b>	Finland
<b>FR</b>	France
<b>HR</b>	Croatia
<b>HU</b>	Hungary
<b>IE</b>	Ireland
<b>IS</b>	Iceland
<b>IT</b>	Italy
<b>LI</b>	Liechtenstein
<b>LT</b>	Lithuania
<b>LU</b>	Luxembourg
<b>LV</b>	Latvia
<b>MT</b>	Malta
<b>NL</b>	Netherlands
<b>NO</b>	Norway
<b>PL</b>	Poland
<b>PT</b>	Portugal
<b>RO</b>	Romania
<b>SE</b>	Sweden
<b>SI</b>	Slovenia
<b>SK</b>	Slovakia
<b>UK</b>	United Kingdom

# 1 Introduction

## 1.1 Rationale and structure of the study

This study aims to evaluate the implementation of the key measures laid down in *Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals* (hereafter referenced as Return Directive or Directive).<sup>3</sup> The underlying objective of the Directive is to establish common standards and procedures to be applied in Member States for returning “illegally staying third-country nationals,”<sup>4</sup> in accordance with fundamental rights as general principles of EU law, as well as international law, including refugee protection and human rights obligations.

Since the entry into force of the Return Directive in January 2009, the European Commission has commissioned a few comparative studies addressing specific questions, notably the return of minors (2011),<sup>5</sup> forced return monitoring (2011),<sup>6</sup> and the reintegration of returnees (2012).<sup>7</sup> In 2013, the Commission published a study on the situation of non-returnable people<sup>8</sup> and an evaluation of the application of the Directive – a meta-study covering 31 countries.<sup>9</sup>

Under Article 19 of the Return Directive, the Commission should report on the application of the Directive every three years, starting from 2013. The first (and the only, as of May 2020) Commission report on the application of the Directive was released in April 2014.<sup>10</sup> The report emphasised the need for proper and effective implementation of the existing rules, promotion of practice in line with the fundamental rights, and cooperation between Member States as well as with non-EU states.<sup>11</sup>

In September 2018, without carrying out an impact assessment, the European Commission published a proposal to recast the Return Directive to achieve “a more effective and coherent” return policy.<sup>12</sup>

The European Parliament’s Committee on Civil Liberties, Justice and Home Affairs (LIBE) asked the European Parliamentary Research Service (EPRS) to provide a substitute impact assessment of the

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<sup>3</sup> 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, 24.12.2008, p. 98–107.

<sup>4</sup> Since the personal scope of the Directive is limited to nationals of third countries in an irregular situation, the study uses the term “person” or “people” to refer to this group.

<sup>5</sup> ECRE and Safe the Children, Comparative Study on Practices in the Field of Return of Minors, 2011.

<sup>6</sup> Matrix, Comparative Study on Best Practices in the Field of Forced Return Monitoring, 2011.

<sup>7</sup> Matrix, Comparative Study on Best Practices to Interlink Pre-Departure Reintegration Measures Carried out in Member States with Short-and Long-Term Reintegration Measures in the Countries of Return, 2012.

<sup>8</sup> European Commission, Study on the situation of third-country nationals pending return/removal in the EU Member States and the Schengen Associated Countries, 2013.

<sup>9</sup> European Commission, Evaluation on the application of the Return Directive (2008/115/EC), 2013.

<sup>10</sup> European Commission, Communication from the Commission to the Council and the European Parliament on EU Return Policy COM/2014/0199 final, 28 March 2014.

<sup>11</sup> Ibid, p. 30.

<sup>12</sup> European Commission, Proposal for a Directive of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third-country nationals (recast), COM(2018)634, 12 September 2018, p. 2.

proposed recast.<sup>13</sup> The assessment concluded, among other things, that there is no clear evidence that the proposal would yield more effective returns. Furthermore, it suggested that the proposal may result in breaches of fundamental rights and generate substantial costs for the Member States.<sup>14</sup> As of May 2020, the recast process is ongoing.

The geographical coverage of this study includes ten Member States, including Belgium (BE), Bulgaria (BG), France (FR), Germany (DE), Greece (EL), Italy (IT), the Netherlands (NL), Poland (PL), Spain (ES), and Sweden (SE). The key selection criterion was the importance of the question of return, as evidenced by Eurostat data. As Table 2 shows,<sup>15</sup> most of the selected Member States were the top countries in terms of the number of return decisions adopted in 2019. FR, EL, DE, ES, PL, IT, NL, BE, and SE have jointly issued almost 85% of all return decisions of the EU Member States bound by the Return Directive. BG was chosen to ensure regional diversification. A further selection criterion was the availability of statistics on voluntary return. With ten countries included, the study covers one-third of all the countries implementing the Directive.<sup>16</sup>

The study is guided by 29 sets of research questions.<sup>17</sup> The questions have been grouped and organised under four headings,<sup>18</sup> which correspond to the four main measures established under the Directive: (1) return decision, (2) implementation of the return decision, (3) entry ban, and (4) pre-removal detention.

The remaining part of this introductory section explains the methodology used for the study. Section 2 evaluates the manner in which the selected countries have implemented the key measures of the Directive. Section 3 assesses the Directive according to the evaluation criteria set out in the Commission's Better Regulation Guidelines. Finally, Section 4 draws overall conclusions and presents several policy recommendations.

## 1.2 Methodology

As this study evaluates the implementation of a piece of EU legislation in Member States' national laws, the most natural sources of information are the Member States themselves. Thus, the author had originally planned to gather relevant data from the selected Member States via a questionnaire, followed by interviews as necessary.

Accordingly, the author extracted key questions from the research questions for the study and prepared a questionnaire containing 17 questions. This questionnaire was sent to the Permanent Representations of all the selected countries to the EU in Brussels on 7 February 2020. However, of the ten Member States, only one (DE) completed the questionnaire. Three other Member States proposed informal interviews, which were conducted in March and April 2020.

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<sup>13</sup> European Parliamentary Research Service, The proposed Return Directive (recast): Substitute Impact Assessment, European Parliament, February 2019.

<sup>14</sup> Ibid, p. II.

<sup>15</sup> See Section 2.1.2.

<sup>16</sup> As discussed in Section 2.1.2, the Directive applies to all the EU Member States except from IR and the four Schengen associated countries.

<sup>17</sup> See Annex A.

<sup>18</sup> Introductory paragraphs of each section indicate which research questions are covered in respective sections. Overall, all questions except for questions 19, 28, and 29 are addressed in the study. Question 19 asks about the experience with the implementation of the 2017 soft law instruments. These questions are addressed in the EMN Effectiveness of Return. As regards the additional questions, publications of Fundamental Rights Agency are helpful, Criminalisation of migrants in an irregular situation and of persons engaging with them and Under watchful eyes – biometrics, EU IT-systems and fundamental rights can provide information requested in question 28 and 29, respectively.

The lack of comparable and up-to-date data from the selected Member States represented a major challenge for the outcome of this study, compelling the author to change the originally envisaged methodology described above. This created risks for the study in terms of uncertainty to the validity and recency of the collected data as well as limitations to the further aggregate data, as the new method was considerably more time-consuming and dependent on additional resources. The publications of the European Migration Network (EMN) were leveraged, as they rely on information provided by the Member States via EMN national contact points. The most relevant was the 2017 study on the effectiveness of return, as it addresses the key measures laid down in the Directive.<sup>19</sup>

Of the ten countries, six participated in the EMN study with a respective national report. On 5 and 13 March 2020, the author sent questionnaires to the EMN national contact points of the four remaining countries (BG, FR, IT, PL) requesting their participation. There were no responses. On 7 April 2020, the author was granted access by the General Secretariat of the Council of the EU to a Council document capturing the Member States' positions on return-related measures as expressed during a debate in the Council. Lastly, Schengen Evaluation Reports were reviewed, as they provided an insight into the states' practice.

Given the lack of information provided directly by the Member States, the study relies extensively on the EMN publications. In addition to the above-mentioned study – the Effectiveness of Return (2017) – the following studies are important sources of information:

- Returning Rejected Asylum Seekers (2016);20
- Good Practices in the Return and Reintegration of Irregular Migrants (2014);21
- The Use of Detention and Alternatives to Detention in the Context of Immigration Policies (2014);22
- Approaches to Unaccompanied Minors Following Status Determination (2018);23
- Policies, Practices, and Data on Unaccompanied Minors (2014);24

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<sup>19</sup> EMN, The effectiveness of return in EU Member States: Synthesis Report for the EMN Focussed Study 2017, February 2018, [https://ec.europa.eu/home-affairs/sites/homeaffairs/files/00\\_eu\\_synthesis\\_report\\_return\\_study\\_en.pdf](https://ec.europa.eu/home-affairs/sites/homeaffairs/files/00_eu_synthesis_report_return_study_en.pdf).

<sup>20</sup> EMN, The Return of Rejected Asylum Seekers: Challenges and Good Practices: EMN Synthesis Report for the EMN Focussed Study 2016, November 2006, [https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/networks/european\\_migration\\_network/reports/docs/emn-studies/emn-studies-00\\_synthesis\\_report\\_rejected\\_asylum\\_seekers\\_2016.pdf](https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/networks/european_migration_network/reports/docs/emn-studies/emn-studies-00_synthesis_report_rejected_asylum_seekers_2016.pdf).

<sup>21</sup> EMN, Good practices in the return and reintegration of irregular migrants: Member States' entry bans policy and use of readmission agreements between Member States and third countries: Synthesis Report for the EMN Focussed Study 2014, [https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/networks/european\\_migration\\_network/reports/docs/emn-studies/emn\\_study\\_reentry\\_bans\\_and\\_readmission\\_agreements\\_final\\_december\\_2014.pdf](https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/networks/european_migration_network/reports/docs/emn-studies/emn_study_reentry_bans_and_readmission_agreements_final_december_2014.pdf).

<sup>22</sup> EMN, The use of detention and alternatives to detention in the context of immigration policies: Synthesis Report for the EMN Focussed Study 2014, [https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/networks/european\\_migration\\_network/reports/docs/emn-studies/irregular-migration/00\\_synthesis\\_report\\_detention\\_study\\_final.pdf](https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/networks/european_migration_network/reports/docs/emn-studies/irregular-migration/00_synthesis_report_detention_study_final.pdf).

<sup>23</sup> EMN, Approaches to Unaccompanied Minors Following Status Determination in the EU plus Norway: Synthesis Report for the EMN Study, July 2018, [https://ec.europa.eu/home-affairs/sites/homeaffairs/files/00\\_eu\\_synthesis\\_report\\_unaccompanied\\_minors\\_2017\\_en.pdf](https://ec.europa.eu/home-affairs/sites/homeaffairs/files/00_eu_synthesis_report_unaccompanied_minors_2017_en.pdf).

<sup>24</sup> EMN, Policies, Practices, and Data on Unaccompanied Minors, 2014, [https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/networks/european\\_migration\\_network/reports/docs/emn-studies/emn\\_study\\_policies\\_practices\\_and\\_data\\_on\\_unaccompanied\\_minors\\_in\\_the\\_eu\\_member\\_states\\_and\\_norway\\_synthesis\\_report\\_final\\_eu\\_2015.pdf](https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/networks/european_migration_network/reports/docs/emn-studies/emn_study_policies_practices_and_data_on_unaccompanied_minors_in_the_eu_member_states_and_norway_synthesis_report_final_eu_2015.pdf).

➤ Challenges and Practices for Establishing the Identity of Third-Country Nationals in Migration Procedures (2017).<sup>25</sup>

Table 1: Organisations contacted by the author in the respective Member States

MS	Organisation
BE	Centre federal Migration* Association pour le droit des étrangers
BG	Foundation for Access to Rights
DE	Jesuit Refugee Service
EL	Greek Council for Refugees
ES	Jesuit Service to Migrants
FR	Forum Réfugiés-Cosi
IT	Association for Juridical Studies on Immigration
NL	Dutch Council for Refugees Amnesty International
PL	Association for Legal Intervention
SE	Network of Refugee Support Groups

Source: Author's compilation

\*Myria is a public but independent institution

Where available, the author gathered additional information from the national reports contributing to these studies. In cases where the country has not drafted a national report but has provided information directly to the EMN, the author extracted this data from the synthesis report.

Next to the EMN studies, the EMN ad hoc queries served as a relevant source of data. Moreover, publications of the Odysseus Network (a network of legal experts in immigration and asylum in Europe) in the framework of the Contention and ReDial research projects and the European Union Agency for Fundamental Rights (FRA) provided examples of the states' implementation of specific measures relevant to the study. The 2013 European Commission evaluation of the Return Directive provided valuable insight. Finally, the study was informed by publications of academics and civil society actors.

While the EMN publications provided the author with comprehensive and official information, there is a risk of outdated data. Hence, to verify the reliability and validity of the data found in the EMN publications and collect additional information, the author turned to civil society organisations where necessary. The author selected reliable and well-known civil society organisations operating in each of the selected countries. The author had collaborated with most of them in the past (see Table 1).

Beyond the interviews and email correspondence, two organisations agreed to complete the questionnaire prepared originally for the Member States. In order to gain a broader picture of the EU return policy, the author

conducted interviews with officials from the European Commission and the FRA. Moreover, an interview with an official from Eurostat helped clarify relevant statistical elements. In total, the author conducted 18 interviews between February and May 2020. All sources are listed per country in Annex E of this study.

The study took into account the evaluation methodology as described in the European Commission's 2017 Better Regulation Guidelines, including the corresponding parts of the Better Regulation Toolbox.

<sup>25</sup> EMN, Challenges and practices for establishing the identity of third-country: Synthesis Report for the EMN Focussed Study 2017, December 2017, [https://ec.europa.eu/home-affairs/sites/homeaffairs/files/00\\_eu\\_synthesis\\_report\\_identity\\_study\\_final\\_en\\_v2.pdf](https://ec.europa.eu/home-affairs/sites/homeaffairs/files/00_eu_synthesis_report_identity_study_final_en_v2.pdf).

## 2 Evaluation of the implementation of the key measures established in the Return Directive in selected countries

The evaluation of the implementation of the Return Directive in the selected countries is structured around four key measures, which were established under the Directive, notably return decision (2.1), implementation of the return decision (2.2), entry bans (2.3), and detention (2.4).

### 2.1 Return decision

#### Key findings

- Most Member States rely on Article 2(2)(a) of the Return Directive and do not apply the Directive in “border cases”. The procedure applicable in such contexts affords fewer guarantees to the person concerned and typically involves the deprivation of liberty.
- The Directive does not contain an explicit non-refoulement exception to the obligation on the states to issue a return decision to any person in an irregular situation. However, this function can be implied from a joint reading of the human rights clause in Article 5 and Article 6(4), under which states may issue a residence permit instead of a return decision.
- The risk of refoulement is not systematically assessed by the authorities on their own motion when contemplating the issuing of a return decision.
- There seems to be an assumption among the states that refused asylum seekers have their risk of refoulement assessed during the asylum procedure. However, such procedures commonly assess only the conditions for granting the refugee or subsidiary protection status.
- States provide the possibility of receiving a residence permit on humanitarian or compassionate grounds, but in most countries, these considerations are not automatically assessed in the context of the return procedure.
- In most countries, an appeal against return is not automatically suspensive, which may decrease protection from refoulement and increase administrative burden (as people must apply for an appeal to be suspensive).
- In some Member States, people in return proceedings continue to face obstacles in accessing legal aid.
- Unaccompanied children are rarely returned, even though few countries have an official policy banning their return.

The return process starts by issuing a return decision. This section is devoted to the return decision as it addresses several research questions, notably question 1 on the scope of the Directive, questions 9–10 on procedural safeguards, question 20 on unaccompanied minors (UAM), and questions 21–23 on the return decision. The discussion addresses circumstances that are excluded from the scope of the Directive (2.1.1), issuance of a return decision (2.1.2), circumstances where a return decision may not be issued (2.1.3), return procedure (2.1.4), and specific safeguards applicable to unaccompanied children (2.1.5).

### 2.1.1 Border cases

Under Article 2(2)(a) of the Return Directive, Member States may decide not to apply the Directive in two “border cases.”<sup>26</sup> First, the states are allowed to not apply the Directive to people who are subject to a refusal of entry in accordance with the Schengen Borders Code (SBC).<sup>27</sup> The second category of people to whom the states do not have to apply the Return Directive is more complex. States may decide not to apply the Directive to people “who are apprehended or intercepted by the competent authorities in connection with the irregular crossing by land, sea or air of the external border of a Member State and who have not subsequently obtained an authorisation or a right to stay in that Member State.” The phrase “in connection with the irregular crossing” is unclear and may leave a broad margin of appreciation to the states. The risk is that the people apprehended in border areas may systematically be refused the minimum standards laid down in the Directive.

In *Affum*, the Court of Justice of the European Union (CJEU) addressed this exception and interpreted it narrowly. According to the Court, Article 2(2)(a) requires a direct temporal and special link with crossing the border. States may exclude people who have been apprehended or intercepted at the very time of the irregular crossing the border or near the border after it has been so crossed.<sup>28</sup> Indeed, an unduly wide exclusion from the scope of the Return Directive would run against its objective as set out in the preamble (§5) – to apply to all people who do not or no longer meet the conditions of entry, stay, or residence. The rules of return set out in the Directive are not meant to apply solely to people who have lost their regular status.

Under Article 4(4), the people excluded from the scope of the Directive under Article 2(2)(a) should still be afforded some minimum guarantees, including limitations on the use of coercive measures, postponement of removal, emergency health care, provisions on detention conditions as well as the respect of the principle of *non-refoulement*. Strangely, Article 4(4) includes safeguards relating to the conditions of immigration detention but not rules relating to lawfulness and the length and review of detention. In practice, the refusal of entry or the simplified return of people apprehended at border crossing involves the deprivation of liberty. As such, it is subject to international legal detention safeguards.<sup>29</sup>

A few countries, including BG and IT, did not transpose Article 2(2)(a) into their domestic legislation and, consequently, apply the provisions of the Directive in their border scenarios. IT, for instance, applies the measure of rejection (*respingimento*) to people who fail to comply with the entry conditions or enter its territory by avoiding border controls and who are stopped at the border or immediately after. Most Member States, however, apply this exception and exclude border cases

<sup>26</sup> Under Article 2(2)(b) of the Directive, may also decide not to apply the Directive to people who are subject to return as a criminal law sanction or as a consequence of a criminal law sanction, according to national law, or who are the subject of extradition procedures. Some insight into how states implement this provision is provided in EMN, Ad-Hoc Query on the Return Directive (2008/115/EC) Article 2, paragraph 2 a) and 2 b), 2013.

<sup>27</sup> 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, 23.3.2016, p. 1–52. According to Article 14(1) of the SBC, a person should be refused entry to the territories of Member States if he or she does not fulfil all the entry conditions laid down in Article 6(1) of the SBC. These conditions include having a valid travel document and a valid visa, justifying the purpose of the intended stay, having sufficient means of subsistence for the stay and return, not being listed in the Schengen Information System, and not posing a threat to public policy, internal security, and public health. Under Article 14(1) of the SBC, entry may not be refused on a few accounts, including in accordance with the right to international protection.

<sup>28</sup> CJEU, *Sélina Affum v. Préfet du Pas-de-Calais, Procureur général de la cour d’appel de Douai*, C-47/15, 7 June 2016, para 72.

<sup>29</sup> Border detention is discussed in Section 2.4.6.

from the rules of the Directive. In practical terms, the exclusion of people apprehended at a border crossing is relevant mainly for the states having external Schengen land or a maritime border, as at international airports, people are simply refused entry.

In ES, if the refusal of entry cannot be executed within 72 hours, people can be detained longer (in a police station or detention centre), and a new return procedure (*devolución*) will be applied. This procedure provides for fewer guarantees than the regular return procedures and is applicable to people attempting to enter ES by boat (or through Ceuta or Melilla) or are subject to the entry ban. People subject to this procedure are held in the same detention centres as those slated for return.

In BE, people intercepted while irregularly crossing the external border receive a decision of refusal of entry. They are subject to a distinct regime of detention and are placed in a specific detention centre, namely the Caricole centre. The same maximum period of detention is applicable to these people as to people in in-territory detention, namely five months, extendable to eight months if considerations of public order apply.

In SE, people covered by the exception under Article 2(2)(a) of the Directive receive a decision on refusal of entry together with a removal order issued by the police authority. This procedure provides fewer guarantees than the regular return procedure; for instance, there is no voluntary departure period. People refused entry may be subject to the same regime of detention as people in the regular return procedure and may even be placed in the same detention facilities.

The implementation of Article 2(2)(a) in EL brought about two parallel regimes. Law 3907/2011 transposed the Return Directive to domestic legislation, and it applies to people apprehended in the mainland for irregular stay. Law 3907/2011 does not apply to people apprehended upon irregular border crossing or arrested in the regions located at the external borders (such as Evros or Aegean Islands). Those persons are subject to a distinct law, which predated the Directive, notably Law 3386/2005. Law 3386/2005 provides few detention-related guarantees. Given the geographical location of EL, most people in an irregular situation are captured by the provisions of Article 2(2)(a) of the Directive and are, thus, excluded from Law 3907/2011. This begs the question of what the rule and what the exception is in this context. Also, frequently simplified return procedures are followed under readmission protocols with some states, such as Albania.

The two sets of circumstances under Article 2(2)(a) of the Directive are reflected in two distinct measures in DE. On the one hand, there are separate provisions applicable to the refusal of entry, and on the other, removal following unauthorised entry (*Zurückschiebung*) is applicable to people apprehended in conjunction with unlawful entry. Unlike a regular removal, removal following an unauthorised entry does not require a warning or the granting of a period for a voluntary return and legal remedies usually do not have a suspensive effect either.

If the refusal of entry cannot be enforced immediately, the individual concerned is to be taken into custody for “detention pending exit from the federal territory” (*Zurückweisungshaft*). However, if a person has reached German territory by air and this form of detention is not applied, the person will be taken to an airport transit area. DE does not consider holding a person in an airport transit zone for up to 30 days as detention.

FR has a specific regime, which is applicable to people refused entry or apprehended upon irregular entry. They are placed in so-called waiting zones (*zone d’attente*) for the time prior to their departure, which is a maximum of 20 days (four days, extendable twice by eight days). An appeal against return is not suspensive, except from the initial day (granted upon request). If the return does not take place during the period of 20 days, the person is to be admitted into the territory. The Interior Ministry defines the waiting zones at various ports of entry such as airports, train stations, and harbours open to international traffic. These zones can be “mobile and temporary” and can be

created when at least 10 people arrive in an area not more than 10km away from a border crossing point.

Finally, the NL has, according to Article 43 of the Asylum Procedures Directive, a separate regime of detention for the people refused entry at the border. So-called border detention may be imposed to prevent irregular entry into the territory for up to four weeks, and people are placed at Justitieel Complex Schiphol. Once the asylum application is refused within the border procedure, the Return Directive becomes applicable.

## 2.1.2 Returnees

Return decision is defined in Article 3(4) of the Return Directive as an administrative or judicial decision or act stating or declaring the stay of a person to be irregular and imposing or stating an obligation to return. Under Article 6(1) of the Directive, Member States are obliged to issue a return decision to any person staying irregularly on their territory, without prejudice to the four sets of exceptions enumerated in Article 6(2)–(5).<sup>30</sup>

As Table 2 demonstrates, the 27 Member States jointly issued over 490,000 return decisions in 2019.<sup>31</sup> This total number includes IE, even though it does not implement the Return Directive. Like the UK and DK, IR was granted an “opt-out” from the instruments adopted under Title V of the Treaty on the Functioning of the European Union, and it is not bound by these measures under EU law.<sup>32</sup> On the other hand, Table 2 does not include Schengen-associated countries, which apply the Return Directive as a measure, developing the Schengen *acquis*. According to Eurostat, CH issued 3,100 return decisions, IS 95, and LI 15 in 2019. The figures for NO were not available for 2019.<sup>33</sup>

Almost all the Member States covered by this study are the top countries in terms of the annual number of return decisions. As Table 2 shows, FR, EL, DE, ES, PL, IT, NL, BE, and SE issued jointly almost 85% of all return decisions adopted by the EU Member States bound by the Return Directive in 2019. Most of the states included in this study are the key destinations for asylum seekers in the EU. In 2019, DE, FR, ES, EL, IT, BE, SE, and the NL received the highest numbers of applications across the EU, and the top five (DE, FR, ES, EL, and IT) jointly received around 79% of

Table 2: Return decisions in 2019

MS	#	MS	#
FR	123,845	DK	3,920
EL	78,880	RO	3,325
DE	47,530	HU	3,235
ES	37,890	IE*	2,535
PL	29,305	LT	2,320
IT	26,900	SI	2,060
NL	25,435	SK	1,905
BE	22,010	LV	1,615
SE	21,260	CY	1,300
HR	15,510	BG	1,245
AT	13,960	EE	1,190
CZ	8,955	LU	1,070
FI	7,395	MT	620
PT	5,980	EU	<b>491,195</b>

Source: Eurostat

\*IE is highlighted in grey as it is not bound by the Directive

<sup>30</sup> The most relevant of these exceptions – the possibility to issue a permit instead of a return decision for compassionate, humanitarian, or “other” reasons – is addressed in Section 2.1.3.

<sup>31</sup> Eurostat, Third country nationals ordered to leave - annual data (rounded) (migr\_eiord).

<sup>32</sup> Yet, DK decided to “opt in” the Return Directive and implements it as a measure building upon the Schengen *acquis*, like the Schengen Associated countries. The UK issued 22,275 return decisions in 2019.

<sup>33</sup> In 2017, NO issued 9,795 return decisions.

all asylum requests in the EU. The assessed countries also apprehend the highest numbers of people in an irregular situation. In 2019, DE, EL, FR, and ES registered the highest numbers of apprehensions across the EU, and PL, IT, and BE were in the top 10 countries. However, apprehension or refusal of asylum do not have to always lead to the return procedure. Under Article 6(4), states have a choice not to issue a return decision and, instead, grant the person a permit based on compassionate, humanitarian, or “other” reasons.

Domestic administrative practices can also impact the number of return decisions. The same person may receive more than one return decision if he/she is apprehended at a later stage. Such a practice has been carried out in BE and NL in the past. Further, as a rule, states do not issue the return decision to accompanied children, as they are included in the return decision issued to their parents. Finally, the total figures do not cover people who were refused entry or were held liable to simplified return in border-related cases, excluded from the scope of the Directive by virtue of Article 2(2)(a) as discussed earlier, or, indeed, were subject to informal, arbitrary push-back measures.

The most common nationalities of people who received a return decision in 2019 are presented in Table 3.<sup>34</sup> The prevalence of some nationalities in specific Member States can be explained by geographical factors. What is worrying, however, is that the top five nationalities include the nationals of countries with the highest asylum recognition rates in the EU. In 2019, the most common countries of origin of people who received the final positive decision on their asylum applications were Afghanistan, Syria, Iraq, Nigeria, Iran, Pakistan, Somalia, Bangladesh, Turkey, and Eritrea.<sup>35</sup> Except for Somalia and Bangladesh, these were among the top five nationalities receiving return decisions that year. Among those, nationals from Iraq were among the top five nationalities in five Member States, from Afghanistan in four Member States, from Iran in two Member States, and from Syria in one Member State.

As highlighted above, under Article 6(1) of the Directive, Member States should issue a return decision to any person staying irregularly on their territory. Irregular stay is defined in Article 3(2) of the Directive as the presence on the territory of a Member State of a person who does not fulfil, or no longer fulfils, the conditions of entry set in Article 6 of the SBC or the other conditions for entry, stay, or residence in that Member State.

By referring to domestic rules on entry, stay, or residence, the Return Directive allows the scope of its application to vary among the countries. In fact, Member States may have diverse rules on entry and residence, according to which a person’s stay may be irregular in one state but not in another. This begs the question of whether it is lawful and proportionate for a Member State to recognise and enforce return decision<sup>36</sup> or entry ban<sup>37</sup> issued by another state.

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<sup>34</sup> Eurostat, Third country nationals ordered to leave - annual data (rounded) (migr\_eiord).

<sup>35</sup> The positive decisions include the following status: Geneva convention, subsidiary protection status, and humanitarian status.

<sup>36</sup> The framework for recognition of return decisions issued by another Member State is set out in Council Directive 2001/40/EC of 28 May 2001 on the mutual recognition of decisions on the expulsion of third country nationals, OJ 2001 L 149/34, 2 June 2001. The European Commission encourages states to rely on the mutual recognition rules meaning to enforce return decision issued by another states, see Commission Recommendation (EU) 2017/432 of 7 March 2017 on making returns more effective when implementing the Directive 2008/115/EC of the European Parliament and of the Council, OJ 2017 L 66/15, 11 March 2017 (hereafter Recommendation on return, para. 9(d)). However, the relation between the Return Directive and the Council Decision is unclear and the Directive does not refer to the Council Decision. Crucially, recognising a return decision issued by another state is not listed in any the four sets of circumstances in Article 6(2)-(5) of the Directive, in which states are not obliged to issue a return decision.

<sup>37</sup> As Section 2.3 discusses, registering in the Schengen Information System an entry ban issued by one Member State renders it enforceable across the Schengen area.



Table 3: Top five nationalities of people who received a return decision in 2019

	BG	BE	DE	EL	ES	FR	IT	NL	PL	SE
1	Afghanistan	Morocco	Nigeria	Syria	Morocco	Algeria	Morocco	India	Ukraine	Afghanistan
2	Iraq	Algeria	Iraq	Afghanistan	Algeria	Albania	Albania	US	Georgia	Iraq
3	Syria	Eritrea	Afghanistan	Pakistan	Guinea	Morocco	Nigeria	China	Belarus	Georgia
4	Turkey	Albania	Albania	Albania	Mali	Georgia	Tunisia	Morocco	Russia	Iran
5	Iran	Iraq	Serbia	Iraq	Cote d'Ivoire	Tunisia	Senegal	Turkey	Moldova	Ukraine
Sum	1,245	22,010	47,530	78,880	37,890	123,845	26,900	25,435	29,305	21,260

Source: Eurostat

The Directive applies horizontally to any person whose stay is irregular in any Member State, so it captures various circumstances leading to irregular stay. This notion includes people whose stay was never documented, asylum seekers whose application was refused, students or tourists who overstayed their visa, or migrant workers whose contract of employment terminated. A person could fall under different categories in different countries, as the return decision in some countries is issued before the person has the possibility to apply for asylum. Also, in relation to the scope of the application of the Directive, as discussed above, irregular entrants will be excluded from the scope of the Directive in some countries, while they will be issued a regular return decision in others. With this in mind, a few general categories of the most frequent profiles of people subject to return can be identified.

In DE, the NL, and SE, the biggest group of people subject to return are unsuccessful asylum seekers. In FR, refused asylum seekers and people who could not prove a regular entry accounted for around one-third of all return decisions in 2019, and the share of these two categories has increased in the past years. Cases of the refusal of the application for a regular stay, or its withdrawal, account for around one-fifth of the total cases.

With regard to IT, the share of refused asylum seekers increased considerably between 2012 and 2015, from around 18 to 53%, after which it dropped. More recently, the main categories of returnees are people who lost their permit due to penal infractions, lost their jobs, were prevented from applying for asylum, or could be swiftly returned due to good cooperation with the countries of origin (North Africa (particularly Tunisia), and Nigeria).

Much like IT, in EL, since 2015, the proportion of refused asylum seekers subject to return has decreased. The main categories now are newly arrived persons, who are often not subject to the Return Directive by application of Article 2(2)(a), as highlighted above, and overstayers, mainly people who used to work lawfully in EL.

In ES, refused asylum seekers constitute a small share of the people subject to return. Similar to EL, the most common category of people subject to return in ES are those who entered irregularly but to whom the Return Directive does not apply (they are subject to *devolucion*). The return/refusal of entry procedure is suspended if the person applies for asylum. Like in IT, return decisions are often more likely to be issued to people of nationalities of the countries where return is easier, such as North Africa (particularly Algeria and Morocco) and South America. Among the returnee population, there is a significant proportion of people who lost their regular status due to loss of job or penal infractions.

In BG, too, the main category of returnees consists of people who enter irregularly. In fact, the return order is automatically issued on account of irregular entry or stay before the person has a possibility to apply for asylum; during asylum procedures, return decisions are temporarily suspended.

Since 2014/15, the share of rejected asylum applicants in the total number of return decisions has decreased in BE. The main category of people receiving return decisions consists of intercepted persons who are irregularly staying on the territory (including so-called transmigrants – people crossing BE to reach the UK), which also covers persons who no longer have a regular status, including overstayers. Refused asylum seekers are the second biggest group. In PL, unsuccessful asylum seekers account for around one-fifth of all the people subject to return. Return decisions are mainly issued to people who have lost their legal statuses (not necessarily due to penal infractions) such as workers, students, or people from countries that do not require a visa.

### 2.1.3 Human rights obstacles to return

#### 2.1.3.1 The principle of *non-refoulement*

Under international human rights law, not every person in an irregular situation can be returned. The key human rights obstacle to return is the principle of *non-refoulement*. This principle protects from a removal any person who risks serious violations of his/her fundamental rights upon return. It is enshrined in international refugee, human rights, and humanitarian laws and is considered as having the status of a customary law norm. Within the human rights law regime, the principle of *non-refoulement* is absolute, meaning that it is independent of the person's conduct. The European Court of Human Rights (ECtHR) implied the prohibition of *refoulement* under Article 3 of the European Convention on Human Rights (ECHR), which prohibits torture and cruel, inhuman, or degrading treatment, and Article 2, which protects the right to life.

As explained earlier, Article 6(1) of the Return Directive requires the Member States to issue a return decision to any person in an irregular situation without prejudice to the four exceptions listed in Article 6(2)–(5). None of these exceptions relate explicitly to the principle of *non-refoulement*. The draft of Article 6 of the Directive, presented by the Commission, directly incorporated the prohibition of *refoulement*. It read “[where] Member States are subject to obligations derived from fundamental rights, [...] such as the right to *non-refoulement* [...] no return decision shall be issued.”<sup>38</sup> This draft provision reflected the *non-refoulement* obligations binding on the states.

Although the Return Directive does not contain an explicit *non-refoulement*-based exception to issuing return decisions, such protection can be implied from the text of the Directive. Under the human rights clause in Article 5 of the Directive, when implementing the Directive, states should respect the principle of *non-refoulement*. The obligation to respect this principle should be read

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<sup>38</sup> European Commission, Proposal for a Directive of the European Parliament and of the Council on Common Standards and Procedures in Member States for Returning Illegally Staying Third-Country Nationals, COM(2005)391, (September 1, 2005), article 6(4).

together with Article 6(4) of the Directive, which provides the key exception to the obligation to issue a return decision. Under Article 6(4), Member States may, at any moment, decide to grant an autonomous residence permit or other authorisation, offering a right to stay for compassionate, humanitarian, or other reasons, to a person staying irregularly on their territory. In that event, no return decision should be issued. If a return decision has already been issued, it should be withdrawn or suspended for the duration of the validity of the residence permit or other authorisation offering a right to stay.

In order to properly implement the prohibition of *refoulement*, there should be a standard *ex officio* assessment of the risk of *refoulement* before the return decision is issued. This would prevent the issuing of a return decision to people whose return is barred under the principle of *non-refoulement*, ensuring adequate protection of the person concerned as well as adequate utilisation of resources, as it would prevent the start of the procedure with respect to a person, who cannot be removed in any case.

It is not a straightforward task to trace down whether such an assessment takes place in practice at the moment when the authorities consider starting a return procedure. A few countries have good practices in that regard. In SE, the Aliens Act states that before adopting a return decision, the impediments to return to a particular country need to be assessed (including the risk of torture or persecution). According to the preparatory works to the Aliens Act, a return decision should not be issued if it is clear before the decision that it would not be enforceable. In such a situation, the person should be granted a residence permit. In PL, border guards assess *ex officio* whether there are grounds justifying the issuance of a residence permit for humanitarian reasons or a tolerated stay. These reasons relate to Article 3 of the ECHR, and the return decision will not be issued in such cases. Since 2015, EL has foreseen a possibility of issuing a certificate of non-removal for humanitarian reasons when the conditions of the principle of *non-refoulement* are met. In such cases, no deportation decision is issued. The certificate is issued to nationals of, among others, Eritrea, Iraq, Palestine, Somalia, South Sudan, Syria, and Yemen. The new procedure was intended to reduce the bureaucratic burden. However, since the adoption of the EU-Turkey deal in 2016, this procedure is no longer applicable. Finally, in FR and IT, before adopting a return decision, a Prefect verifies the risk of *refoulement*; in IT, this assessment is reportedly not extensive.

Overall, it cannot be concluded with certainty that the risk of *refoulement* is systematically carried out *ex officio* by authorities when they contemplate issuing a return decision to a person in an irregular situation. This concern is particularly pronounced with regards to refused asylum seekers.<sup>39</sup> There seems to be an assumption that the risk of *refoulement* is already assessed for refused asylum seekers during the asylum procedure. The return procedure is meant to implement the refusal of international protection. Such an approach is encouraged by the European Commission. In the Recommendation on return, the Commission stresses that states should avoid repetitive assessments of the risk of breach of the principle of *non-refoulement* if the principle has already been assessed in other procedures, the assessment is final, and there is no change in the situation of the person concerned (para 12(d)).

However, arguably, unsuccessful asylum procedure should not preclude a *non-refoulement* assessment before starting the return procedure. In fact, the initial risk assessment, carried out within the asylum procedure, does not necessarily include the risk of *refoulement* in line with the understanding under Article 3 of the ECHR and Article 5 of the Directive. Unless a Member State

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<sup>39</sup> As opposed to assessing the risks before removal, see EMN Ad-Hoc Query on The Return Directive (2008/115/EC) and the obligation to respect the *non-refoulement* principle in the return procedure, 2013.

extends its asylum procedure to the assessment of the absolute prohibition of *refoulement*,<sup>40</sup> the procedures regulated under the Directive 2013/32/EU of the European Parliament and of the Council on common procedures for granting and withdrawing international protection (recast) (hereafter Asylum Procedures Directive)<sup>41</sup> cover only the determination of the need of international protection. This concept is narrower than the principle of *non-refoulement*.

According to Article 2(a) of the Directive 2011/95/EU of the European Parliament and of the Council 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) (hereafter Qualification Directive),<sup>42</sup> international protection means refugee status and subsidiary protection status. By virtue of Article 2(e) of the Qualification Directive, the “refugee status” mirrors the definition of a refugee under Article 1(A)(2) of the UN Convention Relating to the Status of Refugees. It is, thus, not an absolute protection from *refoulement*, as Article 3 of the ECHR requires.

Further, under Article 2(f)–(g) of the Qualification Directive, “subsidiary protection status” means the recognition by a state of an individual as a person eligible for subsidiary protection. A “person eligible for subsidiary protection” is one who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that, if returned to his country of origin, or in the case of a stateless person, to his country of former residence, he would face a real risk of serious harm and would be unable or, owing to such risk, unwilling to avail himself of the protection of that country. Article 15 defines the notion of “serious harm” as either death penalty or execution, torture, inhuman or degrading treatment, and serious and individual threat to a civilian’s life by reason of indiscriminate violence in situations of international or internal armed conflict. The Qualification Directive provides for an inclusive definition of the subsidiary protection inspired by the human rights sources of the prohibition of *refoulement*.

However, by virtue of the exclusion clause and exceptions to the prohibition of return under the Qualification Directive, the scope of the application of the subsidiary protection status is narrower than the protection from *refoulement* under Article 3 of the ECHR. Under Article 17(1)–(3), the Qualification Directive allows states to exclude the people constituting a danger to the community or the state security from the subsidiary protection status. Moreover, states may exclude a person from being eligible for subsidiary protection if he, prior to his admission to the Member State concerned, has committed a crime that would be punishable by imprisonment had it been committed in the Member State and he left his country of origin solely to avoid sanctions for this crime. In addition, the Qualification Directive does not afford absolute protection from *refoulement*, because under Article 21(2)), a person granted refugee or subsidiary protection status may still be removed if there are reasonable grounds for considering him/her a danger to the state security or, following the conviction by a final judgment of a serious crime, he/she constitutes a danger to the community of the Member State.

<sup>40</sup> For instance, asylum procedure in DE, besides EU-harmonised statuses, covers also ban on deportation in line with the ECHR, see EMN Ad-Hoc Query on The Return Directive (2008/115/EC) and the obligation to respect the *non-refoulement* principle in the return procedure, 2013.

<sup>41</sup> 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.

<sup>42</sup> Directive 2011/95/EU of the European Parliament and of the 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 2011 L 337/9, 20 December 2011

Thus, people who fall within the exclusion grounds or are covered by the exception to the prohibition on return under the Qualification Directive may still have *non-refoulement* protection needs. This is particularly true in relation to exclusion from the subsidiary protection status and exception to the protection on criminality grounds. The ECtHR is clear that such factors have no incidence of the protection from *refoulement* under Article 3 of the ECHR, which is absolute. The Strasbourg case-law on Article 3 should guide the implementation of Article 5 of the Return Directive. According to the ECtHR jurisprudence, the personal scope of protection from *refoulement* under Article 3 of the ECHR includes people accused of terrorist acts or common criminality, including when they lost their refugee status on this account.<sup>43</sup>

The concern that people refused international protection will have a lower chance to be protected from *refoulement* within return procedures, is based on two factors. First, in most Member States, refusal of international protection triggers return procedures, and there does not seem to be a clear step where the authorities would systematically consider the *non-refoulement* principle before issuing return decisions. Three general approaches can be distinguished with regards to the time span between rejecting asylum application and issuing a return decision.

In some countries (such as DE, NL), decisions rejecting asylum applications already include a return decision. In EL, following the 2019 amendment to asylum procedure, return is also a part of the decision refusing asylum, and it becomes enforceable when the appeal possibility is exhausted.

In most Member States, return decision is issued at the same time as the rejection of asylum application. It is suspended during the appeal against the refusal of international protection and becomes enforceable after the possibility of the appeal is exhausted. Yet, in some circumstances (when an application is considered manifestly unfounded or inadmissible), return decision becomes enforceable before the time limit for appealing refusal of international protection has lapsed (FR, SE). In IT and PL, return decision comes at the second stage after the refusal of international protection. Return decision becomes enforceable after the first level appeal against the refusal of asylum. In this case, the suspensive effect will not be granted if the person poses a threat to public policy or security (PL).

In the third group of countries, there is more time between the unsuccessful asylum procedure and return procedure. In BG, return decision is issued at the moment when the appeal has been exhausted. In ES, the rejected asylum seekers have 15 days to leave the country, and return decision can be issued if the person overstays this period, unless an appeal has been lodged. In BE, since 2017, return decision has no longer been issued automatically after the refusal of asylum but after the expiry of the deadline for appealing and if the appeal was lodged, after the decision. Return decision can still be issued after the refusal of asylum if the application is considered inadmissible, but it remains suspended during an appeal. The reason for these changes was to render return more efficient, as many return decisions were suspended during the appeal.

Second, in some states, *refoulement* protection needs are primarily assessed within the asylum procedure. As explained above, unless a Member State extends its asylum procedure beyond refugee and subsidiary protection status, this procedure may not protect every person from *refoulement*. In the NL, for instance, the risk of *refoulement* is not assessed as part of the procedure to take a return decision. The principle of *non-refoulement* is assessed only during the asylum procedure, and the return decision forms a part of the decision, refusing international protection. If a person receives a return decision upon apprehension, the modalities of the assessment of the risk

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<sup>43</sup> This was the case for the applicants in such leading cases as ECtHR, *Chahal v. the United Kingdom*, 22414/93, 15 November 1996, para. 80–81; ECtHR, *Saadi v. Italy*, 37201/06, 28 February 2008, para. 127; ECtHR, *Ahmed v. Austria*, 25964/94, 17 December, para. 46.

of *refoulement* are unclear. The person will be heard, including on the risk of *refoulement*. If he/she mentions grounds for asylum, they will likely be referred to an asylum procedure. During the return procedure, there is no *ex officio* assessment of the principle of *non-refoulement*, but the person can lodge a subsequent asylum application or apply to a court for injunctive relief when the removal is imminent.

Likewise, in DE, the risk of *refoulement* is assessed during an asylum procedure. If international protection is refused, the local foreigner authority in charge of the return procedure is bound by the decision of the asylum authority. On the other hand, if the person has not undergone an asylum procedure, the foreigner authority should consult the asylum authority to verify the obstacles to return relating to the situation in the destination country. In BE, there is a presumption regarding refused asylum seekers that the risk of *refoulement* has been assessed during the asylum procedure.

### 2.1.3.2 Other considerations

Alongside the principle of *non-refoulement*, the right to family and private life, laid down in Article 8 of the ECHR, may constitute an obstacle to return a person. According to the Strasbourg jurisprudence on Article 8, in some cases, the right to respect for one's life developed in the host state can outweigh the state's power to return the person.<sup>44</sup> Also, according to the Committee of Ministers of the Council of Europe, a removal order should only be issued after the authorities of the host state are satisfied that the possible interference with the returnee's right to respect for family or private life is proportionate to a legitimate aim.<sup>45</sup>

The original Commission's draft proposal provided that "[w]here Member States are subject to obligations derived from fundamental rights as resulting, in particular, from the European Convention on Human Rights, such as [...] the right to family unity, no return decision shall be issued."<sup>46</sup> As in relation to the principle of *non-refoulement*, the Directive does not contain an express exception to the issuance of return decision on the account of family and private life, but some protection can be implied under the provisions of the Directive.

Under Article 5 of the Directive, when implementing the Directive, Member States should take due account of the best interests of the child, family life, and the states of health of the person concerned. This human rights clause should be read alongside Article 6(4) of the Directive, as it provides that states may grant an autonomous residence permit or other authorisation offering a right to stay for compassionate, humanitarian, or other reasons to a person staying irregularly on their territory. In that event, no return decision should be issued. Where a return decision has already been issued, it should be withdrawn or suspended for the duration of the validity of the residence permit or other authorisation offering a right to stay.

A good practice is to conduct the assessment *ex officio*. Automatic assessment of the family and private life and health reasons barring return adequately protects the individual's rights, including under Article 5 of the Return Directive. It is also efficient because otherwise, the person would need to challenge return decision on these grounds and appeal procedures require resources. For instance, in PL, border guards assess *ex officio* whether a person qualifies for a residence permit for humanitarian reasons (family life reasons) or a tolerated stay. If such a residence title is issued, no return decision will be issued. Also, in the NL, upon the rejection of asylum application, the Immigration and Naturalisation Service assesses, on its own motion, grounds for a residence permit

<sup>44</sup> ECtHR, *Boultif v. Switzerland*, 54273/00, (August 2, 2001), para. 41–46; ECtHR, *Kaftailova, v. Latvia*, 59643/00, 22 June 2006, para. 61–65.

<sup>45</sup> CMCE, *Twenty Guidelines on Forced Return*, September 2005, Guideline 2(2).

<sup>46</sup> European Commission, *Proposal for Returns Directive*, article 6(4).

on humanitarian grounds, notably the health condition or family life and whether the person is victim of human trafficking.

Overall, in all the Member States, there appears to be a possibility of granting the residence permit on humanitarian or compassionate grounds. However, it is not clear when the relevant assessment takes place and how difficult it is to comply with the requirements to be granted such a permit. Above all, it appears that in most countries, the person has to apply by him/herself, rather than such assessment being automatically carried out by the authorities within the return procedure.

In BE, there is a possibility of applying for a humanitarian permit based on health conditions, family life, or the best interests of the child. However, such a permit is accorded in exceptional circumstances. In FR, the person may apply for a residence permit based on humanitarian considerations in relation to private or family life (children attending school, length of stay in FR, private and family ties, etc.), work (length of stay and employment in FR), or an exceptional talent or service to the community (cultural, sport, or economic fields). In addition, some people may not be subject to a return decision, notably for humanitarian reasons (age and health status), family and private life (parents of children living in FR, spouses of French citizens), and health-related reasons (work-related accidents and occupational diseases).

In DE, a residence title on humanitarian grounds can be issued to people who are already in the return process (including cases of hardship or for victims of human trafficking or illegal employment, as long as they cooperate with criminal proceedings) or on urgent humanitarian or personal grounds for people who have not received return decision yet.

In IT, a "special case" permit may be granted on the basis of health reasons or for second-degree family members living with Italian nationals. In EL, people can apply for a residence permit for humanitarian reasons, which covers inter alia, health reasons preventing return, being victim of human trafficking, abusive working conditions, domestic violence, and being spouse or parents of a Greek national. Alternatively, they can apply for a residence permit for exceptional reasons, which can be granted to a person who has proof of having resided in EL for at least seven years and developed strong ties in the country. In ES, a temporary residence permit can be granted based on integration (work, social and family ties) and humanitarian reasons (victims of violence, critical disease). However, people need to apply for such a permit; it is not assessed as part of the return procedure.

## 2.1.4 Return procedure

### 2.1.4.1 Return decision

In line with Article 3(4) of the Return Directive, return decision is an administrative or judicial decision or act stating or declaring the stay of the person to be irregular and imposing or stating an obligation to return. Under Article 6(6) of the Directive, states may decide to adopt a decision on the ending of a legal stay together with a return decision and a removal decision in a single decision or act without prejudice to the procedural safeguards.

In practice, combining these decisions may shorten the time available for the person to seek a remedy to expound reasons, potentially precluding their return. It appears that all countries, except for IT, combine the return decision with the removal order, which implies that such a decision is enforceable. In IT, the expulsion decision adopted by the Prefect is followed by a removal order, which is adopted by the police in charge of the execution. In practice, these two decisions are adopted simultaneously.

Under Article 12(1) of the Directive, the return decision should be issued in writing, and it should provide reasons in fact and in law as well as information about available remedies. According to the ECtHR, inadequate information about the appeal channels is a key obstacle for the person concerned in accessing the remedy required under Article 13 of the ECHR. As reiterated by the Court, anyone subject to a removal measure, the consequences of which are potentially irreversible, has the right to receive adequate information to be able to access relevant procedures and substantiate their claims.<sup>47</sup>

The legislation of most of the Member States reflects these provisions. However, it is not straightforward to assess whether the return decisions are, indeed, motivated in practice.

In most countries, the law empowers more than one body to issue return decisions. Often, the competency to order return depends on whether the return is triggered by an apprehension of a person in an undocumented situation or refusal of asylum. As Table 4 shows, return decisions are commonly issued by migration authorities (BE, DE, NL, SE), law enforcement authorities (BG, EL, PL), or regional representatives of the government (ES, FR, IT).

A good practice in IT is to involve judicial authorities to verify the decision taken by administrative bodies. A removal order adopted by the administrative bodies must be submitted to the magistrate (*Giudice di Pace* – Justice of Peace) within 48 hours and be validated within the next 48 hours. The magistrate will hear the person and their lawyer, check the merits, and verify the elements of form and substance required for the adoption and enforcement of the removal order.

Further, according to Article 12(2) of the Return Directive, Member States should provide, upon request, a written or oral translation of the main elements of return decisions, including information on the available remedies, in a language the person understands or may reasonably be presumed to understand.

The practice differs in this respect. In most countries, a decision is issued in the domestic language, and it is translated orally to the person. In BE, translation is provided upon the request of the person concerned. In FR, if the decision is notified in person, an interpreter is supposed to be present to translate the main elements. However, if it is communicated per post, it is not translated. In BG and EL, there are rarely any interpreters when the decision is issued, and people are frequently unaware of the content of the decision and their rights.

Table 4: Authorities empowered to issue return decisions

MS	Authorities
BE	Immigration Office
BG	Migration Directorate (Interior Ministry), State Agency "National Security", police or border police
DE	Foreigners authorities of the federal states
EL	Aliens police or Ministry for Migration Policy (if rejection of application for permit or withdrawal of it)
ES	Government Delegate/ Deputy Delegate in the province in the Autonomous Regions
FR	Prefect
IT	Prefect (local representative of the Interior Ministry) or Interior Ministry (for public order, national security or terrorist threat)
NL	Immigration and Naturalisation Service, the Royal Netherlands Marechaussee (military policy) and the National Police
PL	Border Guard
SE	Migration Agency

Source: Author's compilation

<sup>47</sup> ECtHR, *Hirsi Jamaa and Others v. Italy*, 27765/09, GC, 23 February 2012, para. 204; ECtHR, *M.S.S. v. Belgium and Greece*, 30696/09, GC, 21 January 2011, para. 304.

In DE and PL, a summary of the ruling is translated in a written form. In IT, the return decision needs to be translated in a written form to either the person's language or one of four languages (Spanish, Arabic, English, or French), but in practice, the latter option is typically followed.

In SE, the return decisions issued to refused asylum seekers are, as a rule, communicated orally via an interpreter (by Migration Agency case officers who are either present in the room or via a video conference), while return decisions in non-asylum cases are generally communicated in writing. With regard to the oral interpretation, it is to be provided in the native language of the person. If the interpretation in that language is unavailable or cannot be arranged due to time constraints or cost considerations, interpretation in another language that the person understands or has a command over is allowed.

### 2.1.4.2 Appeal

According to Article 13(1) of the Return Directive, the person concerned should be afforded an effective remedy to appeal against or seek a review of return decisions. Under the ECHR, the right to an effective remedy, which is laid down in Article 13 of the Convention, is the key procedural guarantee that benefits people facing return on account of irregular status. According to the ECtHR, Article 13 demands the provision of a domestic remedy that will allow a competent authority to deal with the substance of the complaint and grant appropriate relief.<sup>48</sup>

Article 13(1) of the Return Directive further stipulates that the remedy is to be sought before a competent judicial or administrative authority or a competent body composed of members who are impartial and who enjoy the safeguards of independence. The Directive thus leaves a broad discretion to the states to decide which bodies are competent to receive an appeal against the return decision.

As Table 5 shows, Member States adopted various approaches to the character of the appellate body. Overall, appeal proceedings are regulated by administrative procedure codes, and the judicial bodies involved are commonly administrative courts.

Table 5: Forms of appeal

MS	Form of appeal
	Judicial appeal
BE	Council for Alien Law Litigation (specialised administrative court)
BG	Administrative court
FR	Administrative court
IT	Magistrate (Giudice di pace) (if return decision issued by prefect) Administrative Court in Rome (if return decision issued by the Interior Ministry)
SE	Migration Court (specialised administrative court)
	Mainly judicial appeal, administrative appeal possible in some cases
DE	Foreigners authorities of the federal states* (unless return decision was taken by the Federal Office for Migration and Refugees in asylum procedure and it may differ across federal states) Administrative court
	Both administrative and judicial appeal
EL	Police Administrative court of first instance
ES	Government Delegate/Deputy Delegate Administrative Court
NL	Immigration and Naturalization Service* (only in non-asylum cases) Administrative court of appeal
PL	Foreigners Office Administrative court of first instance

Source: Author's own compilation

<sup>48</sup> ECtHR, *M.S.S v. Belgium and Greece*, para. 288.

Three main approaches can be identified: 1) in most states, only a judicial appeal is available (BE, BG, FR, IT, SE); 2) in another set of countries, the first-level appeal is an administrative one, and the second-level appeal is judicial (EL, ES, NL, PL); 3) in DE, a judicial appeal is the main procedure, but an administrative appeal is possible in some cases.

An administrative appeal is an appeal to the hierarchical superior within the administrative authority that issued a return decision. In EL and PL, it is necessary to first appeal to the administrative authority before seeking judicial remedy, while in ES, administrative appeal appears to be optional. In the NL, administrative appeal is based on a written procedure.

In PL, the administrative appeal (before the Head of the Office for Foreigners) is the most important step as it can address facts. At the level of judicial appeal, the court will limit its review to questions of the law. In DE where the administrative appeal is foreseen in some procedures, it is optional.

A second level (or third level in the countries with the administrative appeal) appeal is possible in several countries, including BE (Council of State), BG (Supreme Administrative Court), FR (Administrative Court of Appeal), IT (Court of Cassation), the NL (Administrative Jurisdiction Division of the Council of State), PL (Supreme Administrative Court), and SE (Migration Court of Appeal). Yet, in most cases, this appeal addresses only questions on the law and not facts.

While all Member States have empowered the administrative courts to review return decisions, BE and SE have set up specific administrative courts for asylum and migration cases. In BE, Council for Alien Law Litigation (CALL) was set up in 2007 to rule on asylum applications and review appeals against migration-related decisions. It is considered an advantage to have a tribunal specialised in migration and asylum law with judges knowledgeable in these areas of law. The CALL is sometimes contrasted with the penal law courts that are competent to review immigration detention in BE. Penal law judges are not specialised in rules governing immigration detention, and it sends a misleading message when penal law courts deal with administrative detention. Some pitfalls do exist as the CALL is subject to distinct procedural rules that are sometimes less favourable than those in the mainstream regime. Yet, overall, it is considered a good practice.

A crucial question is how much time a person has to appeal against a return decision. The Directive is silent on this point. In the Recommendation on return, the European Commission stresses that the states should provide for the shortest possible deadline to avoid misuse of rights and procedures, in particular as regards appeals lodged shortly before the scheduled date of removal (para.12(b)). Under Article 13 of the ECHR, people who are liable to return have the right to an effective remedy in front of a competent national authority. Hence, it appears odd to perceive the right to appeal mainly from the perspective of "misuse of rights and procedures."

The ECtHR emphasises the period available to a person for challenging the return. According to the Court, the right to an effective remedy under Article 13 of the ECHR implies two inter-related requirements concerning time limits. First, the time-span between the adoption of the return decision and its enforcement should be sufficient to allow the person to appeal. Second, the time limit for submitting the appeal must not be excessively short as otherwise, the remedy would be inaccessible in practice and be in breach of Article 13 of the ECHR.<sup>49</sup>

Since appeal proceedings are regulated by the Member States' codes of administrative procedure and the competent authorities are the administrative courts, arguably, the time to appeal should

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<sup>49</sup> ECtHR, *Baysakov and Others v. Ukraine*, 54131/08, (February 18, 2010), para. 74; ECtHR, *Shamayev and Others v. Georgia and Russia*, 36378/02, (April 12, 2005), para. 458–461; ECtHR, *Jabari v. Turkey*, 40035/98, (July 11, 2000), para. 40.

align with the time applicable to other administrative proceedings, which in many countries, is typically a month.

Most Member States set multiple periods depending on the reasons for the return and the procedure preceding the adoption of the return decision. From this perspective, as shown in Table 6, three sets of time limits can be identified, namely, a period of around a month, which is referred to as a regular period because it is similar to that of most of the administrative procedures, a medium-term of around two weeks, and a short term of a few days.

A related question is whether the person will be protected from removal during the time that the court or administrative body examines the appeal. The so-called suspensive effect of the appeal is particularly important in the cases where the return is challenged on account of the principle of *non-refoulement*.

Under Article 13(3) of the Return Directive, the authority or body that is competent to receive appeals should be empowered to temporarily suspend the enforcement of the return decision unless a temporary suspension is already applicable under national legislation. This means that either the legislation should explicitly provide for a suspensive effect or the person should be allowed to apply for it.

Under Article 13 of the ECHR, however, if the return is challenged on account of the risk of *refoulement*, the appeal should have an automatic suspensive effect. The ECtHR attaches great importance to this requirement because of the irreversible nature of the damage that may occur if the risk of torture or ill-treatment materialises.<sup>50</sup>

The automatic suspensive effect is provided merely in EL (in the administrative phase of the appeal), FR, PL (in the administrative phase of the appeal), and SE. In other countries, the person has to apply for it.

In the NL, whether the appeal has an automatic suspensive effect or not depends on the reasons for rejection of the asylum procedure. There are several circumstances where a suspensive effect has to be requested, including subsequent applications and manifestly unfounded applications based on the safe country rule. During the examination of the first request for suspension by the court, the person can stay in the NL, as a rule.

In BG, the person will have only three days to challenge the enforcement of the return decision (or the so-called “preliminary execution” vested in the return decision), which is virtually impossible in

Table 6: Time-period for submitting appeal

Period	MS
Regular time-period (around a month)	
30 days	BE, DE (but may be shorter if asylum application was rejected as manifestly unfounded), ES, FR (if voluntary departure was granted and return ordered on specific grounds), IT
4 weeks	NL (in asylum cases processed in the extended procedure and non-asylum cases)
3 weeks	SE
Medium-term (around two weeks)	
15 days	FR (if voluntary departure was granted and returned issued on specific grounds)
14 days	BE (if the person is in detention), BG, PL
Short-term (a few days)	
7 days	NL (in asylum cases and if the person is in detention)
5 days	EL
2 days	FR (if no voluntary departure was granted and the person is in detention)

Source: author’s own compilation

<sup>50</sup> ECtHR, *M.S.S v. Belgium and Greece*, para. 293; ECtHR, *Abdolkhani and Karimnia v. Turkey*, 30471/08, 22 September 2009, para. 108; ECtHR, *Baysakov and Others v. Ukraine*, para. 71.

practice. In contrast to BG, in most of the countries, including, BE, DE, EL, NL, and PL, the person should simultaneously raise an appeal against the return decision and apply for suspending its enforcement.

Like in DE and the NL, in PL, the application for the suspension is suspensive. The courts do not automatically grant the suspensive effect, rather they assess whether the person has adequately motivated his/her claim and whether there is a risk of harm that is difficult to repair. In most cases, the courts grant the suspensive effect.

This is, reportedly, only rarely granted in BE and ES. In BE, however, another procedure is available that protects the person from the return in urgent cases. If the person is in pre-removal detention and the return is imminent, he/she can submit an urgent appeal to the CALL within 10 calendar days or 5 days (if it is a subsequent application) which is suspensive.

#### 2.1.4.3 Legal and linguistic assistance

More often than not, the provision of legal and linguistic assistance is necessary for the person to avail the right to an effective remedy. Under Article 13(3) of the Return Directive, the concerned person should be able to obtain legal advice, representation, and where necessary, linguistic assistance.

By virtue of Article 13(4) of the Directive, Member States should ensure that necessary legal assistance and/or representation is granted on request and free of charge in accordance with the relevant national legislation or rules regarding legal aid. Article 13(4) is a "shall" provision; hence, it appears that the states are obliged to provide legal aid and merely the modalities are left to domestic discretion. The states may subject the provision of free legal assistance and/or representation to the same conditions they have set for legal aid in asylum proceedings as regulated by the Asylum Procedures Directive.

Pursuant to the Asylum Procedures Directive, Member States may decide that assistance will be granted only to those who lack sufficient resources and only through the services provided by the legal advisers who are specifically designated by the national law to assist and represent applicants. Further, the states may limit the provision of legal aid to the proceedings in the first instance. The states may also impose monetary and time limits on the provision of free legal assistance and representation provided that such limits do not arbitrarily restrict access to legal assistance. Finally, the states may demand to be reimbursed for any costs borne if the applicant's financial situation has improved considerably or if the decision to afford the legal assistance was taken based on false information supplied by the applicant.

The provision of legal aid is laid down in the immigration legislation (ES, FR, SE), code on the administrative procedure (PL), or law on legal aid (BG, SE). Irrespective of the legal basis, the provision should be effective in practice.

Most countries impose the aforementioned conditions based on the financial situation of the beneficiary. The people in return proceedings generally fulfil these conditions, but this procedure may take time, which is limited in the appeal procedure. It is a good practice in BE to assume that the people subject to the proceedings regulated by the immigration law can fulfil the financial conditions. Also, in SE, the Migration Board will appoint a legal advisor as a rule in all cases of refusal of entry or return.

The people involved in return proceedings typically need to request legal aid from the general legal aid system, but in several countries, including BE, ES, FR, and IT, the procedure appears to be quite straightforward and the judicial assistance is granted.

On the other hand, in BG, even though, as per the Law on Legal Aid, the person should have access to free legal aid to prepare an appeal, the time limit of 14 days to submit the appeal makes it impossible in practice to benefit from legal aid to prepare the appeal. However, if the person succeeds in submitting an appeal, the court may appoint a pro bono lawyer from the National Bureau on Legal Aid.

In DE and EL, the courts will only grant legal assistance if an appeal is not manifestly inadmissible, is unfounded, or has chances to succeed.

A discreet problem exists in relation to the character of the appeal. As mentioned above, in EL and PL, the first instance of the appeal is an administrative one to the body that issued the return decision. Yet, legal assistance is to be granted by the courts, and it thus covers only the judicial phase of the appeal. This is problematic in PL as the facts can be disputed during the administrative appeal in front of the Office for Foreigners, while the administrative court limits its review to questions of law.

There are various modalities of legal assistance. In most of the countries, a lawyer will be appointed *ex officio*. There are concerns in relation to the quality of such a scheme as pro bono lawyers are often not much paid for this service or they are not knowledgeable in migration law.

On the other hand, in DE, lawyers are not state-appointed, but the lawyer representing the person would need to apply to get paid by the state. This is often problematic as they would need to first prepare the appeal without knowing whether the court will accept to cover their service. So, in practice, lawyers often ask the person to pay them in advance. In FR, both options are possible; namely, the person can ask the court to appoint a lawyer *ex officio* or benefit from legal aid to pay for his or her lawyer.

As regards interpretation, it is less clear to what extent such assistance is available to the person concerned. In ES, interpreters are involved in the administrative phase of the return process but not in the judicial appeal phase.

In some countries, where the procedure foresees a hearing, the interpreter will be present and paid by the state. This appears to be the case in FR during the hearing in front of the administrative court and, in PL, at the hearing with the border guard or the Office for Foreigners. On the other hand, no standardised procedure is evident that can offer the person the assistance of an interpreter to prepare the appeal dossier and participate in the appeal process.

However, in cases where a lawyer assists the person, he/she should arrange for interpretation, which seems to be the case in BE. In some countries, including EL and PL (except the hearing), no interpretation assistance is foreseen. On the other hand, interpreters are widely involved in SE, but their quality is sometimes questioned.

## 2.1.5 Unaccompanied children

### 2.1.5.1 Guardianship

Children travelling without their parents or guardians are among the most vulnerable categories of people and referred to as unaccompanied minors (UAM). In 2019, 3,330 UAM sought asylum in EL; 2,690 in DE; 1,220 in BE; 1,045 in the NL; 890 in SE; 755 in FR; 660 in IT; 525 in BG; and 105 in PL.<sup>51</sup> Under Article 22(2) of the UN Convention on the Rights of the Child (CRC), UAM should receive the

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<sup>51</sup> Eurostat, Asylum applicants considered to be unaccompanied minors by citizenship, age and sex Annual data (rounded).

same protection as (national) children who are temporarily or permanently deprived of their family environment. As such, according to Article 20(1) of the CRC, they are entitled to special protection and assistance provided by the state.

According to the UN Committee on the Rights of the Child (CRC Committee), such protection and assistance include guardianship. As soon as the child is identified, the states should appoint a guardian who is to be consulted and informed regarding all the decisions taken in relation to the child. The guardian should have the authority to participate in the decision-making processes, including immigration and appeal hearings, care arrangements, and all the efforts in the search for a durable solution. The guardian should have the necessary expertise in the field of childcare so as to ensure that the interests of the child are safeguarded and that the child's legal, social, health, psychological, material, and educational needs are appropriately covered. The agencies or individuals whose interests could potentially be in conflict with those of the child should not be eligible for guardianship.<sup>52</sup>

Under Article 10(1) of the Return Directive, before deciding to issue a return decision for an unaccompanied child, assistance by appropriate bodies other than the authorities enforcing the return should be granted with due consideration being given to the best interests of the child. The provisions of Article 10(1) of the Return Directive appear limited, particularly when compared to the provisions for UAM in asylum procedures under Directive 2013/33/EU of the European Parliament and of the Council laying down standards for the reception of applicants for international protection (recast) (hereafter Reception Conditions Directive).<sup>53</sup>

Article 24(1) of the Reception Conditions Directive reflects the requirements spelled out by the CRC Committee. It provides that the states should ensure that a representative represents and assists the unaccompanied minor to enable him/her to benefit from their rights and comply with the obligations provided for in that Directive. The unaccompanied minor should be informed immediately of the appointment of the representative. The representative should perform his/her duties in accordance with the best interests of the child and should have the necessary expertise to that end. In order to ensure the minor's well-being and social development, the person acting as a representative should be changed only when necessary. Organisations or individuals whose interests conflict or could potentially conflict with those of the unaccompanied minor should not be eligible to become representatives.

In light of the provisions of the CRC, the difference in the scope of guarantees applicable to children in return procedures and those in asylum procedures is unjustifiable. Hence, UAM falling under the scope of the Return Directive should be afforded the same level of protection and care as asylum-seeking children, including as regards guardianship arrangements. Overall, the states interpret the notion of "appropriate bodies" in Article 10(1) of the Return Directive to imply a guardian or at least a representative. Two approaches can be distinguished in this regard:

First, in most countries, UAM are under the care of the general child welfare agency. In DE, the family court appoints a guardian, who is most often a youth welfare officer. The tasks of a guardian include acting as personal contact, a legal representative, and the person with the right of custody. The guardian assists with asylum and migration procedures and supports in developing life projects.

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<sup>52</sup> CRC Committee, General Comment No. 6: Treatment of unaccompanied and separated children outside their country of origin, CRC/GC/2005/6, 1 September 2005, para. 33.

<sup>53</sup> 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 (recast), OJ 2013 L 180/96, 29 June 2013.

Similarly, in FR, a guardian is appointed by the judge and, often, the child protection service of the local authority ensures guardianship. In SE, the appointment and role of a guardian are defined in the Act on Legal Guardian for Unaccompanied Children. Guardianship responsibilities lie with municipal authorities and the head of the guardian's office in the municipality appoints the guardian.

In PL, the head of the care centre where the UAM is placed will act as the guardian. In turn, a legal representative will be appointed for each procedure. Likewise, in BG, the director of child protection services will act as a representative and social workers will take up the guardianship role. Reportedly, it is frequently difficult to find social workers who are willing and able to act as guardians for UAM.

In ES, guardianship falls under child protection services. In EL, the guardianship system is not operational. The public prosecutor should act as temporary guardian but this role is overstretched as there are no guardians available to be appointed.

Second, in BE and the NL, there is a separate guardianship system for UAM, which is different from the guardianship for national children. In BE, as regulated in the Guardianship Act, the Guardianship Service falls under the Justice Federal Public Service and not Home Affairs in order to guarantee certain independence from migration authorities. The Guardianship Service assigns a guardian from its list to assist, support, and represent the child. The guardian's role is to ensure that all decisions taken with respect to the child are in his or her best interest. The tasks include ensuring adequate accommodation, care, education, and health care; ensuring that the child has legal representation in asylum and migration procedures; advising the child; proposing durable solutions; and assisting the child with integration.

In the NL, the guardianship institution is called Nidos, and it operates under the same legal provisions as the Youth Welfare Service for national children. The guardians employed by Nidos are to be independent of the migration authorities. They take care of the child and organise accommodation and legal assistance in asylum procedures and fulfil educational and health care needs.

### 2.1.5.2 Return

The Return Directive does not prohibit the return of UAM but lays down conditions for implementing such a measure. According to Article 10(2) of the Directive, before removing an unaccompanied child, the authorities should be satisfied that the child will be returned to a member of his/her family or a nominated guardian or that adequate reception facilities are in place in the state of return. In practice, a few Member States prohibit the return of UAM. The countries that do not formally prohibit it rarely implement such returns as family tracing and assessment of the reception and care in the destination country is time-consuming and cumbersome.<sup>54</sup>

In BE, for instance, a return decision cannot be issued with respect to a UAM. An order to bring back the child can, in principle, be issued to the UAM's guardian if the return is considered a durable solution, but these orders are rarely implemented. A voluntary return, with a specific reintegration programme, can be organised by the Federal Agency for the Reception of Asylum Seekers (Fedasil) with the International Organization for Migration (IOM) Brussels and Caritas. Few UAM return via these programmes, reportedly, 31 in 2017, and 19 in 2016. While the process to find a durable solution is in motion, the UAM will be granted a 6-month temporary residence permit which, after three years, will lead to a permanent residence permit if no durable solution is found.

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<sup>54</sup> In order to benefit from specific child guarantees, including protection from return, UAM should be recognised as minors. In some countries, including BG, ES or IT, age assessment procedures are not precise.

Like in BE, no return decision can be imposed on UAM in BG. A child cannot be forcibly returned but can opt for a voluntary departure return. Between 2014 and 2017, 112 UAM were left in the framework of an assisted voluntary return (AVR) programme. Now, UAM can receive a residence permit.

In FR, UAM cannot receive a return decision. UAM are not required to have residence permits, so they are considered to be legal residents in FR. However, the return of a child to his/her country of origin may be decided by the Juvenile Court if it is in the child's best interest to reunite with his/her family. If this is decided, a specific programme for a voluntary departure is implemented by the French Office for Immigration and Integration (*Office Français de l'Immigration et l'Intégration* OFII).

In IT, UAM cannot be removed except on public order or for security reasons, in which case, it is decided by the Juvenile Court. If the family is found and the return is considered a durable solution that is in the child's best interest, the child may depart via AVR programmes. Between 2011 and 2014, only 20 children were reunited with their families in the framework of AVR programmes. Additionally, UAM can receive a "special case" permit.

In DE, a return is theoretically possible, but it is rarely implemented because it is difficult to find a parent or guardian in the destination country. Most removals are thus suspended. If parents are found and consent to the child's return, voluntary returns are possible under the AVR programme but rarely happen in practice. In 2017, 80 UAM departed in the framework of the AVR programme and 170 in 2016.

In PL, a forced return is not prohibited but very rarely implemented. In practice, most UAM flee to reach Western Europe.

In ES, the return of UAM follows a specific procedure designed to protect the child's best interests. There are five stages and both the child and his/her guardian are heard. At the end of the procedure, the Government Delegate decides whether the child should be reunited with their family, turned over to the protection services in their country of origin or remain in ES. The decision can be appealed. If nine months lapse since the UAM was turned over to child protection services, he/she will receive a residence permit. In practice, very few UAM are returned and a majority remain in ES.

In EL, the return of UAM should be approved by the Public Prosecutor for Juveniles and the condition is that the child's social and family environment can ensure the child's smooth reintegration and rehabilitation and his/her child-specific rights. UAM are, reportedly, not forcibly returned, but returns to Albania can be based on a readmission agreement. If conditions for the UAM's return are not met, the removal will be postponed.

It appears that solely two countries implement forced returns of UAM – notably, the NL and SE. In the NL, the return can take place if the guardian can transfer guardianship to the family, the official guardian, or an organisation in the country of origin. The guardian will request IOM to investigate the availability of reception arrangements and the circumstances to which the child would return. In 2019, 10 UAM left via a voluntary return, and 10 were removed. As these figures show, few UAM are removed. If a return is not possible for three years and the child cooperates with the process, he/she may receive a residence permit on a so-called no-fault policy.<sup>55</sup>

In SE, the Migration Agency carries out the family tracing and identification and assessment of the reception conditions according to detailed guidelines. UAM departing voluntarily have access to various types of reintegration assistance depending on their country of origin. 106 UAM left SE via

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<sup>55</sup> Such permits are not specific to UAM and are discussed in Section 2.2.3.

AVR in 2019, 166 in 2018, and 308 in 2017. SE forcibly returned 11 UAM in 2019, 10 in 2018, and 11 in 2017. A majority of UAM will receive at least a temporary residence permit.

## 2.2 Enforcement of return decision

### Key findings

- Voluntary return is cost-effective and easier to organise than a forced return.
- Under the principle of proportionality and Article 7(1) of the Return Directive, voluntary return should be prioritised over forced return; yet, in most countries, voluntary returns are a minority.
- Monitoring of forced returns is carried out by an Ombudsperson/NPM, civil society organisations, or bodies affiliated with enforcement staff, whose institutional independence may be questionable.
- When removal would violate the principle of non-refoulement, the Return Directive solely demands postponement of removal. This is reflected at the domestic level as few states grant a regular or tolerated status to the person concerned.

This section is devoted to enforcement of the return decision and responds to research questions 1–6 on voluntary departure and questions 24–27 on the implementation of the return decision. The discussion addresses voluntary departure (2.2.1) and removal (2.2.2), which are the two ways to enforce the return decision pursuant to the rules set out in the Return Directive. The section then focuses on the postponement of return (2.2.3), which is related to a discussion on the lack of obligatory *non-refoulement*-based exceptions to the obligation to issue return decisions.<sup>56</sup>

Table 7 displays the number of people effectively returned.<sup>57</sup> In some instances, these numbers are considerably lower than the numbers of return decisions issued, as shown in Table 2.<sup>58</sup> The relation between these two numbers in a given year is called the return rate. The European Commission currently associates the return rate with the effectiveness of the return policy. Indeed, the Commission deplored that the overall return rate was merely around 37% in 2017 and 46% in 2016 and noted that the effectiveness of return should be increased.<sup>59</sup>

However, the return rate is a misleading indicator. First of all, the people who received the return decision were not necessarily returned within the same year as some return decisions are implemented in the following year. Further,

Table 7: Number of persons returned

MS	2017	2018	2019
BE	6,315	4,940	4,245
BG	1,755	710	630
DE	47,240	32,140	28,185
EL	18,765	12,490	9,700
ES	10,785	12,560	12,370
FR	15,665	17,935	17,705
IT	7,045	5,615	6,470
NL	8,390	8,980	11,185
PL	22,210	25,715	25,930
SE	9,950	10,750	9,955

Source: Eurostat

<sup>56</sup> See Section 2.1.3.

<sup>57</sup> Eurostat, Third country nationals returned following an order to leave - annual data (rounded).

<sup>58</sup> See Section 2.1.2.

<sup>59</sup> European Commission, State of the Union 2018: A stronger and more effective European return policy, 12 September 2018, [https://ec.europa.eu/commission/sites/beta-political/files/soteu2018-factsheet-returns-policy\\_en.pdf](https://ec.europa.eu/commission/sites/beta-political/files/soteu2018-factsheet-returns-policy_en.pdf); European Commission, Proposal for a Directive of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third-country nationals (recast), 12 September 2018.

some states issue more than one return decision to a person if the person was apprehended at a later stage. This practice was observed in BE and the NL, but these countries have now changed their policies to eliminate this practice. Yet, it cannot be ruled out that other states also pursue such practices. Also, several states (at least BE, DE, ES, FR, IT, NL, and SE according to the EMN report on return<sup>60</sup>) issue return decisions to people whose whereabouts are not known; so, such return decisions are rarely enforced. Finally, it appears that return decisions are rarely withdrawn when the return cannot take place. As will be discussed below, fundamental rights considerations may bar return, and the obstacles to return include inadequate cooperation of the destination countries or the person concerned. In practice, most states do not withdraw the return decision in such circumstances and non-implemented return decisions drag down the return rate.

## 2.2.1 Voluntary departure

### 2.2.1.1 Voluntary departure period

Article 3(8) of the Return Directive defines voluntary departure as compliance with the obligation to return within the time limit fixed for that purpose in the return decision. Under Article 7(1) of the Directive, a return decision should provide for an appropriate period for voluntary departure without prejudice to a few exceptions. Article 7(1) is a “shall” provision, so Member States are obliged to afford a voluntary departure period as a rule. This approach to voluntary return flows also from the preamble of the Directive. According to Recital 10, where there are no reasons to believe that this would undermine the purpose of a return procedure, voluntary return should be preferred over forced return and a period for voluntary departure should be granted.

The requirement of prioritising voluntary over forcible return is enshrined in EU law. In *Z.Zh. and I.O.*, the CJEU stressed that the principle of proportionality must be observed throughout all the stages of the return procedure established by the Directive, including the stage relating to the return decision, in the context of which a Member State decides on the grant of the period for voluntary departure. As one of the core general principles of EU law, the principle of proportionality entails that the return process should be carried out by means of the least restrictive measures possible in the individual circumstances of the case. Second, the CJEU links the voluntary form of return to the observance of fundamental rights. According to the Court, the objective of the Directive is to establish a return policy that is both effective and fully compliant with fundamental rights and dignity. The requirement of granting a period for voluntary departure aims at ensuring that the fundamental rights of non-citizens are observed during the implementation of the return decision.<sup>61</sup>

Voluntary departure is also considered advantageous by some states (BE). First of all, voluntary departure is more cost-effective than a forced return. PL reported that as of 2008, the average cost of forced return per person was approximately 1,700 EUR (950 EUR escorted removal plus 750 EUR average three-month detention) as compared to the cost of voluntary return of around 850 EUR (600 EUR transport plus 250 EUR average one-month detention). Although these figures are dated, the difference in costs between forced and voluntary return arguably still holds. In FR, in 2018, a forced return cost around 14,000 EUR, while a voluntary return cost 2,500–4,000 EUR. In line with the findings of the EPRS substitute impact assessment of the recast proposal, the average cost per

<sup>60</sup> EMN, *The effectiveness of return in EU Member States*, 2017.

<sup>61</sup> CJEU, *Z. Zh. v. Staatssecretaris Voor Veiligheid En Justitie and I. O. v. Staatssecretaris Voor Veiligheid En Justitie*, C-554/13, (June 11, 2015), para. 47-49 and 69.

forced return is 2,000 EUR, while the cost per voluntary return depends heavily on the assistance offered to the returnee and ranged from 3,200 EUR in DE, to 1,650 EUR in BE and 975 EUR in IT.<sup>62</sup>

Second, voluntary departure is relatively straightforward to implement as the person concerned is expected to cooperate and no escorts are required. Some countries of origin (such as Algeria and Iran), for instance, accept the return of their nationals only via the voluntary scheme. It also triggers fewer objections from civil society organisations. Finally, in terms of effectiveness, the voluntary return has more chance than forcible return to be sustainable, meaning that the returnee will not seek to return to the EU afterwards.

The 2014 Commission's Communication on EU Return Policy widely promoted voluntary departure. The Commission applauded that all the states had introduced a period for voluntary departure and generally accepted the primacy of the voluntary departure. The Commission, however, found that in many states, the promotion of voluntary departure could be improved. Finally, according to the Commission, further promotion of voluntary departure would continue to be one of the main policy objectives of the EU return policy.<sup>63</sup> Since then, the Commission's approach to the voluntary departure period has considerably shifted, and the 2017 Recommendation on return narrows down the scope of the application of this measure.

In light of the principle of proportionality and Article 7(1) of the Directive, voluntary departure should be prioritised. In most of the countries, including BE, BG, FR, NL, or PL, granting the period for voluntary departure is phrased in the law as a default option.

Under Article 7(1) of the Return Directive, Member States may provide in their national legislation that a period for voluntary departure should be granted only following an application by the person concerned. In such a case, Member States should inform the persons concerned of the possibility of submitting such an application. In all Member States except for IT, the voluntary departure period is granted automatically, i.e. the person does not have to apply for it.

In IT, unless the conditions for immediate transfer to the border apply, the person may ask the prefect to grant him/her a period for voluntary departure, including through AVR programs. The information about the possibility to apply for a period for voluntary departure is communicated in the form of a letter or a brochure handed over to the person concerned along with the return decision. The letter is provided in multiple languages, i.e. English, French, and Spanish, and informs about the possibility of requesting a period for voluntary departure and benefiting from AVR programmes. The application for voluntary departure does not prevent one from being forcibly removed while waiting for the prefect's reaction.

In its Recommendation on return, the European Commission stresses that states should only grant voluntary departure following a request by the person concerned (para. 17). Making the voluntary departure option conditional upon request may represent an obstacle for the person who has to apply to benefit from it. It is likewise a burden for the authorities as they would need to assess the application of the person. If the person does not fall within the scope of exceptions to granting a period of voluntary departure, it is unclear what added value this measure offers.

According to Article 7(1), the period for voluntary departure should be between 7 and 30 days. In some countries, the law provides for a period of 30 days (BE and FR) or 4 weeks (SE and NL). In PL, the period is between 15 and 30 days. Most of Member States provide for a period of 7–30 days in

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<sup>62</sup> European Parliamentary Research Service, The proposed Return Directive (recast): Substitute Impact Assessment, European Parliament, January 2019, p. 147.

<sup>63</sup> European Commission, Communication from the Commission to the Council and the European Parliament on EU Return Policy, COM(2014) 199, (March 28, 2014), p. 5, 7, 21 and 30.

their legislation (including BE (for people from countries that need a visa to stay for above three months), BG, DE, EL, ES, and IT). The decision on the actual length is taken by the authority issuing the return decision. Since the difference between a week and a month is considerable, an insight into the criteria guiding this decision would be valuable. In particular, it is important to understand whether the length of the voluntary departure period is contingent upon the personal situation of the person concerned or the reasons behind the return decision.

In DE, for instance, the duration of the voluntary departure period hinges upon procedure and grounds leading to return but a period of 30 days is a default option. This period will be shortened to seven days if the application for asylum was considered manifestly unfounded.

Depending on the circumstances of the person, even a period of 30 days may sometimes be insufficient to prepare oneself for the departure and leave in a dignified manner. Hence, it is a welcome initiative that the Return Directive foresees the extension of this period. Under Article 7(2), Member States should, where necessary, extend the period for voluntary departure by an appropriate period, taking into account the specific circumstances of the individual case, such as the length of stay, the existence of children attending school, and the existence of other family and social links.

In several countries, the period for voluntary departure can be extended in individual circumstances enumerated in Article 7(2) (including in BE, ES, FR, IT, NL, PL, and SE). In FR, this extension may be granted "exceptionally." In PL, these reasons are enumerated in a non-exhaustive manner. In BE, the individual circumstances in practice may also cover other cases, such as advanced pregnancy or health problems. In DE, if there are grounds to suspect that the person concerned is a victim of human trafficking or illegal employment, the period for voluntary departure should be at least three months as a rule.

Several countries grant an extension on reasons related to return and cooperation by the person. In IT, an extension may be granted if the person is admitted to an AVR programme. In the NL, the period can be prolonged if the person ensures that the travel documents will be available within the short term, and in BE and SE, it may be extended to enable the person to obtain the travel documents. In BE, an extension may be granted for organising a voluntary departure or a reintegration scheme in the country of origin.

In BE, the willingness to cooperate with the authorities plays a role in the decision for an extension, meaning the person needs to prove to have taken steps to organise voluntary return by, i.e. signing return form and contacting the embassy or IOM. In DE, a longer period for voluntary return is granted, if the person withdraws his/her asylum application or withdraws the appeal against a decision refusing asylum. If in these cases, the person concerned is willing to leave DE, he/she may be given up to three months to do so.

SE considered the period for a voluntary departure to be too short to give information about AVR, counsel the person, and grant the person time to organise the return. Obtaining travel documents from third countries can take some time and often results in having to extend the period for voluntary departure. Likewise, DE stressed that planning for a voluntary departure, for example, under an assistance programme, may take more than the usual 30 days.

Setting an excessively short period for voluntary departure may, thus, reduce compliance with this obligation as the time is simply insufficient to prepare and implement a voluntary departure even if the persons concerned are willing to do so. Hence, it is unclear why the European Commission currently promotes the shortest possible period for voluntary departure. In its Recommendation on return, the Commission highlights that the period should be as short as possible, and a period longer

than seven days should be granted only when the person actively cooperates with the return. In addition, it is not supported by Article 7 nor CJEU's ruling in *Zh. and O.*

Pursuant to Article 7(4) of the Return Directive, if there is a risk of absconding, if an application for a legal stay has been dismissed as manifestly unfounded or fraudulent, or if the person concerned poses a risk to public policy, public security or national security, Member States may refrain from granting a period for voluntary departure or may grant a period shorter than seven days.

In its Recommendation on return, the Commission stresses that in cases enumerated in Article 7(4) of the Directive, no period for voluntary departure should be granted (para. 21). However, Article 7(4) is a "may" provision, meaning that the states are free to decide to refuse or shorten the voluntary departure period if the enumerated circumstances are present. In line with the terms of Article 7(1) and the preamble as well as CJEU's ruling in *Zh. and O.*, voluntary departure of 7–30 days is a rule while shortening or refusing it is an exception.<sup>64</sup> As such, Article 7(4) should be interpreted and used in a restrictive manner. Further, if the enumerated circumstances apply to a given case, the states should take a less restrictive measure, which is shortening rather than refusing it altogether. Hence, it is a welcome option that the legislation of some states, such as BE or EL, provide for both options.

As regards the circumstances justifying the refusal or shortening of the voluntary departure period under Article 7(4), some Member States transposed all three of them into their legislation (BE, EL, FR, IT, and NL). In BE, the grounds relating to fraudulent or manifestly unfounded applications are described in detail, which reduces the scope of its unduly wide application. Accordingly, this applies when the regular stay has been withdrawn due to a fake marriage, false or misleading information, falsified documents, fraud, or if the asylum request was declared inadmissible because it was a subsequent application without new elements or was manifestly unfounded. Some states did not transpose all three grounds for refusing or shortening of the voluntary departure period. ES and PL rely on the risk of absconding and threat to national security, while BG uses only the threat to national security.

During the period of voluntary departure, under Article 7(3), Member States may impose measures aimed at avoiding the risk of absconding, such as regular reporting to the authorities, depositing of financial guarantee, submission of documents, or obligation to stay at a certain place. Some states, such as BE, explicitly list non-compliance with these measures as a ground for refusing or shortening the period for departure.<sup>65</sup> IT lists non-compliance with the obligation to leave the country, and PL lists a situation where the person tries to unlawfully cross the border during the period for voluntary departure.

Article 7(4) enumerates the three circumstances in an exhaustive manner, which means that no further reasons should be relied on. Yet, some states have other grounds, such as hindering removal (ES) or expulsion following a crime (SE). In DE, no period for voluntary departure is granted if the person is in detention, and in the NL, this holds if the person's asylum application was refused on account of, for example, a safe country of origin. According to the NL, a so-called 0-day period for voluntary departure for asylum seekers from safe countries of origin enables the authorities to immediately place persons in detention and conveys a deterrent message of what the consequences are (particularly imposition of entry ban).

In line with Article 7(1) and the principle of proportionality highlighted in the *Zh. and O.* ruling, voluntary departure should be prioritised. Yet, the Eurostat statistics do not reflect it. Table 8 compiles data on voluntary departure collected by Eurostat and the percentage of voluntary

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<sup>64</sup> CJEU, *Z. Zh. and I. O.*

<sup>65</sup> Although provided in law, the preventive measures have not yet been applied in practice.

departure in the total number of persons who left the state's territory. This data is not available for DE and the NL. These Member States noted not being able to collect the data of non-assisted voluntary returns. Since all the other countries do collect these data, an exchange of information and practices on this matter would be helpful.

Table 8: Number and percentage of voluntary departures

MS	2015		2016		2017		2018		2019	
<b>BE</b>	3,310	57%	4,725	66%	3,700	59%	:		2,045	48%
<b>BG</b>	180	24%	870	72%	1,270	72%	380	54%	180	29%
<b>EL</b>	:		:		:		4,730	38%	:	
<b>ES</b>	2,355	18%	905	9%	1,310	12%	830	7%	885	7%
<b>FR</b>	5,920	32%	4,845	34%	5,935	38%	7,115	40%	4,720	27%
<b>IT</b>	1,015	22%	1,015	18%	1,805	26%	435	8%	435	7%
<b>PL</b>	12,080	93%	17,785	96%	21,305	96%	24,575	96%	24,910	96%
<b>SE</b>	7,285	74%	9,375	79%	7,005	70%	5,965	87%	:	

Source: Eurostat and percentage calculated by the author

As Table 8 exemplifies, in 2019, 96% of returnees from PL left the country via a voluntary return option; from BE, around half; from BG and FR, just below 30%; and from ES and IT, merely a small percent.<sup>66</sup> It is striking that three times more people left PL via a voluntary return than they did from BG, while both countries are, in general, transit countries; which often raises an assumption of a risk of absconding. Reportedly, people subject to return in PL are generally willing to depart. Besides the choice of the returnees, the official policy plays a role. Voluntary return is prioritised in SE while it is not in IT, for instance. In order to be granted a voluntary departure period in IT, the person should provide proof of having accommodation and enough resources resulting from legal sources proportionate to the term granted. A minority of the people subject to return can fulfil these criteria.

### 2.2.1.2 AVR programmes

Pursuant to the preamble (§10) of the Directive, in order to promote voluntary departure, the states should provide enhanced return assistance and counselling and make the best use of the relevant funding possibilities offered under the European Return Fund (ERF).

When return assistance and counselling are provided to the returnee, the return is called "assisted voluntary return" and is generally defined as voluntary departure supported by logistical, financial, or other material assistance.<sup>67</sup> Operational programmes that provide return assistance and counselling are referred to as "Assisted Voluntary Return" (AVR) programmes. The programmes which also include the reintegration component are referred to as AVR(R).

AVR schemes usually include financial and in-kind assistance and can be broken down into three phases, notably, the pre-return, return, and post-return phase. In the pre-return phase, the relevant measures consist of return counselling, administrative assistance (such as the acquisition of travel documents), and logistical assistance (such as the purchase of a flight ticket). In the transportation phase, the returnees may receive transit assistance and help with formalities. Finally, the measures

<sup>66</sup> Eurostat, Third-country nationals who have left the territory by type of return and citizenship (migr\_eirt\_vol).

<sup>67</sup> EMN glossary, [https://ec.europa.eu/home-affairs/what-we-do/networks/european\\_migration\\_network/glossary\\_en](https://ec.europa.eu/home-affairs/what-we-do/networks/european_migration_network/glossary_en)

implemented in the post-return stage focus on reception and inland transportation. Reintegration support may include financial aid, medical assistance, education, vocational training, and business set-up support.<sup>68</sup>

All the examined Member States have AVR programmes in place. Some are extensive and long-standing, including the REAN programme in the NL (Return and Emigration of Aliens from the Netherlands) or REAG/GARP programme in DE (Reintegration and Emigration Programme for Asylum-Seekers in Germany/Government Assisted Repatriation Programme). The programmes vary in length (some projects were set up for a limited period only), the scope of assistance granted, geographical focus (some countries target the nationals of particular countries), and population in focus.

AVR programmes are typically co-funded through the Asylum, Migration and Integration Fund (AMIF), and government funding. They are implemented by IOM and, in some countries, also by civil society organisations, such as Caritas (BE) or the Italian Refugee Council. IOM is the main implementation partner of the AVR projects. IOM is an inter-governmental organisation that is acting on behalf of its members. In 2016, IOM became a related organisation within the UN system. It is, however, not directly a part of the UN and, hence, is not formally required to uphold the UN Charter.<sup>69</sup> IOM has a long-standing experience with AVR programmes, and currently, these programmes carried out for the EU Member States are a considerable source of funding for the organisation.<sup>70</sup>

Various bodies are involved in the management of voluntary return programmes, including migration agencies (SE: Migration Agency; DE: Federal Office for Migration and Refugees), bodies in charge of return policy and implementation (EL: Police; NL: Repatriation and Departure Service), or specialised bodies (BE: Federal Agency for the Reception of Asylum Seekers (Fedasil); FR: French Office for Immigration and Integration (OFII)). The OFII is a public administrative body specialised in return and reintegration and operates under the Ministry of the Interior in FR. In contrast, Fedasil falls under the responsibility of the Ministry for Social Integration in BE to keep it independent from the Ministry for Asylum and Migration, which is in charge of removal policy (forced return and detention). This is a good practice, which is not seen in the other Member States, as voluntary and forced return commonly fall under the same authority.

Since 2012, Fedasil has implemented a so-called 'return path.' This concept refers to an individual (personalised) counselling path proposed to people placed in the reception facilities of the reception network of Fedasil in view of their return. It has two phases, namely during asylum procedure and after the rejection of the asylum application. The second phase should start at the latest five days after the refusal of international protection. The return path, including timing for the return, is detailed in a document, which the person has to sign.

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<sup>68</sup> EMN, Programmes and Strategies in the EU Member States fostering Assisted Return to and Reintegration in Third Countries, p. 8; IOM, Assisted Voluntary Return and Reintegration (AVRR) in the EU, 2010, p. 1–2; see also Matrix Insight, International Centre for Migration Policy Development, and European: Council on Refugees and Exiles, Comparative Study on Best Practices to Interlink Pre-Departure Reintegration Measures Carried out in Member States with Short – and Long- Term Reintegration Measures in the Countries of Return, Commissioned by European Commission DG Home Affairs, (January 2012).

<sup>69</sup> Antoine Pécoud, Mariette Grange, "Les dilemmes de l'Organisation internationale pour les migrations," The Conversation, 3 July 2018, <http://theconversation.com/les-dilemmes-de-lorganisation-internationale-pour-les-migrations-99170>.

<sup>70</sup> IOM, Assisted Voluntary Return and Reintegration: 2017 Key Highlights, p. 9; IOM, Assisted Voluntary Return and Reintegration: 2015 Key Highlights, p. 13.

Table 9 shows the number of people who departed in the framework of AVR programmes.<sup>71</sup> Compared to the total number of people who left the host Member States, the proportion of returnees who benefited from the assisted return is generally low and fluctuates considerably across the years. Compared to the number of people departing via voluntary departure displayed in Table 8 above, in FR in 2019 and BG in 2018, the number of assisted voluntary returns was higher, which might suggest that assistance is offered to forced returnees. Indeed, since 2018, in FR, it is possible for a person placed in pre-removal detention to apply for return assistance. The successful applicants are thus able to benefit from the OFII allowance which will be paid upon their return.

Table 9: Number and percentage of assisted voluntary returns

MS	2015		2016		2017		2018		2019	
BE	3,355	57%	3,590	49%	3,105	49%				
BG	90	12%	700	58%	855	49%	630	89%	85	13%
EL	:						4,730	38%		
FR	4,030	22%	3,315	24%	4,800	31%	6,825	38%	5,265	30%
IT	0	0	75	13%	465	7%			185	3%
PL	:				505	2%	450	2%	380	1%

Source: Eurostat and percentage calculated by the author

## 2.2.2 Removal

Removal is defined in Article 3(5) of the Return Directive as the enforcement of the obligation to return, namely, physical transportation out of the Member State. Removal is regulated under Article 8 of the Directive. Pursuant to Article 8(1) of the Directive, states should take all necessary measures to enforce the return decision if no period for voluntary departure has been granted or if the obligation to return has not been complied with within the period for voluntary departure granted. As Table 8 above demonstrates, voluntary departures for many countries constitute a minority of returns; therefore, most of the people are removed.

Removals vary in terms of the degree of force, form of escorts used, and scope of escorting. For instance, in BE, depending on the attitude of the returnee, removal will be organised “without escort”, indicating the person will be escorted until the boarding, or “with escort”, where they will be escorted by two policemen during the flight. A similar procedure is in place in DE. Either way, removal involves some form of coercion or force; therefore, there are obvious risks to the personal integrity and safety of the returnee. Organising escorted return is expensive for the host state;<sup>72</sup> hence, as stressed earlier, voluntary return is also beneficial for the Member States.

According to Article 8(4) of the Directive, when Member States use — as a last resort — coercive measures to carry out the removal of a person who resists removal, such measures should be proportionate and should not exceed reasonable force. They should be implemented as provided for in the national legislation in accordance with fundamental rights and with due respect for the dignity and physical integrity of the person concerned. Under the preamble (§13), the use of

<sup>71</sup> Eurostat, Third-country nationals who have left the territory by type of assistance received and citizenship (migr\_eirt\_ass)

<sup>72</sup> European Parliamentary Research Service, The proposed Return Directive (recast): Substitute Impact Assessment, European Parliament, January 2019, p. 146-147.

coercive measures should be expressly subject to the principles of proportionality and effectiveness with regard to the means used and objectives pursued.

Article 8(4) focuses on the principle of proportionality, which reflects the ECtHR’s jurisprudence on the permissible use of force in the context of law enforcement activities. Under Article 3 of the ECHR, which prohibits ill-treatment, the use of force during police operations is subject to the principles of strict necessity and proportionality. Even if the application of physical force was strictly necessary, Article 3 of the ECHR will be violated if the degree of force is found to be excessive.<sup>73</sup>

Under Article 8(5) of the Directive, in carrying out removals by air, Member States should consider the Common Guidelines on security provisions for joint removals by air.<sup>74</sup> These guidelines address the medical condition of the returnee, requirements upon escorts, including training, and limitation on the use of coercive measures.

Table 10 maps out bodies that are involved in the organisation of removals. In all the examined countries, removal is a duty of law enforcement staff. In most of the countries, escorts are police (BE, DE, EL, ES, IT, SE) but, in the NL, it is military police and in PL border guards, which is charged with removals.

As such, law enforcement officers are subject to the applicable regulations. However, due to the particular context of removal, it would be beneficial if specific rules are also laid down in migration legislation. Dutch legislation provides for good practices in this regard.

Indeed, in the NL, the Aliens Circular requires that when coercive measures are used to implement removal, the authorities should examine whether these measures are suitable and necessary. If coercive measures are used to make a person board a plane, the captain needs to be informed. After the doors of the plane are shut, coercive measures may only be used if the captain gives their consent to such use. These requirements detail the rules laid down in the general law regulating activities of police and military police. They provide that coercive measures in the context of removal may only be applied if the circumstances reasonably require so. This may be the case when there is a risk of absconding, a danger for the safety or the life of the person concerned, the persons carrying out the removal, or a third party, or a danger of a grave disturbance of public order. The coercive measure may only be used if it does not harm the health of the returnee.

Table 10: Authorities in charge of forced return

MS	Authorities
BE	Immigration Office (escort by police)
BG	Migration Directorate
DE	Federal States and Federal Police
EL	Repatriation Department of Aliens Directorate of Attica, The passport control agencies (escort by Hellenic Police)
ES	National Police
FR	Ministry of interior/ border police
IT	Police headquarters
NL	Repatriation and Departure Service (escort by Marechaussee: military police)
PL	Border Guard
SE	National Police

Source: Compilation of author

<sup>73</sup> ECtHR, *Shamayev and Others v. Georgia and Russia*, 36378/02, (April 12, 2005), para. 375–386.

<sup>74</sup> The Common Guidelines are annexed to Council Decision 2004/573/EC of 29 April 2004 on the organisation of joint flights for removals from the territory of two or more Member States, of third-country nationals who are subjects of individual removal orders OJ 2004 L 261/28, 29 April 2004.

Given the inherently coercive nature of removal and the opacity of removal operations, independent monitoring constitutes a key safeguard. According to Article 8(6) of the Return Directive, Member States should provide for an effective forced-return monitoring system. Under the preamble, states should be able to rely on various possibilities to monitor forced return (§13).

According to the FRA, a monitoring system can be qualified as effective if it is carried out on an on-going basis by an organisation, which is independent of the authorities enforcing return and covers all activities undertaken in respect of removal, from pre-departure to arrival and reception in the destination country.<sup>75</sup> So, three elements should characterise a monitoring arrangement so that it can be considered effective, namely the body in charge, frequency of inspections, and scope of monitoring.

In terms of the body in charge of monitoring, as shown in Table 11, three main categories can be identified: ombudsman institutions (including National Preventive Mechanisms (NPM)), civil society organisations, and bodies affiliated to enforcing personnel.

The involvement of ombudsman institutions and NPMs is a good practice, provided that adequate funds are ensured for these operations and that the personnel is trained. An advantage of involvement of the NPM is that they enjoy wide discretion regarding timing and organisation of their visits, and authorities typically cannot refuse a visit (like it is in FR). On the other hand, the overall independence of and lack of the use of human rights standards by the Dutch NPM (Inspectorate of Justice and Security) was criticised.

Civil society organisations may often not have sufficient funds to carry out monitoring, especially during the actual flight. In PL, for instance, the involvement of civil society organisations should be funded if removal takes place via a charter flight or if there are more than five deportees. In practice, this happens in a few cases as people are frequently removed through a land border. In DE, there are NGOs present at various airports (Berlin, Düsseldorf, Hamburg, and Frankfurt); however, in general, they do not accompany the actual flight.

The institutional independence of the police inspectorate (AIG) involved in monitoring in BE and the Migration Agency in SE may be questioned. However, in SE, the roles of the actors involved are different as the Migration Agency monitors removal carried out by police.

The frequency of inspections and the scope of monitoring may also depend considerably on the available funding. However, to be effective, the scope of monitoring should extend to three phases,

Table 11: Forced return monitoring

Form of monitoring body	Member States
Ombudsman or NPM	Ombudsman (BG, EL, ES) NPM (FR, IT, NL)
Civil society organisations	BG (Centre for Study of Democracy), DE (various NGOs at various airports), PL (various NGOs)
Bodies affiliated to enforcement staff	BE (General Inspectorate of the General Federal Police and the Local Police), SE (Migration Agency)

Source: FRA, Forced return monitoring systems - 2019 update, <https://fra.europa.eu/en/publication/2019/forced-return-monitoring-systems-2019-update>, verified by the author.

<sup>75</sup> FRA, Fundamental rights: challenges and achievements in 2012, p. 55

namely pre- departure, in- flight, and arrival phase.<sup>76</sup> It appears that in- flight monitoring is not systematic. The FRA's data for 2018 show wide discrepancies among the Member States, ranging from 87 operations (including 9 with a monitor present on board of the flight) in BE to 41 operations (including 17 with a monitor present on board of the flight) in EL, 16 operations covering all three phases in ES, to 3 operations (including 2 with a monitor present on board of the flight) in FR.<sup>77</sup> For instance, AIG in BE decides based on a risk analysis of a planned removal whether it will monitor the operation and, if so, whether partially (until the boarding) or entirely (during the flight).

## 2.2.3 Postponement of return

### 2.2.3.1 The principle of *non-refoulement*

As discussed earlier, the Return Directive does not contain an obligatory *non-refoulement*-based exception to the obligation of Member States in Article 6(1) to issue a return decision to any person in an irregular situation.<sup>78</sup> Such protection can nevertheless be inferred from a joint reading of Articles 5 and 6(4) of the Directive. Under Article 5 of the Directive, when implementing the Directive, states should respect the principle of *non-refoulement*. According to Article 6(4) of the Directive, Member States may at any moment decide to grant an autonomous residence permit or other authorisation offering the right to stay for compassionate, humanitarian or other reasons to a person residing irregularly on their territory.

To properly implement the prohibition of *refoulement*, there should be a standard *ex officio* assessment of the risk of *refoulement* before the return decision is issued. This will prevent issuing a return decision to people whose return is barred under the principle of *non-refoulement*. However, since it is unclear whether states systematically assess the risk of *refoulement ex officio* before starting the return procedure, it cannot be excluded that some people subject to the return procedures have *non-refoulement* protection needs.

Hence, it is crucial to carry out the *ex officio* risk assessment during the return procedure. Otherwise, the person would need to apply to have his/her *non-refoulement* concerns respected. In SE, before the removal, the Migration Agency should verify *ex officio* whether the circumstances have changed since the decision was issued. The person concerned may also apply and invoke new circumstances, which constitute impediments to removal.

Article 9(1) of the Directive addresses the situation when it is determined that a person cannot be removed because of the risk of *refoulement* and provides that states should postpone removal in such circumstances. Under the original version of the Directive proposed by the European Commission, states should withdraw their return decision if the return is precluded by the principle of *non-refoulement*.<sup>79</sup> The Directive stops short of requiring it explicitly. If removal is postponed on the account of the principle of *non-refoulement* and yet, the return decision is not withdrawn, the person remains in an irregular situation. Such irregular status, which is known to the authorities (as they postponed removal), conflicts with the protection of fundamental rights of the person

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<sup>76</sup> FRA, Fundamental rights: challenges and achievements in 2012, p.55; Commission Recommendation (EU) 2017/2338 of 16 November 2017 establishing a common "Return Handbook" to be used by Member States' competent authorities when carrying out return-related tasks, OJ 2017 L 339/83, 19 December 2017, p. 119.

<sup>77</sup> FRA, Forced return monitoring systems - 2019 update, <https://fra.europa.eu/en/publication/2019/forced-return-monitoring-systems-2019-updat>.

<sup>78</sup> See Section 2.1.3.1.

<sup>79</sup> European Commission, Proposal for a Directive of the European Parliament and of the Council on Common Standards and Procedures in Member States for Returning Illegally Staying Third-Country Nationals, COM(2005)391, (September 1, 2005), article 6(4).

concerned. Often non-returnable people face impediments to accessing basic socio-economic entitlements. Also, this creates confusion and a lack of foreseeability regarding the procedure, hence defeating the objective to have effective return policies.

Arguably, in line with the principle of *non-refoulement* and the objective of effectiveness, when removal is barred by the principle of *non-refoulement*, Article 6(4) should be interpreted as implying withdrawal of the return decision and issuance of a residence permit based on that. In its 2014 Communication on the Return Policy, the European Commission recognised, that “protracted situations” should be avoided and non-deportable people should not be left indefinitely without basic rights and should not risk being unlawfully re-detained.<sup>80</sup> The FRA recommended that Member States develop procedures to avoid circumstances where people who are not removed remain in legal limbo for prolonged periods.<sup>81</sup>

Measures in place in some states provide for a few good practices. In DE and PL, if removal is postponed, a permit providing for tolerated status may be issued. In PL, “tolerated status” is a legal status that can be granted if removal is impossible for reasons independent of enforcing authorities and the person concerned. In DE, a tolerated status (*Duldung*) is typically granted to all those whose removal is suspended. It is not an equivalent to a residence title but only confirms that removal is temporarily suspended. After 18 months, under tolerated status, if the person cooperates with return, he/she may be granted a temporary residence permit.

On the other hand, in several Member States, no status is granted *ex officio* to people whose return would amount to *refoulement*. As discussed earlier, the domestic legislation generally provides for humanitarian permits, but the people concerned typically have to apply for it, and the conditions are sometimes stringent in practice.<sup>82</sup>

Also, it appears that in practice, in several states, no official acknowledgement that the person cannot be returned is made (BE, BG, ES, FR, IT, NL). Yet, the preamble of the Directive (§12) provides that the people concerned should receive a written confirmation of their situation to be able to demonstrate their specific situation in the event of administrative control.

### 2.2.3.2 Other considerations

Besides the obligatory postponement of removal on the account of the principle of *non-refoulement*, the Return Directive provides also for optional postponement. Pursuant to Article 9(2) of the Directive, Member States may postpone removal for an appropriate period considering the specific circumstances of the individual case.

Under Article 9(2)(a) of the Directive, the specific circumstances of the individual case calling for the postponement of removal include the person’s physical state or mental capacity. In several states, removal may be postponed due to health reasons (including BE, DE, ES, FR, IT, NL, SE) or advanced pregnancy (including BE, DE, DE, EL, ES, FR, IT, NL, SE).

Further, according to Article 9(2)(b), removal may also be postponed for technical reasons such as lack of transport capacity or failure of removal due to lack of identification. All examined Member States face challenges with establishing the identity of the person concerned. Several countries (including BE, BG, DE, EL, ES, IT, PL, NL, SE) noted that the cooperation of countries of origin is either lacking or insufficient. Some countries (BE, BG, EL, NL) also found some countries of origin such as

<sup>80</sup> European Commission, Communication from the Commission to the Council and the European Parliament on EU Return Policy, COM(2014) 199, (March 28, 2014), p. 8.

<sup>81</sup> FRA, Fundamental Rights of Migrants in an Irregular Situation in the European Union, 2011, p. 38.

<sup>82</sup> See Section 2.1.3.

Algeria, Iraq, Iran, and Lebanon accept only voluntary return. With regard to the non-cooperation of the person concerned, the most common actions include concealing one's identity (BE, EL, NL, SE), physical resistance (FR, NL), or absconding (DE, NL).

Like in relation to the postponement of removal on account of the principle of *non-refoulement*, postponement for the reasons discussed in this section should be merely seen as a temporary solution. Postponing the return procedure for a prolonged period when removal is not possible conflicts with the objective of effectiveness and fundamental rights. Hence, Article 6(4) should be relied on. In DE, suspension of removal refers to *Duldung*, which is not a residence title. A person liable to return may receive a temporary residence permit if their departure is impossible through no fault of the person concerned, and the obstacle to removal is not likely to drop in the foreseeable future. After 18 months, the person may be granted a residence permit. In the NL, people who cannot leave but show a willingness to depart and cooperate with the authorities may receive, under strict conditions, a temporary permit based on the "no-fault" policy. This permit is rarely granted.

## 2.3 Entry bans

### Key findings

- Member States tend to implement Article 11(1) of the Directive by automatically imposing entry bans if the voluntary departure is not granted or if the return obligation is not complied with during the period for voluntary departure.
- In some Member States, entry bans are imposed alongside voluntary departure, which can reduce the incentive to comply with the return decision.
- The length of entry bans is frequently decided based on individual circumstances, as the length often relates to the reason for issuing the return decision.
- The threat of receiving an entry ban may be effective as an incentive to comply with the return decision during the period for voluntary departure. Once imposed, the entry ban may discourage people from leaving.
- In line with the principle of proportionality, the possibility not to issue an entry ban under Article 11(4) should be considered a rule, and the decision to impose it should be based on an individual assessment of the circumstances of the case.
- An entry ban involves costs; hence, its efficiency should be considered.
- There is currently no comparable and disaggregated data on the use of entry bans.

Under the scheme of the return laid down in the Return Directive, the return decision may be accompanied by an entry ban decision. As defined in Article 3(6) of the Return Directive, entry ban refers to an administrative or judicial decision or act accompanying a return decision, which prohibits the entry and stay on the territory of the Member States for a specified period.

Therefore, this measure links the return policy with the border management policy, as it renders the returnee ineligible for future legal entry to the Schengen area during a certain period of time. This is achieved by entering an alert in the Schengen Information System (SIS). Via an SIS alert, an entry ban imposed by a Member State may be enforced by all other states. According to the European Commission, an entry ban sends a "clear message that those who disregard migration rules in the EU Member States will not be allowed to re-enter any EU Member State for a specified period of

time.”<sup>83</sup> Entry bans have thus an explicit deterrent function that begs the question of whether this measure is fit for the return framework, which is formally administrative and non-punitive.

Given the deterrent function of an entry ban, a consideration underlying discussion in this section is whether an entry ban is compatible with the principle of proportionality and individual assessment. This section addresses research questions 7 and 8 and explores the key features of an entry ban, notably reasons for imposing it (2.3.1), its length (2.3.2), and conditions for revocation or suspension (2.3.3). The section ends by delving into the role of entry bans from the perspective of effectiveness and fundamental rights (2.3.4).

### 2.3.1 Imposition of entry ban

According to Article 11(1) of the Return Directive, return decisions should be accompanied by an entry ban if no period for voluntary departure has been granted or if the obligation to return has not been complied with. In other cases, return decisions may be accompanied by an entry ban. Both the obligatory and optional entry bans under Article 11(1) raise questions regarding the proportionality and effectiveness.

Given the deterrent function of an entry ban, the “shall” provisions of Article 11(1) are difficult to reconcile with the principle of proportionality and the individual assessment. Under the Preamble of the Directive (§6), according to the general principles of EU law, the decisions made under the Directive should be adopted on a case-by-case basis. In *Zh. and O.*, the CJEU referred to that recital and stressed that the principle of proportionality should be observed throughout all the stages of the return procedure established by the Directive.<sup>84</sup>

In addition, the circumstances where obligatory entry bans are applicable are broad. As discussed earlier, the risk of absconding, manifestly unfounded, or fraudulent application of a legal stay or threat to public order may lead to the refusal to grant a person a period for voluntary departure. In addition, the length of this period may frequently be insufficient for the person to comply with the return decision.<sup>85</sup> Hence, a considerable proportion of people in the return procedure may fall within the grounds for the automatic imposition of an entry ban. Further, as Member States have different grounds for refusing voluntary departure (not least because the understanding of the risk of absconding varies across the countries<sup>86</sup>), the scope for the obligatory issuance of an entry ban may vary considerably between countries.

The legislation or practice of several Member States (BE, BG,<sup>87</sup> FR,<sup>88</sup> NL, SE) follow the provisions of Article 11(1) of the Return Directive and provide for an automatic entry ban if the period for voluntary departure has not been granted or complied with and optional entry bans in other cases. In practice, in BE and FR, entry bans are automatically imposed when no voluntary return is granted, and the bans are generally not issued when the person leaves the territory during the voluntary

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<sup>83</sup> European Commission, Return Handbook, p. 124.

<sup>84</sup> CJEU, *Zh. and O.*, para. 49.

<sup>85</sup> See Section 2.2.1.

<sup>86</sup> See Section 2.4.1.

<sup>87</sup> In BG, the legislation provides also for mandatory entry ban based on 24 grounds for refusal of entry or visa, which broadly include reasons related to state security, public order, public health, the use of forged documents, criminality, attempt to stay in breach of immigration rules or use BG to as a transit, yet reportedly these grounds are understood as discretionary.

<sup>88</sup> In FR, obligatory entry ban is also imposed if the person received return decision in prison.

departure period. Since voluntary departure is rarely offered in practice in BG and ES, entry bans are systematically imposed.

In other countries such as DE, IT and PL, the legislation provides for an automatic imposition of entry bans in all cases. This means that even the people who have received a period for voluntary departure and left the host state during that time-limit will be issued an entry ban.

With regard to the optional entry ban under Article 11(1) of the Directive, the risk is that it will be imposed also when the person is complying with the voluntary departure option. In such cases, entry ban will lose the incentive it represents for returnees to comply with the return decision within the prescribed length of time. Indeed, legislation in the NL explicitly states that an entry ban may be issued to a person who benefits from a voluntary departure period. In 2014, the Dutch Council of State ruled that there is no legal provision that precludes administrative authorities from using their discretion to issue entry bans in cases in which a period for voluntary departure has been granted.

In FR, entry ban is optional (on a case-by-case basis) for all return decisions that do not fall under the scope of the mandatory entry ban. The administrative authority takes into account the time for which the person has been present on the French territory, the nature and length of the person's ties with FR, and whether they have already been the subject of an expulsion measure and pose a threat to public order.

It is a good practice to clarify which cases may lead to an entry ban to prevent an unduly wide scope of these cases. BE and EL enumerate circumstances that may entail an optional entry ban; however, some of these grounds are wide. They include working without a work permit or public order offense, where the person has not been condemned (BE), and a threat to public order, national security or public health (EL).

The scope of the imposition of entry bans is difficult to assess since the Eurostat does not collect these statistics. Unlike the number of return decisions and the number of people who effectively left the host state, displayed in the previous sections, the number of persons served entry bans is not included in the Regulation No 862/2007 of the European Parliament and of the Council on Community statistics on migration and international protection and repealing Council Regulation No 311/76 on the compilation of statistics on foreign workers (Migration Statistics Regulation).<sup>89</sup> Following the ongoing process of amendment, the Regulation will provide for collection of entry ban statistics, yet on a non-obligatory basis. The entry ban statistics are included in so-called pilot studies, which will be carried out on a voluntary basis, to test the feasibility of new data collections within the scope of the Regulation.<sup>90</sup>

Table 12: Number of entry bans

MS	2016	2017	2018	2019
BE			1,868	1,724
FR			35,000	46,000
SE		10,055	12,530	

Source: Compilation by the author

<sup>89</sup> Regulation (EC) No 862/2007 of the European Parliament and of the Council of 11 July 2007 on Community statistics on migration and international protection and repealing Council Regulation (EEC) No 311/76 on the compilation of statistics on foreign workers (Migration Statistics Regulation), L 199/23, 31.7.2007

<sup>90</sup> Since 2018, the Migration Statistics Regulation is in the process of amendment. In November 2019, the Council and European Parliament reached a political agreement on a Regulation amending the existing Statistics Regulation. In June 2020 the Parliament voted in favour of the Council's position adopted in March 2020.

In order to draw conclusions about states' practice in the area of entry ban, comparable statistics should be available. The author received entry ban statistics from a mere three countries, notably BE, FR, and SE. These are presented in Table 12. Table 13 reproduces less recent statistics provided in the 2014 EMN study on entry bans.<sup>91</sup> Wide discrepancies are easily discernible. As regards the three countries for which recent data was made available for this study, the proportion of the entry ban decision in relation to the number of return decisions was 56 percent for SE (2018), 37 percent for FR (2019), and 8 percent for BE (2019). These discrepancies show various approaches to the issuance of entry bans across the countries.

In the Recommendation on return, the European Commission stresses that Member States should systematically enter an alert on entry ban in the SIS (para. 24(c)). Most states, including BG, EL, FR, IT, PL, NL, and SE, register entry bans in the SIS as a standard practice. Systematic registration of entry bans in the SIS raises questions not only regarding proportionality but also cost-effectiveness. BE, for instance, noted that systematic registration of entry bans in the SIS would not be possible due to administrative burden (including trained personnel) that this measure would entail, also considering the increasing number of entry bans. Therefore, entry bans are registered as a regular practice (rather than a systematic one) by priority considering, in particular, the risks to public order and national security and the length of the validity of entry ban. According to BE, this approach reflects the principle of proportionality.

### 2.3.2 Length of entry bans

According to Article 11(2) of the Return Directive, the length of an entry ban should be determined with regard to all the relevant circumstances of the individual case and should not in principle exceed five years. Such entry bans are referred to as "regular" entry bans. Article 11(2) further provides that the length may nevertheless exceed five years if the person represents a serious threat to public policy, public security, or national security. Hence, in contrast to the imposition of an entry ban, its length is subject to individual assessment. This is reflected at the domestic level.

In DE, for instance, the decision on the length of the entry ban is taken on a case-by-case basis. The nature of the offence and the reason for return are weighted against the length of legal stay and family and social ties developed in DE (through schooling or vocational training). If there are particular protection needs, the length of the entry ban may be reduced. This can be the case if the entry ban entails a disproportionate hardship, e.g. when the family members of the person concerned reside in DE, the person has the right of custody for a child residing in DE or in the case of UAM or elderly people.

Often, there is a relation between the length of an entry ban and the ground on which the ban was imposed. In SE, the maximum duration of a regular entry ban is five years. In practice, there is a link between the ground for an entry ban and its length. In cases where no period of voluntary departure

Table 13: Number of entry bans in 2013

MS	2013
BG	849
EL	52,619
NL	3,945
PL	7,334

Source: EMN, Good practices in the return and reintegration of irregular migrants, 2014

<sup>91</sup> EMN, Good practices in the return and reintegration of irregular migrants, 2014.

is granted, the time limit of an entry ban is two years, but if the obligation of return has not been complied with within the period of voluntary departure, the validity of the entry ban is a year.

In FR, the duration of the entry ban is two years if voluntary departure has been granted but not fulfilled and three years if no voluntary departure has been granted. In DE, while the maximum limit of regular entry bans is five years, it is usually imposed for a year in the case of refused asylum seekers and for three years if the asylum application is a subsequent one. In BE, the regular length is three years. It can be ordered for a maximum of five years if fraud or unlawful means have been used to obtain legal stay or over five years in the case of a serious threat to public order or national security.

The NL and PL provide for various durations of an entry ban in their legislation. The NL distinguishes between a “light” entry ban that is valid most often for two years and a “heavy” entry ban that is typically valid for ten years. Within the scope of a light entry ban, the Dutch legislation enumerates circumstances when it can be imposed for a year (if the person exceeded the period for residence by less than 90 days) and, on the other hand, when it can be issued for longer than two years (three- and five-year thresholds). Heavy entry ban concerns cases where the person poses a threat to public order or security and can be imposed for 20 years if the threat is serious.

In PL, four time-periods relate to the basis on which the return decision was issued: between six months and three years, between one year and three years, between three and five years, and five years.

While some countries do not clarify the length of an entry ban related to public order (BG), others do (EL) and have sometimes various thresholds (DE<sup>92</sup> and IT).

Finally, in practice, the most common length of an entry ban is one year in SE, three years in ES, and five years in BG.

### 2.3.3 Non-imposition and revocation of entry bans

The possibility to refrain from imposing an entry ban or revoke it allows the mandatory character of entry bans pursuant to Article 11(1) of the Return Directive to reconcile with the principle of proportionality and individual assessment. Article 11(3) of the Directive provides that the Member States may refrain from issuing, withdrawing, or suspending an entry ban in individual cases for humanitarian reasons. The states may also withdraw or suspend an entry ban in individual cases or certain categories of cases for other reasons. When compared to the terms used in Article 11(1), Article 11(3) reads like an exception. Yet, arguably, the principle of proportionality demands a reverse order. Given the coercive character of an entry ban, the non-imposition of an entry ban under Article 11(3) should be a default option while the issuance of a ban under Article 11(1) should be an exceptional measure based on individual assessment.

Article 11(3) also addresses optional entry bans, i.e. those not issued on one of the two explicit grounds enumerated in Article 11(1). Article 11(3) provides that states should consider withdrawing or suspending such an entry ban where a person can demonstrate they have left the territory of a Member State in full compliance with a return decision. This scenario concerns cases where a person who has left the territory of a Member States during the period for voluntary departure nevertheless receives an entry ban. To give a full effect to this provision, revocation procedures should be accessible and be made effective in practice.

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<sup>92</sup> DE enumerates however cases where a permanent entry ban will be issued.

BE, FR and SE provide for exceptions to the mandatory entry ban for humanitarian reasons in their legislation. In practice, in SE, reasons related to family life, such as the presence of children or other relatives in SE or the Schengen area, may call against the imposition of entry ban. In BE, the reasons include family life and health reasons (such as if the person would need to return to BE for medical or psychological reasons). Also, in BG and the NL, in practice, an entry ban may not be issued on the account of humanitarian reasons, family life, and health reasons.

In some countries, particular categories of people may be exempted from the entry ban, such as children in BE or victims of human trafficking or smuggling in EL.

In BG, when considering to revoke or suspend the implementation of an entry ban, the competent official should consider the duration of the person's stay in BG, the categories of vulnerable persons, presence of asylum or residence proceedings, family links and the availability of family, cultural and social relations with the country of origin of the person. The revocation is at the discretion of authorities that issue the original entry ban, which may reconsider their decision in the event of new facts and circumstances.

Revocation is particularly relevant in countries that impose the entry ban in all cases of return (including ES and IT). In ES, when the return obligation has been complied with, the entry ban can be revoked. With this aim, returnees have to report at the border or to Spanish consulates to have their entry ban revoked. This allows authorities to verify whether the period of voluntary departure has been complied with. Yet, in practice, entry bans are rarely revoked. In IT, a person who has left the country voluntarily within the deadline provided in the removal order has the right to request a revocation of the ban by proving they have actually departed from the country. The revocation is at the discretion of the Italian Minister of the Interior.

In BG, EL, and SE, the competent authorities may revoke or suspend the entry ban in cases where the person proves that he/she has left in accordance with the prescribed term for the voluntary departure. In FR, if the person proves to have left FR in compliance with the return decision, two months after the expiry of the period for voluntary departure, they can apply for revocation. The administrative authority may refuse this repeal only in light of particular circumstances relating to the situation and behaviour of the person concerned.

In PL, the entry ban may be revoked if the person proves that they have left in accordance with the return decision and the re-entry to PL is justified, in particular, on humanitarian grounds. To get the entry ban revoked, the person would need to cover the costs of removal. The revocation can take place after half the period or two years have lapsed. Likewise, BE and the NL impose a period during which the entry ban cannot be revoked. In the NL, it is half the duration of an entry ban and in BE two thirds. Such a period is required unless there are humanitarian reasons (BE).

The 2014 EMN report on entry ban provides some figures regarding the revocation of entry bans. They are not disaggregated according to the reason of suspension or withdrawal. However, they do display the tiny share of entry bans is revoked. In 2013, BG revoked 3 entry bans (while imposed 849), PL revoked 587 entry bans (while imposed 7,334) and SE suspended 121 (while imposed 10,392).<sup>93</sup>

Revocation of an entry ban should imply that the alert is deleted from the SIS. The NL expressed concerns regarding the validity of entry bans registered in the SIS. In the NL, the continued validity of the entry ban in SIS is monitored by a special authority; however, the country questioned whether

<sup>93</sup> EMN, Good practices in the return and reintegration of irregular migrants, 2014.

all Member States do so and whether all alerts are removed from the SIS once the time period of their validity has lapsed.

ES and FR confirmed that in such cases, data is indeed deleted from the SIS. In PL, in cases of a suspension of the entry ban, data should be removed from the SIS, until such time as the circumstances justifying the suspension cease to exist. After the suspension period, the data is re-entered into the SIS.

### 2.3.4 Purpose of entry bans

According to the European Commission, the aim of an entry ban is to “prevent future risks of illegal stay.”<sup>94</sup> However, an entry ban does not prevent irregular entry or stay but rather precludes regular (legal) entry or stay. As such, it does not support *per se* the measures combatting irregular migration.

An entry ban is a coercive measure that reinforces the effect of return by not only precluding future legal stay in the host Member State but also in all the Schengen states. This raises questions of proportionality and adequacy of an entry ban among formally non-punitive return measures. The proportionality of an entry ban is even more questionable as the Return Directive obliges states to impose an entry ban in certain circumstances, which may exclude an individual assessment.

In the opinion of several Member States (BE, DE, NL, SE), an entry ban can help foster compliance with the return decision. The threat of the imposition of an entry ban may serve as an incentive to the person concerned to leave the country within the time period for voluntary departure.

As observed by the IOM and civil society organisations, solely the threat of imposing an entry ban may have the desired deterrent effect. Once imposed, entry bans may, in fact, discourage people from leaving the host country. People who receive an entry ban may be less willing to depart voluntarily and participate in AVR programmes because they know that they will no longer be able to enter the EU.

This is a cause for concern that is used in some Member States (BE, SE) as a way to encourage people under the visa waiver policy (including from Western Balkans) to withdraw their asylum applications, as manifestly unfounded asylum application may lead to the imposition of the entry ban. SE observed that the threat of an entry ban has led to a drop in the number of unfounded asylum applications. However, arguably, there might have also been a drop in asylum applications that are not unfounded.

Finally, entry bans imply costs for Member States. Under Articles 12 and 13 of the Return Directive, the decision on an entry ban is subject to the same procedural guarantees and appeal as the return decision.<sup>95</sup> In the NL, implementing entry bans triggered an increase in regulatory and administrative burden due to additional tasks required from the immigration authorities, the police, and the military police in relation to decision-making processes, administrative tasks, and hearings.

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<sup>94</sup> In line with the Return Recommendation, para.24(d): “Where justified, following an individual assessment and in application of the principle of proportionality, an entry ban should be issued in order to prevent future risks of illegal stay.”

<sup>95</sup> See Section 2.1.4.

## 2.4 Detention

### Key findings

- Although detention is, in practice, based on an individual assessment, it is easy to justify detention because of a broad legal basis.
- States have long and sometimes non-exhaustive lists of criteria for establishing a risk of absconding.
- Certain criteria for establishing the risk of absconding are hardly related to a person's propensity to flee the return process, such as lack of identity documents or public order considerations.
- All states provide alternatives to detention in their legislation. However, in practice, these measures are applied exceptionally because of the broad understanding of the risk of absconding.
- In most countries, detention is ordered by administrative authorities and ex-officio reviewed by judicial authorities.
- In several countries, the detention of unaccompanied children is prohibited, but they may be detained due to an inaccurate age assessment.
- All countries primarily use dedicated detention centres. Additionally, people may be detained at the border or in police stations for shorter periods.
- It is impossible to assess impact of detention on the return rate because little disaggregated and comparable data is available.

This section addresses pre-removal detention and examines the grounds for detention (2.4.1), alternatives to detention (2.4.2), length of detention (2.4.3), procedures (2.4.4), child-specific safeguards (2.4.5), and places of detention (2.4.6). The discussion is guided by research questions 12–18. The underlying consideration in this section, similar to the entry ban, is that detention should be a measure of the last resort, ordered based on an individual assessment. The prohibition of arbitrary detention implies also guaranteeing review of detention and detention place which reflects the administrative character of immigration detention. Besides the rules on pre-removal detention explored in this section, EU law lays down two other detention regimes. People in asylum procedures may be detained by virtue of the Reception Conditions Directive and people subject to Dublin transfer proceedings may be liable to detention under Regulation 604/2013 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) (hereafter Dublin Regulation).<sup>96</sup>

In its Recommendation on return, the European Commission stresses that detention can be essential for enhancing the effectiveness of the EU's return system (§16) and encourages states to use detention, in particular when there is a risk of absconding, align detention period with the maximum duration allowed under the Return Directive, and expand detention capacity (para.10). In order to conclude that detention actually enhances the effectiveness of return, detailed and disaggregated statistics are necessary. Do higher numbers of detainees imply higher numbers of returns? What is the share of detainees who are effectively returned directly from detention? How many people

<sup>96</sup> Regulation 604/2013 of the European Parliament and of the Council of 26 June 2013 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), OJ 2013 L 180/31, 29 June 2013.

subject to return who were not detained in fact absconded? Does longer detention help increase the number of returns? How many people placed in alternatives to detention have absconded? These statistics are not available for most of countries.

Similar to re-entry ban statistics, Eurostat does not collect statistics on the number of people placed in detention, as the current Migration Statistics Regulation does not request states to collect this kind of data. Following the ongoing process of amendment, the Regulation will provide for collection of detention statistics, yet on a non-obligatory basis. These statistics will be included in the pilot studies, which will be carried out on a voluntary basis, in order to test the feasibility of new data collections.<sup>97</sup> These figures will include the number of people placed in pre-removal detention, disaggregated by duration of detention, and number of persons subject to an alternative to detention, disaggregated by type of alternative. Although these statistics are not as detailed as necessary to discuss the relation between detention and number of returns, this is still a positive change. Currently Member States use different data collection methods so that it is impossible to compare figures even for the number of detainees.

Table 14 displays figures collected by the author. Yet, for several reasons, they may not be entirely comparable. First, DE and FR differentiate between numbers of people in Dublin detention and those in pre-removal detention. Other countries do not appear to disaggregate statistics as per these grounds for detention, hence the total number might also include people in Dublin procedures. Further, BE and SE differentiate between number of people in detention and number of detention orders, as some people are detained more than once. The table features the number of detainees. Yet, it is unclear which of the two figures other countries provide. Next, the NL has two regimes of detention, notably border and territorial detention.<sup>98</sup> Only the latter relates to the Return Directive, yet disaggregated figures are not available for all years.<sup>99</sup> In FR, as discussed later,<sup>100</sup> immigration detention is carried out in long-term dedicated detention centres called *centres de rétention administrative* (CRA) but some people are initially detained in short-term facilities called *locaux de rétention administrative* (LRA). It is not clear whether all people detained initially in LRA were later transferred to CRA and hence, whether these two figures should be summed up.<sup>101</sup> Finally, the total number of detainees are unavailable for DE, due to its federal system. Further, federal states use different data collection methods and some states do not differentiate between pre-removal and Dublin detention. Hence, data provided in the table should be considered incomplete and read with caution. What this data however does show is that in several countries (including BE, EL, IT, NL) the numbers of detainees have considerably increased in the past years.

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<sup>97</sup> See explanation in Section 2.3.1.

<sup>98</sup> See Sections 2.1.1 and 2.4.6.

<sup>99</sup> However, when asylum application is refused within border procedures, the Return Directive becomes applicable.

<sup>100</sup> See Section 2.4.6.

<sup>101</sup> FR operates also immigration detention in its overseas French territories. In 2018, 19,237 people were placed in immigration detention outside of the mainland (18,679 in CRA and 540 LRA).

Table 14: Detention statistics

	2016	2017	2018	2019
<b>BE</b>	6,311	7,106	8,158	
<b>BG</b>	11,314	2,989	2,456	2,184
<b>FR</b>	22,801 (with Dublin) (21,571 in CRA + 1,230 in LRA).	25,274 (with Dublin, in CRA),	18,500  26,614 (with Dublin) (24,912 in CRA + 1,702 in LRA)	17,000
<b>DE</b>	1,804 with Dublin; 1,172 without Dublin	2,634 with Dublin; 1,734 without Dublin	1,797 with Dublin; 1,297 without Dublin	
<b>EL</b>	14,864	25,810	31,126	
<b>IT</b>	2,984	4,087	4,092	
<b>NL</b>	2,570 (2230 in territorial detention)	3,181 (2,845 in territorial detention)	3,510 (3,160 in territorial detention)	3,780 (total)
<b>PL</b>	1,201	1,290	1,456	1,539
<b>ES</b>	7,597	8,814	7,855	6,473
<b>SE</b>		4,101	3,707	4,163

Source: Compilation by the author

## 2.4.1 Grounds for detention

Under Article 5(1) of the ECHR, everyone has the right to liberty and no one should be deprived of his or her liberty except on such grounds and in accordance with such procedure as are established by law. According to the ECtHR, legislation authorising detention should satisfy general principle of legal certainty, including being accessible, precise and foreseeable in its application to avoid the risk of arbitrariness.<sup>102</sup> The same requirements are applicable under EU law. By virtue of Article 52(3) of the Charter of Fundamental Rights of the European Union, the understanding of the right to liberty under Article 6 of the Charter should mirror that under Article 5 of the ECHR. On this basis, in *Al Chodor*, the CJEU referred to the ECtHR's case-law and stressed that detention should comply with specific safeguards, such as presence of a legal basis, clarity, predictability, accessibility and protection against arbitrariness.<sup>103</sup>

The Return Directive provides for two explicit grounds justifying detention. Under Article 15(1) of the Directive, Member States may only keep in detention a person who is the subject of return procedures in order to prepare the return or carry out the removal process, in particular when: (a)

<sup>102</sup> ECtHR, *Sadaykov v. Bulgaria*, 75157/01, 22 May 2008, para. 23, ECtHR, *Soldatenko v. Ukraine*, 2440/07, 23 October 2008, para. 110-111.

<sup>103</sup> CJEU, *Policie ČR, Krajské ředitelství policie Ústeckého kraje, odbor cizinecké policie v. Salah Al Chodor, Ajlin Al Chodor, Ajvar Al Chodor*, C-528/15, 15 March 2017, para. 37-40.

there is a risk of absconding or (b) the person concerned avoids or hampers the preparation of return or the removal process. Most Member States have transposed both grounds for detention in their domestic legislation (BE, BG, EL, ES, FR, NL, SE).

The risk of absconding is one of the key concepts laid down in the Return Directive. Besides justifying detention, it can also lead to refusal of voluntary departure period and, consequently, a re- entry ban.<sup>104</sup> Under Article 3(7) of the Directive, the risk of absconding refers to the existence of reasons in an individual case which are based on objective criteria defined by law that lead to believe that a person who is the subject of return procedures may abscond. The “objective criteria” are not defined in the Directive. Hence, the understanding of the concept of the risk of absconding may vary between Member States.

In its Recommendation on returns, the European Commission stresses that Member States should provide for eight criteria for establishing a risk of absconding in their legislation (para. 15-16). Since states have already various criteria in their laws, the Commission’s request may further extend the domestic lists of criteria. Given far-reaching consequences of qualifying a person as a potential absconder, the concept of a risk of absconding and the criteria underlying risk assessment should be narrowly defined. Table 15 reproduces the eight criteria listed by the Commission and maps out which states provide for them in their law.

Table 15: Criteria for establishing the risk of absconding

Criteria enumerated by the Commission	MS	Domestic criteria reflecting criteria listed by the Commission
refusing to cooperate in the identification process, using false or forged identity documents, destroying or otherwise disposing of existing documents, refusing to provide fingerprints;	BE, BG, DE, EL, FR, IT, NL, SE	<p>BE: the person has provided false or misleading information or false documents;</p> <p>BE: the person does not collaborate with the authorities competent for implementing and/or overseeing the provisions of the law;</p> <p>BG: the person holds forged documents;</p> <p>BG: the persons has supplied incorrect information;</p> <p>DE: the person has refused or failed to cooperate in establishing his identity;</p> <p>DE: the person deceives the authorities regarding his identity, in particular by suppressing or destroying identity or travel documents or claiming a false identity;</p> <p>EL: the person has false documents;</p> <p>EL: the person provided false information to authorities;</p> <p>FR: the person has forged, falsified or established under a name other than his own a residence permit or an identity or travel document or if he/she has made use of such a title or document;</p> <p>FR: the person has refused to communicate the information allowing to establish his or her identity, communicated inaccurate information, or refused to undergo fingerprinting or photographing;</p>

<sup>104</sup> See Sections 2.2.1.1 and 2.3.1, respectively.

Criteria enumerated by the Commission	MS	Domestic criteria reflecting criteria listed by the Commission
		<p>FR: the person has not presented him or herself to the consular authorities of the country of which it is reasonable to believe that he/she has the nationality to receive a travel document;</p> <p>IT: the person has previously falsely declared personal details;</p> <p>NL: the person does not (or not sufficiently) cooperate in determining his or her identity and nationality;</p> <p>NL: the person has provided incorrect or conflicting information regarding his or her identity, nationality or travel to the NL or another Member State in connection with his or her application for admission;</p> <p>NL: the person has gotten rid of travel- or identifying documents, without any need to do so;</p> <p>NL: the person used false or forged identity documents in the NL;</p> <p>SE: the person used incorrect identity;</p> <p>SE: the person has not cooperated to clarify identity and therefore hampered the examination of the application for a residence permit;</p> <p>SE: the person has deliberately given false information or withheld material information.</p>
opposing violently or fraudulently the operation of return	BE, FR	<p>BE: the person has resorted to fraud or other illegal means in the context of an expulsion or removal procedure;</p> <p>FR: the person has avoided carrying out a previous removal order.</p>
not complying with a measure aimed at preventing absconding, such as failure to report to the competent authorities or to stay at a certain place	BE, BG, DE, EL, FR, NL, SE	<p>BE: the person has not complied with alternatives to detention;</p> <p>BG: the person cannot be found on the residence address announced;</p> <p>DE: despite being informed of the notification obligation, the person has in the past already eluded the authorities by changing his or her place of residence not only on a temporary basis without notifying the competent authority of an address at which he/she can be reached;</p> <p>FR: the person has not complied with the measures imposed during the period for voluntary departure;</p> <p>FR: the person has not complied with alternatives to detention;</p> <p>NL: the person has evaded supervision.</p> <p>*Previous absconding: BG, EL, SE</p>
not complying with an existing entry ban	BE, BG, EL, IT, PL, SE	
unauthorised secondary movements to another Member State		
explicit expression of the intention of non-compliance with a return decision	BE, BG, DE, EL, FR, NL, PL, SE	

Criteria enumerated by the Commission	MS	Domestic criteria reflecting criteria listed by the Commission
non-compliance with a period for voluntary departure	BG, EL, IT, NL	
an existing conviction for a serious criminal offence in the Member States	BG, EL, NL, SE	<p>BG: the person has previous been convicted of a crime, regardless of rehabilitation;</p> <p>EL: the person has been convicted for criminal offences;</p> <p>EL: there are serious indications that the person has committed or is about to commit a criminal offense;</p> <p>NL: the person is suspected of or convicted for a crime;</p> <p>SE: the person has been convicted of an offence punishable by imprisonment.</p>

Source: Author’s compilation based on domestic laws

As Table 15 demonstrates, most of the criteria put forth by the Commission are provided in domestic laws. Often states have more than one criterion corresponding to the criteria listed by the Commission. Additionally, states also have other criteria, including lack of valid identity or travel documents (BG, EL, ES, FR, IT, PL), irregular entry or an attempt to do so (BE,<sup>105</sup> EL, FR,<sup>106</sup> PL), lack of fix address or accommodation (ES, FR, IT, NL), subsequent or manifestly unfounded application (BE,<sup>107</sup> NL<sup>108</sup>), public order and public security considerations (BG, DE), being subject to an entry ban (BE, NL), lack of sufficient subsistence (NL), irregular work (NL), and concealment of facts (BE<sup>109</sup>).

There are three, inter-related, concerns regarding the objective criteria for establishing the risk of absconding. First, several criteria can hardly demonstrate a person’s propensity to flee the return process and can capture the majority of people in an irregular situation. For instance, not having valid documents and address in the host state or having entered in an unlawful way are common features of most of migrants, asylum seekers, and refugees worldwide. Equally concerning are criteria related to public order and national security and penal convictions as they blur the lines between administrative pre-removal detention and penal detention. Arguably, such criteria are not “objective,” as Article 3(7) of the Directive requires. According to the Advocate General’s opinion in

<sup>105</sup> BE has a qualified version of this criterion, is applies to a person who has not applied for a permit after irregularly entering the country or has not made an asylum application within the 8-day deadline set out by the law.

<sup>106</sup> FR has a qualified version of this criterion, it applies when a person, who cannot justify having entered French territory regularly, has not applied for the issue of a residence permit; has remained on French territory beyond the period of validity of his or her visa or, if is not subject to the visa requirement, at the expiration of a period three months from his entry into FR, without having requested the issue of a residence permit; or has remained on French territory more than one month after the expiration of his residence permit, his receipt for a residence permit request or his provisional residence permit, without having requested one the renewal.

<sup>107</sup> BE enumerates three criteria under this heading, notably if the person has introduced a new asylum application immediately after being issued a refusal of entry or being returned; has lodged multiple asylum applications in BE or other Member States, which have been rejected; or has been fined for lodging a manifestly abusive appeal before the CALL.

<sup>108</sup> The NL enumerates two criteria under this heading, notably if the person has applied for asylum under the border procedure and their application has not been processed, has been declared inadmissible, or has been rejected as manifestly unfounded, or has submitted several applications for a residence permit which were not successful.

<sup>109</sup> BE enumerates three criteria under this heading, notably if the person, after being inquired, has concealed the fact of giving fingerprints in another Dublin State; has concealed the fact of lodging a prior asylum application in another Dublin State, or has declared – or it can be deduced from his or her files – that he or she has arrived in BE for reasons other than those for which he or she applied for asylum or for a permit.

*Al Chodor*, Article 3(7) of the Directive entails that criteria be of “substantive validity,” meaning that they should be objective and consistent with the proportionality test.<sup>110</sup>

Second, overall, Member States have long lists of the criteria. For instance, NL has 19 (but two need to be fulfilled, BE has 11 criteria, FR and SE have 8 each (but in FR the criteria are long), and DE has 7. The more criteria listed in law, the wider the legal basis to detain (and refuse the period for voluntary departure and impose entry ban). This may reverse order between the norm (liberty and voluntary return) and the exception (detention, forced return, and entry ban). In addition, some states (BG, EL, PL) do not exhaustively enumerate the criteria, so authorities may use criteria not provided in law to establish the risk of absconding. The absence of an exhaustive list of criteria is contrary to the definition of the risk of absconding under Article 3(7) of the Directive, as it refers to “objective criteria defined by law.” It is also not precise and foreseeable, hence questionable under Article 5(1) of the ECHR and Article 6 of the EU Charter. Indeed, in *Al Chodor*, the CJEU found that the objective criteria for establishing the risk of absconding should be provided in an act of general application which is binding and foreseeable in its application. Consistent practice is not sufficiently precise and predictable to adequately protect the person against arbitrary detention.<sup>111</sup>

Third, the scope for individual assessment is unclear. Regarding the eight criteria listed in the Recommendation on return, the Commission stressed that the first five should constitute a rebuttable presumption about a risk of absconding and the other three criteria should be considered as an indication of such risk. Rebuttable presumption places the burden of proof on the person to demonstrate the contrary. Arguably, such an interpretation of the concept of the risk of absconding is not in line with the principle of proportionality and last resort. Considering the coercive measures applicable to people who may be listed as posing a risk of absconding (detention, forced return, and entry ban), the principle of proportionality demands an individual assessment of the circumstances of the case if a criterion is present. Detention (and forced return and entry ban) should only be imposed as a last resort. Hence, the administration should hold the burden of proof rather than the concerned person.

As regards the second ground for detention, Article 15(1)(b) of the Return Directive does not indicate which acts could be perceived as avoiding or hampering return nor does it define the parameters of this concept. In addition, Article 15(1) does not demand states to define it in their domestic legislation. As a result, several states (BE, BG, EL, NL, SE) literally transposed this provision without including any clarification as to the understanding of this notion. This affords authorities wide justification to order detention. Such legislation does not appear to be precise and foreseeable in its application, as required under Article 5(1) of the ECHR.

A positive practice exists in that regard in German legislation. DE does not differentiate between the risk of absconding and avoiding or hampering the removal process. Rather, the risk of absconding is regarded as a specific case of avoiding or hampering the removal process. Besides the risk of absconding, the examples of hampering the removal procedure include the cases when the period for voluntary departure has expired and the person has changed his or her place of residence without notifying the foreigners’ authority of a new address; the person has failed to appear at the location stipulated by the foreigners’ authority on a date fixed for deportation due to reasons for which he/she is responsible; or the person has evaded deportation by other means. Although this list is long, it is still useful from the perspective of legal certainty to have the concept of hampering or avoiding return explicitly delimited.

<sup>110</sup> Advocate General, Opinion of Advocate General Saugmandsgaard Øe: Case C-528/15, 10 November 2016, para 35.

<sup>111</sup> CJEU, *Al Chodor*, para. 42-46. The ruling addressed the risk of absconding under the Dublin Regulation but since the legal provisions are practically the same, the ruling should be applicable to pre-removal detention by analogy.

By using the terms “in particular,” Article 15(1) of the Directive appears to enumerate the two grounds in a non-exhaustive manner. Indeed, some states lay down further grounds for detention in their domestic legislation, including investigation of the person’s identity (BG, IT), acquisition of travel documents (IT), unlawful entry (DE), or public health considerations (ES). These grounds provide for a wide basis for detention.

Further, several Member States allow detention based on state security or public order considerations (EL, DE, PL) or criminality (ES, SE). Detaining people on such grounds appears to serve other states’ objectives than to ensure removal of the person, notably protection of the population or public order. While these circumstances are often justifiable to detain a person, immigration legislation should not be used for this purpose. Rather, criminal legislation should apply horizontally to any person under the state jurisdiction. Reliance on these grounds blurs the lines between administrative immigration detention and punitive detention.<sup>112</sup> In *Kadzoev*, the CJEU ruled that public order and public safety considerations are not self-standing grounds for pre-removal detention under the Directive.<sup>113</sup>

## 2.4.2 Alternatives to detention

Under international law, immigration detention should not only be lawful but also necessary in individual circumstances. In line with consistent case-law of the UN Human Rights Committee (HRC), immigration detention “could be considered arbitrary if it is not necessary in all the circumstances of the case and proportionate to the ends sought, for example, to prevent absconding.”<sup>114</sup> Detention should be a last resort, where non-custodial measures (so-called alternatives to detention ATD) are not sufficient for ensuring an effective return. The principle of proportionality and the corresponding duty for considering ATD in the first place implies the obligation to individually assess the necessity of detaining a person.

The Return Directive reflects these principles. By virtue of Article 15(1), Member States may impose pre-removal detention unless other sufficient but less coercive measures can be effectively applied in a specific case. The preamble reiterates that detention is justified if the application of less coercive measures would not be sufficient (§16). In the joined cases *FMS and Others*, the CJEU ruled that Article 15 of the Return Directive precludes that detention is ordered without the examination of the necessity and proportionality of this measure.<sup>115</sup>

ATD are not only in line with the principle of proportionality, but they are also cost-effective. For instance, as of 2016, the average daily cost of a person placed in a family unit (discussed below) in BE was approximately 100 EUR while the average cost of staying in a detention centre was approximately 180–200 EUR. In 2019, the average daily cost in detention per person in SE was 484 EUR compared to the 39 EUR in the reception centre.

The legislation of some Member States (BE, DE, EL, NL) explicitly prioritises ATD. In practice, however, in BE, BG, EL, and IT, ATD are reportedly only rarely used. In the NL, the need for detention is individually assessed, but it is easier for the administration to call for detention than ATD. The wide legal basis for detention may be a reason for this. In ES and IT, ATD can only be applied if the person

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<sup>112</sup> Scholars have labelled such measures as crimmigration.

<sup>113</sup> CJEU, Saïd Shamilovich Kadzoev (Huchbarov), C-357/09 PPU, 30 November 2009, para. 69-71.

<sup>114</sup> HRC, Danyal Shafiq v. Australia, 1324/2004, (November 13, 2006), para. 7(2); HRC, A. v. Australia, 560/1993, (April 30, 1997), para. 9(2); HRC, Madafferi v. Australia, 1011/2001, (August 26, 2004), para. 9(2).

<sup>115</sup> CJEU, FMS, FNZ (C-924/19 PPU), SA, SA junior (C-925/19 PPU) v. Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság, Országos Idegenrendészeti Főigazgatóság, 14 May 2020, para. 302(7).

has an address, which is often not the case. These examples show that there is an underlying assumption that only detention can prevent absconding and lead to an effective return.

The Return Directive does not list the measures which Member States can adopt as ATD. Generally, it is assumed that the measures listed in Article 7(3) of the Return Directive to prevent absconding during the period of voluntary departure can be used. These measures include the following: regularly reporting to the authorities, depositing an adequate financial guarantee, submitting documents, or being obliged to stay at a certain place. Table 16 shows which of these measures are provided for in domestic legislation. Furthermore, three measures (electronic monitoring, guarantor, and community management) are included in Table 16 because they are listed in the Return Handbook.<sup>116</sup>

ATD restrict a person's freedom of movement. Hence, these measures are subject to the proportionality test, like detention. The less intrusive measures, adapted to the specific circumstances of the case, should be chosen.<sup>117</sup>

Not all restrictive measures imposed on people subject to a return decision should be considered ATD. ATD are measures applied as alternatives to depriving liberty and not as alternatives to liberty. When detention has no legal basis, when for instance, a person poses no risk of absconding, ATD are not applicable. Likewise, the person should be released and not placed in ATD when detention ceases to be legal, for instance, when there is no realistic prospect of return or the maximum permissible length of detention has been reached. Indeed, in *FMS and Others*, the CJEU stressed that the imposition of an alternative measure to detention can only be envisaged if the reason which justified the detention of the person concerned was and remains valid, but the detention does not appear or no longer appears necessary or proportionate.<sup>118</sup>

In the examined countries, potential confusion between ATD and other non-custodial measures may relate to several factors. First, the legislation is often unclear. The Return Directive already does not list ATD in Article 16 on detention, but the relevant measures can be found in Article 7, which deals with voluntary departure. As Table 16 shows, several countries, including DE, EL, ES, and the NL, also do not list preventive measures as explicitly ATD.

Table 16: ATD in law

Type of ATD	MS
Reporting obligations	BE, BG, DE*, EL*, IT, PL, ES*, SE
Residence requirements	BE, FR, DE*, EL*, IT, NL*, PL, ES*
Obligation to surrender a passport or travel documents	BE, BG, DE*, EL*, IT, NL*, PL, ES*, SE
Release on bail	BE, BG, DE*, EL*, NL*, PL
Electronic monitoring	DE*
Guarantor requirements	NL*
Release to a care worker or under a care plan/ community management programme	

\* These measures are not framed as ATD but as measures to be applied during voluntary departure period or pending return (without emphasis on detention)

Source: Compilation by the author

<sup>116</sup> List comes from Return Handbook, p. 140.

<sup>117</sup> SRHRM, Report of the Special Rapporteur on the human rights of migrants, François Crépeau: Detention of migrants in an irregular situation, A/HRC/20/24, 2 April 2012, para 68.

<sup>118</sup> CJEU, *FMS and Others*, para. 293.

Second, the nature of some measures makes it difficult to draw the line. Among the listed measures, the residence requirements appear to cover the widest scope of measures. Residence requirements can imply both house arrest, whereby the person stays in his or her house, taking up residence in a reception centre, or a ban on leaving a particular geographical area, like a municipality. Classifying residence in a reception centre is not straightforward. Some centres are described by the Member States as ATD while civil society organisations do not qualify them as such. These facilities accommodate people prior to departure, including open return places (BE); Freedom-restricting Centres (VBL), and Family Centres (GL) (NL), return preparation measures (DPAR) (FR), and departure facilities (DE). Arguably, the distinguishing feature is whether placement in such facilities is decided during the detention procedures by authorities empowered to order detention.

Finally, as mentioned above, some countries impose stringent conditions that have to be fulfilled to be granted ATD. Therefore, sometimes, a person fulfilling them should not be detained at all. Likewise, in some countries, the person is placed in ATD after being released from detention.

### 2.4.3 Length of detention

Under Article 15(5) of the Return Directive, Member States should set a limited detention period, not exceeding six months. According to Article 15(6), states may extend that period for a period of maximum twelve months if, regardless of all their reasonable efforts, the removal operation is likely to last longer due to a lack of cooperation by the concerned person or delays in obtaining the necessary documentation from third countries.

In its Recommendation on return, the European Commission urges Member States to provide for an initial period of detention of no longer than six months and the possibility to further prolong the detention up to eighteen months in the cases provided for in Article 15(6) of the Directive in national legislation. States should provide for these maximum periods laid down in the Directive to ensure effective removals (para. 10(b)). However, there is no evidence that lengthy detention periods increase the effectiveness of return. As the substitute impact assessment concluded, returns tend to occur in the initial phase of detention.<sup>119</sup> For instance, in FR, in 2017, 80% of the removals occurred before the twenty-fifth day in detention. Hence, it is often not necessary to prolong detention because it does not contribute to removal. Extending detention under such circumstances is not cost-effective.

Currently, the maximum time-limits laid down in the Directive (six months extendable up to eighteen months) is provided in the legislation of BG, DE, EL, and NL. The maximum initial period of detention is two months in SE and three months in PL. It is extendable up to twelve months in both countries based on the two grounds listed in Article 15(6) of the Directive.

Regarding the justification of extension of detention, all the aforementioned countries allow it on both the grounds laid down in Article 15(6) of the Return Directive. However, in DE, detention due to delays in receiving documents from destination countries is only a justifiable reason for the extension of detention if the return is based on state security or a terrorist threat.

The possibility of extending the detention appears to be widely used. For instance, in BG, both initial and consecutive detentions tend to be ordered for the maximum permissible length. In the NL, the courts tend to interpret the grounds in a permissive way.

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<sup>119</sup> European Parliamentary Research Service, The proposed Return Directive (recast): Substitute Impact Assessment, European Parliament, January 2019, p. 115.

A good practice followed in DE is limiting the scope of the non-cooperation ground. The General Administrative Regulation to the Residence Act provides examples of non-cooperative behaviour, including failing to participate in obtaining travel documents, breaching the requirement to surrender a passport, and refusing to contact the diplomatic mission of their country of origin. In case of a lack of cooperation in the procurement of travel documents, the alien authorities have to prove that the detention time has been fully utilised to organise the issuance of such documents. Refusal to cooperate justifies the extension of detention beyond six months only if it precludes the removal. Therefore, the potential refusal to cooperate has to be accounted for by the alien authorities while planning and organising the return process.

Some states have additional grounds beyond the two enumerated in Article 15(6) of the Directive, justifying the extension of detention. In PL, the detention period can be further extended up to eighteen months if the detainee appeals against their deportation order. In DE, this can be done if the person has filed a subsequent asylum application.

According to the Recommendation on return of the European Commission, the maximum duration of detention currently used by several Member States is significantly shorter than the one allowed by the Return Directive and which is needed to complete the return procedure successfully. According to the Commission, these time-spans preclude effective removals (17). As observed above, there is no evidence that shorter detention periods preclude effective removal.

The countries which have shorter time-spans for detention in their legislation are IT (180 days), BE (five months or eight months if there are reasons of public order or national security), FR (90 days), and ES (60 days). However, it is possible to detain the same person more than once in most of these countries.

The average detention period in 2018 was around 83 days in PL, 44 days in NL, 33 days in IT, 29 days in SE, 26 days in ES, and 15 days in FR. The average length of detention is an imprecise and a potentially misleading indicator.

Indicators showing the percentage of detainees detained for particular lengths of time are more valuable. Some countries collect such statistics. In FR, the number of people detained for over 30 days increased substantially from 2,468 in 2016 to 4,432 in 2018 (reaching 18.5%). In DE, in 2018, 34% of the detainees were detained for less than two weeks, 41% between two and six weeks, 24% between six weeks and three months, and 1% between six and twelve months. No detention lasted longer than twelve months in the period between 2016 and 2018. In 2018, the NL detained 83% of people for less than three months, 14% between three and six months, and 3% for over six months.

In BE, theoretically, the maximum detention period is limited to five months, but new detention orders of five months can be issued every time a person refuses his/her removal (typically, when the person refuses to get on the plane). In practice, a person is not detained longer than 18 months in total.

In FR, re-detention is explicitly allowed under the legislation. After being released from detention, the person can be detained again after seven days if he/she does not leave the country, refuses to cooperate with the authorities, and there are changes in his/her legal or factual situation. Sometimes, in EL, people are released from detention upon the expiry of the maximum period of detention and are given a deadline to leave the country. After the deadline expires, they are detained again, despite their removal being impossible when they had been previously detained. In ES, re-detention is possible because a new return decision can trigger a 60-day detention period.

In the NL, re-detention is possible even after the expiry of maximum time limit of 18 months, but the authorities are supposed to demonstrate that there is a reasonable prospect of removal. Re-

detention is also possible in DE but it is justifiable on the basis of a new application by the authorities and a corresponding court order. The court has to find that the new detention is not a part of the original proceedings. Earlier detention periods are to be included in the total duration of detention if the detention relies on the initial return decision.

## 2.4.4 Procedures

### 2.4.4.1 Detention decision and review

According to Article 15(2) of the Return Directive, detention should be ordered by administrative or judicial authorities. If detention has been ordered by administrative authorities, Member States should either provide for a speedy judicial review to determine the lawfulness of the detention as speedily as possible from the beginning of detention or grant the person the right to initiate proceedings through which the lawfulness of detention should be subject to a speedy judicial review, which is decided on as speedily as possible after the launch of the relevant proceedings. In such a case, Member States should immediately inform the person concerned about the possibility of such proceedings.

In a nutshell, Article 15(2) implies that when immigration detention is not ordered by judicial authorities, it should be promptly reviewed by a court either on its own motion or based on a request of the detainee. Member States implement this provision in diverse manners.

In DE, ES, FR, and PL, detention is ordered by judicial authorities upon request of administrative bodies. In ES, detention is imposed by an investigating judge of the place of apprehension (who is the first-instance criminal judge) upon request by the police. In DE, detention is imposed by a district court (civil jurisdiction) based on an application by administrative authorities (federal police, foreigners' authorities, or the police of the federal states). In PL, detention is ordered by the district penal court upon request by a border guard. Upon apprehension, the border guard has a maximum of 48 hours to request a court to issue a detention order, which has 24 hours to decide. In FR, the initial 48h-detention is ordered by a prefect (regional representative of the central government, operating under the interior ministry). Detention beyond this duration is decided by a judge (Judge of Liberties and Detention – JLD) upon the request of a prefect.<sup>120</sup> In all four countries, the person is heard before the court decides.

In six Member States, detention is ordered by administrative authorities, as listed in Table 17. The administrative bodies that most frequently order detention are the police (BG, EL, IT, NL), immigration authorities (BE, SE), or representatives of the interior ministry (BG).

The arrangements for judicial review vary across the countries. In IT, the judicial review is conducted *ex officio*. Detention is ordered by the police (*questore*) and must be submitted within 48 hours to a

Table 17: Administrative bodies competent to order detention

MS	Administrative body
BE	Immigration Office
BG	Migration Directorate or police
EL	Police or alien police
IT	Police
NL	Police or military police Repatriation and Departure Service
SE	Migration Agency or police

Source: Author's own compilation based on interviews

<sup>120</sup> The JLD is a magistrate of the seat, appointed by the president of the district court (*tribunal de grande instance*). He or she is charged to rule on the provisional detention of a person under investigation, the administrative detention of foreigners and on requests for extension of psychiatric hospitalizations under duress.

magistrate (*Giudice di Pace*) having territorial jurisdiction. The magistrate should conduct a “validation hearing” and validate the detention order within 48 hours.<sup>121</sup>

In the remaining countries, detention is subject to an *ex officio* administrative review, but the involvement of courts on their own motion varies.

In EL, and the NL, the courts review the detention on their own motion only after a certain duration of detention. Precisely, when detention is extended over the initial period. In the NL, detention is commonly ordered by the police, the military police, and Repatriation and Departure Service (DT&M). The district court (immigration chamber) reviews the detention only after 49 days of detention unless the person appeals in the first 28 days.<sup>122</sup> An administrative review is conducted by the Repatriation and Departure Service. The Service checks whether detention is still justified after every return interview. In detention cases, detention interviews are held at least once a month. In EL, the detention is ordered by the police or the alien police. It is subject to an automatic judicial review by the administrative court in the first instance only if detention is extended beyond six months. An administrative review is conducted *ex officio* by the police director who issues the detention order every three months.

There is no automatic judicial review of detention in BE, BG and SE. The court will review detention only upon application of the detainee. In SE, detention is ordered by the Migration Agency and reviewed by the same body *ex officio* every two months. If detainee appeals, the Migration Court will review the detention. Similarly, in BE, detention is ordered by the Immigration Office and is reviewed by the same body after two months of detention. The person can apply for a judicial appeal to the Council Chamber of the Criminal Court of the first instance. In BG, detention is ordered by the Director of the Migration Directorate or the police. The detainee can appeal to a first-instance administrative court within 14 days. There is an automatic review of continuity of detention on a monthly basis by the Director of the Migration Directorate. However, it does not result in a written act, so it cannot be challenged.

Regarding the review of the continued detention, according to Article 15(3) of the Return Directive, the detention should be reviewed at reasonable intervals of time either on application by the detainee or *ex officio* in every case. In practice, the automatic review of continued detention occurs when the detention is extended. Therefore, relatively short maximum periods of detention in law can trigger more frequent reviews of the continued detention and support the right to liberty.<sup>123</sup>

Article 15(3) of the Directive further provides that reviews should be subject to the supervision of judicial authority in the case of prolonged detention periods. In *Mahdi*, the CJEU interpreted the expression “prolonged detention” as a period exceeding the initial period of detention of six months under Article 15(6) of the Directive.<sup>124</sup>

In DE, ES, FR, IT, and PL, the judicial review, as described above, is repeated when the administration intends to prolong the detention beyond the initial period. In EL and the NL, the court is automatically involved when the detention is extended beyond the initial period. In BG and SE, the extension of detention occurs without the *ex officio* involvement of judicial authorities.

<sup>121</sup> Reportedly, the validation hearings are short, there is a limited possibility to provide evidence and the magistrate commonly validates the detention order issued by the police.

<sup>122</sup> The period of 49 days is calculated as follows: 28 days (initial period of detention), +14 day (during which the court has to organise the hearing) +7 days (following the hearing, for the court to render its ruling).

<sup>123</sup> The length of detention is discussed in Section 2.4.4.

<sup>124</sup> CJEU, Bashir Mohamed Ali Mahdi, C-146/14 PPU, 5 June 2014, para. 42-43.

#### 2.4.4.2 Appeal

Under Article 5(4) of the ECHR, everyone who is deprived of his/her liberty should be entitled to initiate proceedings through which the lawfulness of his/her detention can be speedily determined by a court. Under Article 15(2) of the Return Directive, if detention has been ordered by administrative bodies and there is no automatic judicial review of the lawfulness of the detention, the person has the right to take the proceedings to request judicial review. Pursuant to Article 15(3) of the Directive, the person should be entitled to apply for a review as detention continues.

All examined states provide for an appeal procedure against the initial detention or extension of detention before judicial authorities. There is a second-level jurisdiction in all the countries, but the scope of this review differs. The competent courts are under penal (BE, ES, FR, PL), civil (DE), or administrative jurisdiction (BG, EL, NL, SE). SE has a specific court, namely, the Migration Court (and Migration Court of Appeal). The NL has separate chambers for immigration law matters at the district courts (judges sitting in these chambers also work in, at least, another field of administrative law).

In FR, a person can challenge both the initial 48h-detention and detention beyond that period in front of the JLD. The detainee can appeal to the JLD at any moment to demand release if new circumstances appear. The detainee can contest each extension decision by the JLD within 24h to the administrative court of appeal, which has 48h to decide.<sup>125</sup> The decision of the court of appeal can be challenged before the court of cassation regarding the application of law. In PL, detainees can appeal the decision of the district court (both initial and extension) in the regional court (penal jurisdiction) within seven days and the court has seven days to examine the appeal. Additionally, in DE, an appeal can be filed against the decision of the district court on detention or extension of detention to a regional court within a month. The appeal fully examines the lawfulness of the detention, including the factual situation. Against the decision of the regional court, the appeal about questions of law can be lodged with the Federal Court of Justice within a month.<sup>126</sup> People detained in ES can contest their detention before the same investigating judge of the Provincial Court (*Audiencia Provincial*) that has issued the detention order.

In IT, it is not possible to appeal *Giudice di Pace's* validation or the renewal of decision in a local court. An appeal regarding the interpretation of law can be brought to the Court of Cassation (Supreme Court). The appeal process is lengthy and complex, and many lawyers do not fulfil the requirements for presenting in front of this court.<sup>127</sup>

As highlighted earlier, the possibility of appealing is crucial in Member States, where automatic judicial review occurs at a later stage or is not conducted at all.

In BE, the detainee can request release in front of the Council Chamber of the Criminal Court (which is the first-instance criminal court) every month (i.e., following each extension). The Court should pronounce its ruling within five working days. Otherwise, the person should be released.<sup>128</sup> An

<sup>125</sup> In 2018, 8,170 people were released from detention by JLD or court of appeal.

<sup>126</sup> The appeal needs to be submitted by a lawyer registered with the Federal Court of Justice to deal with detention cases as contrary to criminal cases, only selected lawyers can deal with detention under civil law. The appeal before Federal Court is only permissible if the case concerns fundamental legal issues and it is a lengthy procedure.

<sup>127</sup> For instance, a lawyer needs to have practiced law for at least 12 years to act in front of the court of cassation.

<sup>128</sup> The scope of judicial review of detention carried out by the Council Chamber remains limited because of the assumption that the competence to decide on the removal, and as such on the measures to execute such a decision, lays with the Immigration Office and the CALL (discussed in Section 2.1.4), not with the criminal courts. There is a difference in the jurisprudence of the Dutch-speaking and the French-speaking court. A person has more than twice as much chance of being released from a detention centre if he/she appeals to a French-speaking Court than to a Dutch-speaking court.

appeal can be lodged against the decision of the Council Chamber before the Indictment Chamber at the Court of Appeal (criminal section of the Court of Appeal) within 24 hours. The decision about this appeal must be rendered within 15 days. Otherwise, the person should be released. A purely judicial appeal (limited control of legality) can be introduced against this final decision at the Court of Cassation within 48 hours, which should be ruled on within 15 days.

People detained in the NL can appeal against the detention and its extension in the district court. In the context of the initial detention order, the court will conduct a hearing within 14 days after it has received the appeal. It will give its judgement within seven days after the hearing. If it does not, the detention will be unlawful. In the context of the extension of detention, a hearing is not obligatory. The decision of the district court can be challenged in front of the Council of State (administrative jurisdiction). In EL, the person may appeal a detention decision and extension before the administrative court of first instance. The president of the administrative court assesses this appeal and his/her decision is not subject to an appeal.

Finally, appeal channels are particularly important in the Member States that do not provide for an automatic judicial review of detention. In SE, detention orders and extensions may be appealed in the Migration Court every two months. The ruling of the Migration Court can be challenged on legal grounds in front of the Migration Court of Appeal. In BG, the detention order and its prolongation may be appealed before the administrative court within 14 days, which should be ruled on within one month. The decision of the first-instance court may be appealed as regards the application of law before the Supreme Administrative Court. The 14-day deadline for lodging an appeal is an obstacle to challenging detention because detention orders are often not translated. Consequently, few appeals are submitted.

#### 2.4.4.3 Legal and linguistic assistance

Under Article 15(2) of the Return Directive, detention should be ordered in writing with reasons being given in fact and in law. All Member States have legal provisions to that effect.

Article 5(2) of the ECHR provides that everyone who is arrested should be promptly informed about the reasons for their arrest in a language they understand. Regarding the translation of detention decisions, domestic legislations provide that people should be informed in a language they can understand (BE), an interpreter should be present while notifying a detention decision (FR), people should receive a copy of the detention decision in a language they can be reasonably expected to understand (NL), or the person should receive the information about the reasons for their detention in a language they can understand (EL). It is difficult to map out the practice. The author learned that in ES, PL, and SE, detention decisions are orally translated for the person. Conversely, concerns have been expressed about the lack of translation of detention orders in BG and EL. However, interpreters are present during hearings in several Member States, including DE, FR, IT, PL, and SE.

Regarding legal assistance, six civil society organisations in FR are allowed to have judicial permanence in detention centres. Thus, detainees can directly access legal advice every day. Legal advisers can also appeal against their detentions. In the proceedings before the court, detainees can be assisted by a lawyer appointed free of charge. The legal assistance involves appointing a lawyer or paying for the lawyer a person already has.

In BE, detainees have the right to state-paid legal assistance for judicial review proceedings. Either their own lawyer is funded, or they have a lawyer assigned to them. In detention centres in Vottem and Bruges, there is a judicial permanence organised by the Bureau for Legal Assistance of the Bar Association. The other centres do not have a first line of legal assistance and social services of the centre need to contact the bar association for a lawyer to be assigned. In SE, detainees are granted a public counsel after three days in detention. The counsel is appointed automatically; the person

does not need to apply. In the NL, detainees are assigned a lawyer during appeal or review proceedings if they cannot afford to pay themselves. A lawyer is contacted through the *piketcentrale* (duty lawyer service), which is part of the Legal Aid Board (*Raad voor de Rechtsbijstand*). Concerns have been raised about the knowledge of the lawyers assigned in these three countries.

In IT, detainees can receive state-funded legal aid to pay for their lawyers or, if they do not have, cover the costs of lawyers assigned as public defenders. However public defenders are often assigned shortly before the hearing. Legislation in ES explicitly provides for free legal advice for detention-related proceedings. Agreements should be concluded with bar associations so that they provide legal assistance to detainees, but few such agreements have been concluded on so far.

In DE, detainees can apply for legal aid in the context of judicial review of detention, but it is rarely granted, as the provision of legal aid is contingent upon the determination of the chances of success by the court. Detainees rely on legal advice provided free of charge by civil society organisations, including church-based social organisations or refugee councils. In some detention centres, these organisations organise regular visits to detention centres.

Although in BG, detainees theoretically should have access to state-funded legal aid, in practice they are rarely granted it. The underlying challenge is that the person needs to apply for the provision of legal aid, which is difficult to manage within the 14-day deadline for submitting the appeal. In PL, detentions are reviewed based on the code of penal procedure. Thus, detainees should have access to free legal assistance. However, they are rarely granted legal assistance because they lack proper information and are informed about the hearing on short notice. Additionally, detainees in EL are generally not given legal assistance. In these countries, detainees need to rely on civil society organisations, who are not capable of addressing the needs of all detainees. For instance, legal assistance in detention was reduced in PL in 2016 and 2017 due to a lack of funding because of the delay in implementing the AMIF.

## 2.4.5 Safeguards applicable to children

### 2.4.5.1 Unaccompanied children

Article 17(1) of the Return Directive states that UAM should only be detained as a last resort for the shortest possible period of time. According to Article 17(4) of the Directive, as far as possible, UAM should be provided accommodation in institutions equipped with personnel and facilities accounting for the needs of people their age. Under Article 17(5), the best interests of the child should be a primary consideration in the context of the detention of children.

The last resort principle enshrined in the Return Directive is also well established in international law. However, it has been superseded by a norm of non-detention of children put forward by a number of international bodies. According to the Joint General Comment of the UN CRC and the UN Committee on Migrant Workers (CMW), detention is never in the best interest of the child. The principle of the last resort, which is applicable to the detention of children within the juvenile criminal justice system, is not applicable in immigration proceedings because it would be incompatible with the best interests of the child. Hence, UAM should never be detained. Rather, UAM should be placed in an alternative care system.<sup>129</sup>

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<sup>129</sup> CMW and CRC, Joint general comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23 (2017) of the Committee on the Rights of the Child on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return, CMW/C/GC/4-CRC/C/GC/23, 16 November 2017, para. 11-13.

Four approaches can be distinguished. First, several Member States' laws prohibit the detention of UAM, either explicitly (BE, BG, and ES) or by prohibiting their return (FR and IT).

However, in practice, UAM may end up in detention centres in these countries due to inaccurate age assessments. This problem was reported in BG, IT, ES, and FR. In ES, medical age assessments are employed as a rule, rather than an exception. They are applied even if the individual presents official identity proofs or manifestly appears to be a minor. In 2018, 89 UAM were released from detention after being identified as minors in ES. Similarly, 205 minors were released in FR.

In BE, in case of doubt about the age of a person declaring himself or herself at the border as a minor, the person may be held in detention during the age assessment procedure for up to three days. This period is extendable for three more working days in exceptional cases. In FR, a specific procedure is applied for UAM who arrive at the border. They may be confined in waiting zones for the time that is strictly necessary to assess whether they come from a safe country, their asylum claims are inadmissible or manifestly unfounded, or if they threaten the public order.

In BG, UAM may end up in detention not only because of being wrongly identified as adults but also because they may be "attached" to unrelated adults. Upon apprehension, UAM are systematically assigned ("attached") to any of the adults present in the group with whom they travelled. Thus, arrested UAM are not served with a separate detention order but are described as an "accompanying child" in the detention order of the adult to whom they have been assigned. The average duration of detention of "attached" UAM was 12 days in 2019.

Since 2018, new rules have been implemented in BG. They ensure direct referral of UAM from the police to the child protection services. They reform police detention practices for UAM below fourteen years. However, those aged over fourteen years or whose age cannot be evidently established by their appearance still risk being "attached" to unrelated adults or registered as adults. In 2019, 135 UAM were detained, including children detained as "attached". In 2017, 141 "attached" UAM were detained.

In PL, the detention of UAM aged fifteen years or below is prohibited while those UAM who are in the asylum procedure cannot be detained at all. UAM may only be placed in a "guarded centre" (rather than a "deportation-arrest", which has a more restrictive detention regime) and must be separated from adults. In practice, they are placed at the Ketrzyn guarded centre, which has a dedicated section for children. They are separated from the remaining part of the centre. The centre reportedly offers child-friendly conditions and the personnel are attentive to their needs. However, any detention centre has unavoidable features such as the absence of child-specific care and adequate education.

Another group of countries (NL and SE) has specific grounds for UAM to be detained. Regarding the NL, UAM cannot be placed in border detention,<sup>130</sup> unless there are doubts about their age and an age assessment needs to be conducted. UAM can only be placed in territorial detention if (1) they are suspected of or have been convicted for an aggravated offence; (2) their departure can be arranged within 14 days; (3) they have previously absconded from the accommodation centre to an unknown destination or have not complied with ATD; and (4) they have been refused entry at the external border and the minority has not been established yet. UAM can be detained for a maximum of two weeks. This can be extended by two weeks in exceptional cases. When detained, UAM are placed in the Closed Family Facility (*Gesloten Gezinsvoorziening*, GGV) in Zeist where families are also detained (see below).

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<sup>130</sup> As discussed in Sections 2.1.1 and 2.4.6, the NL has a specific regime of detention applicable at its borders, which is not covered by the rules of the Return Directive.

In SE, UAM can be detained under “exceptional circumstances.” The presumption is that children are not detained without specific grounds for detention. These circumstances include if it is likely that the child will be refused entry or when it is necessary to prepare or implement refusal of entry decisions. Children can also be detained if there is an obvious risk of the minor going into hiding, thereby jeopardising the enforcement of an order that should not be delayed and it is not sufficient for the minor to be supervised. The child can also be detained for enforcing or preparing a refusal of entry or expulsion if the supervision was insufficient while enforcing a previous decision. Children can be detained for three days, which is extendable for three days under exceptional circumstances. Reportedly, children are rarely detained in practice.

Finally, the legislation of DE and EL has a general last resort rule applicable to UAM. However, the practice differs considerably between these two countries. In DE, the General Administrative Regulation to the Residence Act provides that minors aged under 16 should not be detained. The regulation and practices differ across German federal states. However, overall, UAM are rarely detained, except during age assessment procedures. In EL, the official policy is to not detain children. However, age assessment procedures are systematically applied and are reportedly unreliable, resulting in children being often wrongfully identified as adults and detained with them. Children can also be placed in “protective custody” pending transfer to an accommodation facility. This measure is systematically prolonged because of a lack of space in reception centres and open shelters. Since August 2019, an average of 200 children has been held in “protective custody” in EL, often in police cells. The number almost doubled compared to the same period in 2018, when less than a hundred children were being held per month.

#### 2.4.5.2 Families with children

Under Article 17(1) of the Return Directive, families with minors should only be detained as a last resort and for the shortest possible period of time. According to Article 17(2) of the Directive, families detained pending removal should be provided with separate accommodation guaranteeing adequate privacy. Article 17(5) further provides that the best interests of the child should be a primary consideration in the context of child pre-removal detention.<sup>131</sup> The aforementioned Joint General Comment of the CMW and CRC laid down the same rules against the detention of families as those about the detention of UAM. According to the committees, families should not be detained but rather should be placed in non-custodial, community-based settings.

A promising practice has been developed in BE. The law does not clearly prohibit the detention of families; rather, it limits this measure. In practice, families with children are not detained except for a short period on arrival (maximum of 48 hours) or just before departure (the night before a removal).

Since 2009, families with children in BE have been placed in so-called *maisons de retour* (referred to as Family Identification and Return Units, FITT, or just family units) or under house arrest. Family units include individual unguarded houses and apartments. Residents enjoy the freedom of movement, with certain restrictions and rules. They have their own house key and can leave the houses with specific rules. Family units function like ATD. However, legally, the families are detained because they receive a return decision and detention order.

Placing families in family units upholds the fundamental rights of the people concerned and is also cost-efficient. At the end of 2016, the average daily cost of a person in a family unit was around 100

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<sup>131</sup> Article 17 of the Directive spells out further safeguards. Under article 17(3), minors in detention should have the possibility to engage in leisure activities, including play and recreational activities appropriate to their age, and shall have, depending on the length of their stay, access to education.

EUR, compared to 200 EUR average detention cost per day. As of 2019, there were 27 housing units (studios, apartments, and houses) in five locations in BE (Zulte, Tielt, Sint-Gillis-Waas, Tubize, and Beauvechain) with a total capacity of 169. A total of 497 persons (218 adults and 279 children) resided in the housing units in 2019, compared to 629 persons in 2018 and 567 in 2017.

However, currently, the family units attract debates because the authorities complain that a considerable proportion of families placed there abscond (in 2016, 38% of the families returned, 35% disappeared, and 27% were released). On the other hand, civil society organisations highlight that better case management would resolve the problem of absconding. MYRIA has called for an external evaluation of and increased funding in the family units.

To discourage families from absconding from family units, in August 2018, the government allowed for the detention of families. Five closed living units for six to eight families were created in the 127bis repatriation centre. Families could be held there for up to a month (14 days, renewable once). According to official sources, the detention is applied when a family manifestly refuses to cooperate with the return procedure, including refusing to leave BE through voluntary return, fleeing their family unit, or posing a risk of absconding. The legal basis for such detention was suspended in April 2019. Between August 2018 and April 2019, only nine families were detained.

Some Member States (DE and SE) tend to detain one family member.

Some states (ES, FR, IT, and PL) frame the detention of families as a way to preserve family unity or as a parent's right to be accompanied by their children. By implication, in such circumstances, children are not subject to an individual detention order. Hence, they are barred from accessing detention-specific guarantees.

In ES, such a measure is possible if the Public Prosecutor allows it and the centre has adequate space to accommodate the families. In IT, the Juvenile Court decides this. In both countries, families are rarely detained.

In FR, children may accompany their parents in detention if they do not respect the house arrest (which is an alternative to detention), abscond, or object to their removal. Such detention is possible based on the consideration of the interest of the child and can last 48 hours preceding the programmed departure. The duration of detention is as short as possible. Such detention is only possible in a place benefiting from isolated and adapted rooms, specifically intended for families.

Families with children cannot be detained at the border in the NL unless there are specific cases such as one of the members having a criminal record or the family ties not being real or credible. In terms of territorial detention, detention of families with children is possible when the grounds are fulfilled by all family members, notably risk of absconding, obstruction of the return procedure, additional information needed for the processing of an application, or public order grounds. Additionally, at least one of the family members must clearly refuse to cooperate. They can be

Table 18: Number of children in detention

MS	Available figures
BG	2019: 216 children including 135 UAM
FR	2018: 208 children in 114 families (but mainly Dublin detention); 2017: 304 children in 147 families
NL	2018: 40 UAM; 2017: 50 UAM; 2017: 133 children in 67 families
PL	2019: 132 children, including 24 UAM 2018: 304 children, including 20 UAM
SE	2019: 6 children 2018: 13 children;

Source: Author's compilation

detained for up to two weeks, but this period can be extended by two weeks if the removal cannot occur, they physically resist or if the parents initiate fresh procedures.

In BG, families with children can be detained “in exceptional circumstances” for a maximum of three months. However, this limit was not always respected in practice in the past.

Regarding the places, both existing detention centres in BG have family units. In FR, six centres have family units. In PL, three of them have family units. In the NL, families with children and UAM have been detained in a specific detention centre (GGV) located in Zeist. Opened in 2016, the facility consists of twelve bungalows for families (each with a capacity of six) and a building with ten single rooms for UAM. The centre ensures the least possible restrictions and adequate material conditions. Additionally, the facilities have been adapted to suit children’s needs.

Table 18 lists the number of children detained in the past years, including UAM and children travelling with their families. Like the total numbers of detainees, discussed above, the number of children may also include children placed in Dublin proceedings.

## 2.4.6 Places of detention

Under Article 16(1) of the Return Directive, detention should, as a rule, occur in specialised detention facilities. Such facilities are to be understood as detention centres only confining people who have been deprived of their liberty under immigration or asylum legislation. However, the use of penitentiaries is not excluded under the Return Directive. In fact, the second sentence of Article 16(1) provides that if a Member State cannot provide accommodation in a specialised detention facility and is obliged to resort to prison accommodation, the concerned people should be separated from ordinary prisoners.

The CJEU strengthened the obligations under Article 16(1). In the joined cases of *Bero and Bouzalmate*, the Court ruled that in line with Article 16(1) of the Directive, states should, as a rule, detain people pending removal in specialised detention facilities. The first sentence of Article 16(1) provides the principle that pre-removal detention should occur in specialised detention facilities. The use of prisons allowed under the second sentence of Article 16(1) represents derogation from that principle which, as such, must be interpreted strictly.<sup>132</sup>

The emphasis on the use of dedicated detention facilities, as opposed to penitentiaries, can be considered one of the key beneficial features of the Return Directive. It ensures that the Directive conforms with the human rights requirements. In a non-immigration case, the ECtHR stressed that there must be a relationship between the grounds for detention that the authorities rely on and the place and conditions of detention.<sup>133</sup> Likewise, the HRC, in its case-law, requires the conditions and regime of detention to correspond with the form of the detention imposed.<sup>134</sup> As administrative detainees, people detained under immigration legislation should be placed in centres, which ensure that the regime and conditions of detention reflect the preventive and non-punitive character of immigration detention.

Member States primarily use dedicated detention centres. However, there are a few exceptions. Until recently, DE confined migrants to specific sections of prisons but after the *Bero and Bouzalmate* ruling (which, in fact, was about this practice) ceased using penitentiaries and opened several

<sup>132</sup> CJEU, *Adala Bero v Regierungspräsidium Kassel and Ettayebi Bouzalmate v Kreisverwaltung Kleve*, C-473/13 and C-514/13, 17 July 2014, para. 15, 28, 32.

<sup>133</sup> ECtHR, *Ashingdane v. the United Kingdom*, 8225/78, (May 28, 1985), para. 44.

<sup>134</sup> HRC, *Fardon v. Australia*, 1629/2007, (May 10, 2010), para. 7(2) and 7(4)(1).

dedicated facilities.<sup>135</sup> However, the country plans to restart using prisons. In SE, adult returnees may be placed in penitentiaries on three grounds.<sup>136</sup> EL has systematically used police and border guard stations for prolonged immigration detention. In fact, apparently, a considerable proportion of immigration detainees are confined within police stations.<sup>137</sup>

Table 19: Dedicated detention facilities

MS	Dedicated detention infrastructure
BE	Management: Immigration Office 6 centres with the capacity of 660 (March 2020) Caricole Transit Centre*, 127bis Repatriation Centre, Vottem, Merksplas, Bruges, Holsbeek
BG	Management: Migration Directorate 2 centres with the capacity of 700 (March 2020) Sofia/ Busmantsi and Liubimets
DE	Management: differs between federal states 11 centres with the capacity of 588 (Jan 2019) Berlin-Lichtenrade, Büren, Darmstadt-Eberstadt, Dresden, Eichstätt, Erding, Hamburg, Hannover (Langenhangen), Ingelheim, Munich Airport (Hangar 3), Pforzheim
EL	Management: Police 8 centres with the capacity of around 6,417 (Dec 2018) Amygdaleza, Corinth, Drama Paranesti, Fylakio, Kos, Moria, Tavros (Petrou Ralli), Xanthi,
ES	Management: National Police 7 centres with the capacity of 1,589 (Dec 2018) Algeciras, Barcelona, Gran Canaria, Madrid, Murcia, Tenerife, Valencia.
FR	Management: Border police 19 centres with the capacity of 1,549 (Dec 2018) Bordeaux, Coquelles, Hendaye, Lille-Lesquin, Lyon Saint-Exupéry, Marseille, Mesnil-Amelot, Metz-Queuleu, Nice, Nîmes, Palaiseau, Paris-Palais de Justice, Paris-Vincennes, Perpignan, Plaisir, Rennes-Saint-Jacques-de-la-Lande, Rouen-Oissel, Sète, Strasbourg-Geispolsheim, Toulouse-Cornebarrieu
IT	Management: Police 7 centres with the capacity of 751 (Feb 2019) Torino, Trapani-Milo, Palazzo San Gervasio-Potenza, Bari-Palese, Caltanissetta-Pian del Lago, Roma-Ponte Galeria, Brindisi-Restinco
NL	Management: Custodial Institutions Service 3 centres with the capacity of 1,446 (Dec 2019) Schiphol*, Rotterdam, Zeist

<sup>135</sup> Currently, besides dedicated detention facilities listed below, DE operates police station in Bremen with the capacity of 20.

<sup>136</sup> These grounds are the following: the person is expelled for having committed a criminal offence; when he or she is being held in isolation in a dedicated detention centre but cannot be held there any longer for security reasons; or for "some other exceptional grounds." Specific units in prisons in Norrtälje and Storboda are used for this purpose.

<sup>137</sup> Besides regular police stations, EL operates two facilities (Thessaloniki aliens police and Athens airport facility) which confine only migrants and asylum seekers but are integrated in the system of police stations.

MS	Dedicated detention infrastructure
PL	Management: Border Guard 7 centres with the capacity of 527 (April 2020) Lesznowola, Białystok, Krosno Odrzańskie, Kętrzyn, Biała Podlaska, Przemyśl (two centres).
SE	Management: Migration Agency 6 centres with the capacity of 502 (May 2019) Gävle, Märsta, Flen, Källered, Åstorp, Ljungbyhed

Source: author's own compilation based on GDP and AIDA websites and interviews

Table 19 gives an overview of the dedicated detention facilities used by the Member States. The Caricole centre in BE and Schiphol centre in the NL are used mainly for border detention, not falling under the Return Directive. BE, DE, and SE, have recently changed or are still changing the detention infrastructure to expand its total capacity.

In addition to the dedicated detention centres, several Member States detain people for a short term in police stations after being apprehended. This typically happens before their accelerated removal or sending the person to the dedicated detention centre. The situation in FR is quite unique because these places are specific to migrants rather than common police stations. FR has a network of over a dozen permanent *locaux de rétention administrative* (LRA), which can confine foreigners for up to 48hrs. LRA are generally located in police stations in such towns as Ajaccio, Bastia, Brest, Chateauroux, Cherbourg, Choisy-le-Roi, Dreux, Epinal, Modane, Nice-Côte d'Azur Airport, Pontarlier, Saint-Louis, Soissons, Tours, and Troye.

In most cases, people are detained in places other than the regular detention facilities listed above in the border-crossing context.<sup>138</sup> The legal framework for such detention is often unclear. Border detention may be applicable to people who were refused entry pursuant to the SBC and to people who were apprehended upon unlawful border crossing. As discussed earlier, states have a possibility under Article 2(2)(a) of the Directive not to apply the Directive in such circumstances.<sup>139</sup> Some countries (including DE, ES, and the NL) conduct asylum procedures at the border under some circumstances. Such procedures would involve detention and is subject to the provisions of the Reception Conditions Directive. If the asylum request is refused, detention would become pre-removal detention, thereby falling under the scope of the Return Directive. Thus, the legal context is convoluted. Additionally, states sometimes claim that holding people in border transit areas does not amount to detention.

Further, the places where border detention is carried out are difficult to map because they are typically located in airport transit areas or border crossing points. In FR, people who have been refused entry are placed in "waiting zones" (*zones d'attente*) designated at various points of entry such as airports, train stations, and harbours that are open to international traffic. The key zones are at the international airports of Charles de Gaulle and Orly. Others are located at harbours such as Marseille and Calais or at train stations, including Paris-Gare du Nord, Lille-Europe, Strasbourg, Nice, and Modane.<sup>140</sup> In ES, there are "transit ad hoc spaces" (*Salas de Inadmisión de Fronteras*) at some airports (Barcelona, Madrid, and Malaga). People are placed here for up to four days, extendable to ten days, during their border asylum procedures. ES does not consider it detention. Likewise, in DE,

<sup>138</sup> Unlike other countries, BE and the NL carry out border detention (applicable to people refused entry or undergoing asylum procedure at the border) in self-standing, well documented, centres (Caricole in BE and Schiphol in the NL).

<sup>139</sup> See Section 2.1.1.

<sup>140</sup> As discussed in Section 2.1.1, people held in transit zones are excluded from the scope of the application of the Return Directive.

people coming from “safe countries” or people who arrive without documents can be placed at the airports (Berlin, Düsseldorf, Frankfurt, Munich, and Hamburg) during airport asylum procedures which can last up to nineteen days. Like ES, DE does not consider it as detention. At ports of entry, if refusal of entry cannot be immediately enforced, the person can be placed in a “detention pending exit” (*Zurückweisungshaft*). Finally, the “hotspots”, established in EL and IT, based on the European Commission’s European Agenda on Migration,<sup>141</sup> may give rise to practices similar to detention. Currently, EL operates five hotspots (officially called reception and identification centres) on the Aegean Islands (Lesvos, Chios, Samos, Leros, and Kos) and IT has four such centres (Pozzallo, Lampedusa, Messina, and Taranto). Newly arrived people are placed there for identification and the length of stay depends on the number of arrivals.<sup>142</sup>

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<sup>141</sup> European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and The Committee of The Regions, A European Agenda On Migration, COM(2015) 240, 13 May 2015.

<sup>142</sup> EL operates additional reception and identification centre in Fylakio which functions in a similar manner as those placed on the Aegean Islands, but it does not belong to the European Commission’s “hotspot approach.”

### 3 Evaluation of the Return Directive according to criteria of the European Commission's Better Regulation Guidelines

This section examines whether the Return Directive has been effective in attaining its objective. When presenting its proposal of the Directive in 2005, the European Commission stressed that “the objective of this proposal is to provide for clear, transparent and fair common rules concerning return, removal, use of coercive measures, temporary custody and re-entry, which take into full account the respect for human rights and fundamental freedoms of the persons concerned.”<sup>143</sup>

According to the CJEU, “the objective of Directive 2008/115 is 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.”<sup>144</sup>

From these statements, it can be inferred that the objective of the Return Directive is to establish clear rules governing four key measures: return decision, implementation of the return decision, entry ban, and detention; whereby, these rules are both effective and compliant with fundamental rights.

Did the Directive reach its objective, or does it require adaptation to better meet evolving needs? The ensuing discussion assesses whether the objective of the Return Directive has been achieved in terms of the criteria set in the European Commission's Better Regulation Guidelines,<sup>145</sup> notably effectiveness, efficiency, relevance, and coherence.

#### Effectiveness

- How successful has the Return Directive been in achieving or progressing towards its objective?
- What are the factors that hinder progress?

As outlined above, the objective of the Return Directive was to set out a common return policy that would be both effective and compliant with fundamental rights. Precisely, the Directive aimed to establish four key measures – return decision, enforcement of the return decision, entry ban, and detention – which are both effective and compliant with fundamental rights.

#### *Return decision*

Regarding the issuance of the return decision, the basic premise set in Article 6(1) of the Directive is that the Member States should issue a return decision to any person staying in an undocumented manner, without prejudice to a few exceptions. None of these exceptions explicitly addresses human rights' obstacles to return, notably the principle of *non-refoulement* and the right to family and private life.

The principle of *non-refoulement* and the right to family life are enumerated in the general human rights clause in Article 5 of the Directive; however, an explicit mention in Article 6 would strengthen

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<sup>143</sup> European Commission, Proposal for a Directive of the European Parliament and of the Council on Common Standards and Procedures in Member States for Returning Illegally Staying Third-Country Nationals, COM(2005)391, (September 1, 2005).

<sup>144</sup> CJEU, Bashir Mohamed Ali Mahdi, C-146/14 PPU, (June 5, 2014), para. 38.

<sup>145</sup> European Commission, Better regulation: guidelines and toolbox (2017), [https://ec.europa.eu/info/law/law-making-process/planning-and-proposing-law/better-regulation-why-and-how/better-regulation-guidelines-and-toolbox\\_en](https://ec.europa.eu/info/law/law-making-process/planning-and-proposing-law/better-regulation-why-and-how/better-regulation-guidelines-and-toolbox_en)

the protection. Furthermore, the exception in Article 6(4), which is relevant to human rights considerations, uses optional language.

Under Article 6(4) of the Return Directive, Member States may decide to grant a residence permit for compassionate, humanitarian, or other reasons, and in this case, they should not issue a return decision. If the return decision has already been issued, it should be withdrawn or suspended. Given the fundamental character of the principle of *non-refoulement*, Article 5 should be read alongside Article 6(4) and preclude issuing the return decision to a person who risks serious violations of their rights upon return.

However, as the assessment has shown, it is doubtful whether national authorities systematically assess *non-refoulement* considerations before issuing a return decision. In particular, if a person has been refused international protection, a return decision is automatically issued after the rejection of asylum or after the first-instance appeal. There appears to be a presumption that the principle of *non-refoulement* was examined in the framework of the asylum procedure. Yet, in most countries, this procedure may lead to either refugee status or subsidiary protection status, none of which is absolute.

Contrary to the prohibition of *refoulement* under Article 3 of the ECHR, these two protection statuses (refugee status or subsidiary protection status) are subject to exceptions and exclusions, often related to penal infractions. This means that not every person who was refused international protection will be safe upon return. Thus, there should either be an *ex officio* assessment of the risk of *refoulement* prior to the issuance of a return decision, or the return procedure should include two steps as originally envisaged by the Commission. Such a procedure would involve the return decision declaring the person's stay as an irregular and enforceable removal decision. Among the examined Member States, only IT has a two-step procedure; yet, the return decision and removal order are, in practice, issued simultaneously.

The absence of an obligatory *non-refoulement* exception not only weakens compliance with human rights but also questions the effectiveness of the return procedure. In terms of human rights protection, to vindicate their protection from *refoulement*, a person would need to appeal against the return decision. To gain access to an effective remedy, the person will often need legal counsel, an interpreter, and substantial time. Article 13(4) of the Directive provides that states should ensure legal assistance or representation is granted upon request and at no fee, in line with domestic rules and subject to certain conditions. However, in many countries, persons subject to the return procedure do not have adequate access to legal aid.

The Return Directive does not regulate the time period for appeal, and states have adopted varying approaches, often having more than one deadline depending on the reason for return. In some circumstances, and in certain countries (EL, FR, NL), the person will have a week or less to lodge an appeal. Further, Article 13(3) of the Directive allows states not to ensure an automatic suspensive effect of appeal. As a result, in most countries covered by this study, the person needs to request suspensive effect of their appeal, typically at the same time as submitting the appeal. Only a few countries provide for automatically suspensive appeal, for instance, FR. This leads to the risk of some persons being removed before the court considers their appeal.

In terms of effectiveness, without a mandatory *non-refoulement* exception, it is undeniable that the return procedure may be applied to persons who should not be subject to this process at all. Likewise, appeal channels are widely used by persons who have not got a chance to get their risks assessed beforehand. Finally, the lack of automatic suspensive effect increases the number of procedures, as persons have to apply for it.

Most Member States do not return UAM, yet only a few explicitly prohibit this measure. In the interest of efficient use of resources and protection of a child's best interests, the return of UAM should be halted unless a child wants to leave to reunite with their family.

#### *Enforcement of the return decision*

With regard to enforcement of the return decision, efficiency and human rights compliance are also questionable. A voluntary departure period is both efficient and in line with human rights. Under Article 7(1) of the Directive, it should be applied as a rule. However, in practice, it is granted in a minority of cases.

First, Article 7(4) lays down the broad grounds upon which a voluntary departure option can be refused. Regarding these grounds, while the genuine risk of absconding can justify refusal of granting the option for a voluntary departure, it is questionable why the remaining two grounds – notably public order considerations and manifestly unfounded application – should bar it.

Second, the period of 7–30 days may be too short for the person to leave in a dignified manner. It cannot be excluded that some people are willing to comply with the return obligation during the period for departure but are yet unable to do so. Furthermore, DE and SE noted that AVRR programmes often need more time than 30 days.

As noted above, the Directive does not preclude issuing a return decision if the return violates the principle of *non-refoulement*. This may result in a situation where the return procedure is applied to a person who should not be returned. The Directive does not remedy this shortcoming at the enforcement stage. Article 9(1) obliges states to postpone removal when it would violate the principle of *non-refoulement*, yet it is short of demanding states to halt the return process, repeal the return decision, and issue a residence permit to the person.

The joint application of the principle of *non-refoulement* in Article 5 and the possibility to issue a residence permit under Article 6(4), should lead to such a scenario. Good practice was observed in SE, where before removal, the Migration Agency will verify *ex officio* whether the circumstances have changed since the decision was issued.

In DE and PL, if removal has been postponed, a permit for tolerated stay may be issued. In PL, a tolerated status is a legal status that can be granted if removal is impossible for reasons independent of enforcing authorities and the person. However, in most countries, when removal is postponed, the person (often referred to as non-deportable) remains in an irregular situation. Such a semi-legal limbo situation may have acute implications on the person's access to socio-economic rights and overall safety and mental integrity. Such situations leave blind spots and grey zones in Member States' return policies, which are neither efficient nor effective. In fact, regularisation schemes should be part and parcel of effective return policies, as not every person in an irregular situation may be returned.

#### *Entry ban*

Under Article 11(1) of the Return Directive, states should impose an entry ban on people who have not been granted a voluntary return or did not comply with the obligation to depart during the prescribed period. In other cases, the Directive provides for state discretion to decide whether to impose this measure. The "shall" provision in Article 11(1) may rule out an individual assessment, disregarding the principle of proportionality. This is reflected at the domestic level, as states generally automatically impose entry bans in those two circumstances.

Arguably, to comply with the principle of proportionality in the context of "mandatory" entry bans under Article 11(1), states should extensively use the possibility not to issue an entry ban under

Article 11(4). A positive practice was identified in BE and FR where the legislation foresees exceptions to the mandatory entry bans for humanitarian reasons.

A threat to impose an entry ban is meant to compel people to comply with the return decision during the period for voluntary departure. It can, indeed, serve this purpose, thereby increasing return effectiveness. Once imposed, the entry ban may, however, have a counter-productive effect, as the person may decide not to leave because return to the EU is barred.

This being said, the “may” provision in Article 11(1) makes it possible for states to issue an entry ban with all returns. Some states, including DE, ES, and IT, do this in practice. Specifically, in ES and IT, persons can reportedly apply for revocation once they have left within the period for voluntary departure. However, such a procedure is cumbersome for the person concerned and increases the bureaucratic burden on state administration.

#### *Detention*

When it comes to detention, Articles 15 and 16 of the Return Directive have several critical safeguards such as last resort, realistic prospect of return, shortest possible duration, assessment of alternatives to detention, review of detention, and emphasis on the use of dedicated detention facilities.

Despite these provisions, it appears that detention is increasingly being perceived as a standard tool for states to implement the return policy. There appears to be a presumption that persons in an irregular situation are generally willing and able to abscond. Yet, there is a lack of research showing the number of persons who flee during return procedures. A long list of criteria for establishing a risk of absconding widens the grounds for detention.

While an individual assessment reportedly takes place in most cases, it is relatively easy for administrative bodies to argue that detention is lawful because the legal basis is wide. Sometimes, it is easier to prove the necessity of detention than the suitability of alternatives to detention. When removal is imminent and the person represents a genuine risk of absconding, detention may be effective in ensuring return. However, longer periods of detention are not effective as most of the removals take place during initial periods of detention.

#### *Efficiency*

- To what extent are the costs of the Directive justified, given the changes/effects it has achieved?
- To what extent are the costs associated with the Directive proportionate to the benefits it generated?

It is difficult to discuss the cost-effectiveness of the Directive, as there is little information available about the costs of various return-related measures. Overall, regardless of the average total cost of return per person, putting in place this procedure with respect to those who cannot be returned is inefficient in itself. An obligatory *non-refoulement*-based exception to the obligation to issue a return decision to any person in an irregular situation would prevent people with valid claims of harm upon return from entering the return process.

The 2019 EPRS Substitute Impact Assessment of the Commission’s Recast Proposal provides some estimated costs of implemented returns. Accordingly, BE incurs approximately 10,338,250 EUR for

around 5,820 returns on an annual basis, DE 104,222,800 EUR for about 39,515 returns, and IT 9,879,725 EUR for around 6,950 returns.<sup>146</sup>

Further, the cost-effectiveness of detention clearly calls for keeping this measure as short as possible. Daily costs per person in detention considerably vary amongst the Member States, on average, between 100 EUR and 200 EUR per day. Most returns take place in the initial period of detention. According to the EPRS Substitute Impact Assessment, the evidence suggests that detention periods of over a month do not increase the return.<sup>147</sup> Hence, after the initial period of detention, the efficiency of detention drops, as the detention time lengthens.

When compared to alternatives to detention, the cost-effectiveness of detention becomes ever more questionable. The value of detention lies solely in cases where the person represents a genuine and high risk of absconding, which non-custodial measures are unable to diminish.

### Relevance

- How do the objectives of the Directive correspond to wider EU policy goals and priorities?
- How well do the original objectives of the Directive still correspond to today's needs within the EU?

The original objectives of the Directive to establish a return policy, which is both effective and compliant with human rights, are still relevant today. Although the Commission currently mainly emphasises the effectiveness of the return policy, there seems to be no justification for this. The Commission's focus on effectiveness (understood as return rate) appears to be related to the reportedly increasing "migratory pressure" on the Member States and the EU as a whole.<sup>148</sup>

However, after 2015, the number of asylum applications dropped to the pre-2015 levels. Essentially, if there was increased pressure on the Member States' return system, human rights obligations should continue to apply and return measures should comply with the established international human rights framework.

In a broader sense, the Return Directive is only partially relevant to the underlying concerns it was supposed to address. Developing common rules on return aimed to tackle "grey areas" in domestic policies that tended to tolerate the semi-legal status of migrants and to ultimately reduce the size of the population of people in an irregular situation in the EU. Responding to the questions in the European Parliament in 2010, the Commission noted that the Return Directive does not allow for limbo situations because states are obliged under the Directive's rules to either launch the return procedure or afford the person a residence title.<sup>149</sup> Yet, as highlighted above, under the non-mandatory terms of Article 6(4), states merely have the possibility to grant a residence title to the person concerned they are not explicitly obliged to.

Further, Article 9(1) of the Directive does not demand repealing the return decision when removal is postponed based on the principle of *non-refoulement*. As a result, non-deportable people most

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<sup>146</sup> European Parliamentary Research Service (EPRS), The proposed Return Directive (recast): Substitute Impact Assessment, February 2019, [https://www.europarl.europa.eu/RegData/etudes/STUD/2019/631727/EPRS\\_STU\(2019\)631727\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2019/631727/EPRS_STU(2019)631727_EN.pdf), pp. 146-147.

<sup>147</sup> Ibid, pp. 9 and 115.

<sup>148</sup> European Commission, Recast Proposal, p. 1.

<sup>149</sup> European Parliament, "Answer given by Ms Malmström on Behalf of the Commission," Parliamentary Questions, April 7, 2010, <http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=P-2010-1687&language=DA>

often remain in a semi-legal limbo situation, contributing to the “grey zones” the Directive was meant to tackle. As a minimum, the Return Directive could provide for a basic tolerated (legal) status.

More broadly, the return policy alone does not reduce the size of irregular populations. Under the international human rights law, not every person in an irregular situation may be returned. Hence, the return policy should be coupled with regularisation programmes.

### Coherence

- To what extent is the Directive coherent internally?
- To what extent is the Directive coherent with the EU migration and asylum policy?
- To what extent is the Directive coherent with international obligations?

#### *Internal coherence*

Overall, the measures laid down in the Return Directive operate together to achieve the objectives of the Directive. However, the possibility to impose an entry ban in cases where a person has left the country during a period for voluntary departure has proven to be counterproductive because this may reduce the incentives for the person to comply with the return decision. More broadly, vague legal language leaves the states with considerable discretion. This leads to differing interpretations of specific provisions at the domestic level, which ultimately undermine internal coherence of the Return Directive.

A case in point is the notion of the risk of absconding. Most states have long lists of criteria for establishing such risk; while some do not even exhaustively enumerate these criteria. The Return Directive could provide that the criteria should be exhaustively enumerated in the domestic legislation and genuinely be linked to the person’s propensity to flee the return process. As the risk of absconding justifies a series of coercive measures, notably forced return, detention, and entry ban, the assessment of this risk should be firmly based on the principle of proportionality, including thorough individual assessment.

#### *Coherence with EU migration and asylum policy*

Since its inception, the return policy has been considered an integral element of the EU asylum and the migration policy based on the presumption that people without a regular status should be returned. Nonetheless, as legal migration still not harmonised at the EU level, the Directive addresses the consequences of an irregular stay, which is defined as such according to the domestic rules. Further, despite the harmonisation of asylum-related rules, the recognition rates for persons of the same nationality are often strongly divergent across the EU.

Another problematic aspect relates to multiple regimes of detention under the EU asylum and the migration law. Currently, there are three regimes of immigration detention: pre-removal detention under the Return Directive, asylum detention under the Reception Conditions Directive, and Dublin detention under the Dublin Regulation. Some procedural rules and protections differ between these regimes, which may not be justifiable, as all the three forms of detention accompany administrative processes applicable to persons who have not committed any crime. There is a lack of synergy between these rules when it comes to the maximum period of detention. These periods can be accumulated; hence, the former asylum seekers risk being detained for longer periods than people who have not applied for international protection.

#### *Coherence with human rights*

Under Article 1 of the Return Directive, the return procedure is in accordance with fundamental rights as the general principles of EU and international law, including refugee protection and human rights obligations. The general human rights clause in Article 5 of the Directive provides that when

implementing the Directive, states should take into account the best interests of the child, family life, and the state of health of the person concerned and respect the principle of *non-refoulement*. What is striking is that Article 5 fails to refer to the right to family life, which includes the length of stay and integration in society. Based on Articles 1 and 5, and specific provisions, the Return Directive can be implemented coherently with human rights. However, sometimes, vague terms and the current emphasis at the EU and the domestic level on the return rate may lead to the interpretation and application of the provisions of the Directive falling short of fundamental rights, including systematic detention and limited procedural protection against return.

## 4 Conclusions and recommendations

Based on the discussion on the implementation of the Return Directive in the ten selected Member States in Section 2 and the evaluation of the Directive according to the criteria of the Commission's Better Regulation Guidelines in Section 3, this section draws the overall conclusions and puts forward policy recommendations.

### 4.1 Overall conclusions

The Return Directive has two key objectives, effective return and return in line with fundamental rights, although in the current discourse, effectiveness is mainly stressed upon and understood as the return rate. The four key measures established in the Directive – return decision, enforcement of the return decision (by means of voluntary return or forcible return), entry ban, and detention – should be applied in line with both fundamental rights and consideration of effectiveness.

Effectiveness:

The four key measures should be applied in a manner which contribute to the effectiveness of return. Some modalities of these measures may however impede the effectiveness of the overall return while at the same time requiring resources.

- A lack of automatic assessment of the principle of *non-refoulement* before starting the return procedure may result in the procedure being applied to those whose return is not possible.
- The absence of the obligation to withdraw the return decision when the risk of *refoulement* is established may imply that the procedures are being postponed for prolonged periods, which is ineffective.
- Detention extended beyond the initial period is inefficient because most of the returns take place in the first few weeks.
- Reducing voluntary departure options is disadvantageous for states, as voluntary return is cheaper and easier to organise.
- Overly short periods for voluntary departure may preclude departure.
- Entry bans imposed alongside voluntary return reduce the incentive to comply with the return decision.

Hence, effectiveness, efficiency, and internal coherence of the measures set forth by the Return Directive may sometimes be questioned. Member States should apply the relevant measures consciously, rather than automatically, and based on the individual assessment of each case. Above all, the effectiveness of the return does not demand reducing human rights protections, as the European Commission's Recommendation on making return more effective proposes. As the study has shown, more and longer detention, lack of voluntary departure options, and systematic entry bans may not necessarily render the EU return policy to be more effective; such measures may not even increase the return rate.

Fundamental rights protection:

The Return Directive frequently leaves the discretion to states with regard to the specific implementation of its provisions. In the context of the current emphasis on the return rate, this leeway may lead to interpretation and application of the provisions of the Directive, which fall short of fundamental rights, in particular:

- There is a risk that the principle of *non-refoulement* is not systematically assessed, in particular with respect to people who were refused international protection.

- People who cannot be returned are left in limbo without even a tolerated status.
- The voluntary departure period is subject to broad exceptions.
- Detention has a wide legal basis; hence, individual assessment easily leads to the conclusion that detention is lawful.
- Alternatives to detention are applied as exceptional measures, rather than the other way around.
- Detention is maintained for prolonged periods when the return is not feasible anymore.
- An entry ban is imposed automatically when voluntary departure has not been granted or not complied with. This disregards individual assessment and the principle of proportionality.
- The risk of absconding can lead to refusal of voluntary departure, imposition of an entry ban, and ordering detention. Despite these consequences, the criteria used by the states are wide and the burden of proof to show the contrary frequently lies with the person concerned.

The four key measures should be implemented in accordance with Member States' human rights obligations. Under Article 5 of the Directive, when implementing the Directive, Member States should observe the best interests of the child, family life, and state of health of the person concerned and respect the principle of *non-refoulement*. In addition, under EU and international human rights law, the states should also observe the right to private life. Further, the principle of proportionality, including the requirement of individual assessment, applies to all the stages of the return process.

From this perspective, Article 6(4) should be interpreted as requiring states not to issue or withdraw the return decision when fundamental rights are at stake and consequently to provide the person with a permit of residence. Further, voluntary departure should be a default option that can only be refused if a genuine risk of absconding has been established. An entry ban should only be issued if a person poses a clear risk to public policy or safety. Finally, detention should be conceived as an exceptional measure to be applied shortly before return, when the risk of absconding cannot be prevented by the application of alternatives to detention.

## 4.2 Policy recommendations

To ensure that the return policy is both effective and compliant with the fundamental rights of the people concerned, Member States should comply with the following recommendations:

- adhere to the principle of non-refoulement and conduct an ex officio assessment prior to issuing a return decision;
- repeal the return decision and grant the person concerned a residence title when removal is deemed in violation of the principle of non-refoulement;
- ensure that people have access to an effective remedy against return, including adequate time and legal aid to prepare for an appeal, while also allowing for an automatic suspensive effect of appeal;
- prioritise voluntary return by refusing it only in the cases of a clear and genuine risk of absconding and affording adequate time for the person to depart;
- ensure adequate funding for the bodies in charge of monitoring forced returns;
- impose entry bans based on the individual assessment of necessity and avoid imposing it when the person has complied with the obligation to return;
- put in place straightforward procedures to repeal the entry ban when the person has proven to have complied with a return decision;
- use detention only as a measure of last resort, to be imposed only where there is a clear and genuine risk of absconding, which cannot be mitigated by non-custodial alternatives to detention;

- maintain detention for as short a period as possible, when removal is imminent;
- cease the detention of unaccompanied children and families with children as a matter of policy.

## Annexes

### Annex A: Research questions

#### **Scope of the application of the Directive**

1. Concerning the scope of the Directive (Article 2): To what extent are MS making use of the faculty under Article 2(2)(a) and (b)?

#### **Challenges to the effective return identified by the Commission**

2. The Commission identified that MS face 'difficulties and obstacles in return procedures to successfully enforce return decisions' (see explanatory memorandum of the recast proposal, pp. 1-2). What is the actual scale of such identified challenges and what is their impact? Could such impact be quantified? Which challenges are prevalent in which MS? Which other challenges do MS face, which prevent them from effectively enforcing return decisions?

#### **Voluntary Departure and Voluntary Return**

3. Which MS automatically grant a voluntary departure term? Which MS grant it only following a request by the third country national? What is the average and/or maximum length of the voluntary departure term in each MS (in law and in practice)? In which cases is this term reduced, when can it be prolonged and when is it abolished (criteria for the application of Article 7)? How many returns were voluntary departures and how many were forced in 2016, 2017, 2018, and 2019?

4. Do MS or the EU provide any support in the course of voluntary or forced return process? If so, what kind of support is provided, and with which effect? How is the post-return/reintegration support monitored? How many returnees used the possibility of assisted voluntary return? What criteria should returnees fulfil to be able to benefit from assisted voluntary return programmes? Which actors are involved in the implementation of the assisted voluntary return programmes?

5. What kind of returns (voluntary v. forced) are considered sustainable returns? [The sustainability of returns should be assessed in light of whether returnees come back to the EU irregularly or not.] Does it happen to MS to apprehend a person who had already been returned earlier? If so, was the initial return commonly a voluntary or forced one? Are any figures regarding this phenomenon available?

6. The EP substitute impact assessment found voluntary return is generally more cost-effective, referring to a 2010 UNHCR study. The substitute impact assessment compared data from BE, DE, IT and CZ. What are the costs for voluntary and forced returns in other MS?

#### **Entry Bans**

7. What criteria are used for imposing an entry ban in line with Article 11 (in both law and practice)? Does an individual assessment of proportionality of entry ban in the specific case take place? What is the length of the entry bans imposed by MS (both in law and practice)? How many entry bans did MS issue in 2016, 2017, 2018, and 2019? How many of these bans were valid across the Schengen area (i.e. were registered in the Schengen Information System)?

8. Do entry bans prove to have a deterrent or counterproductive effect on (potential) irregular migrants (considering that the purpose of the entry bans is to prevent irregular migrants to enter EU Member State territory)?

### **Procedural Safeguards**

9. How are the safeguards applied in practice? Does return decision always provide legal and factual reasons for return? In what cases it does not include factual reasons? In which language is the decision issued and/or translated? To what extent provisions covered by Article 12 and 13 are consistently applied?

10. What is the deadline for lodging an appeal against a return decision? If it is lodged, does it always have suspensive effects? If not, what are the cases in which it has suspensive effects? Do returnees receive information of remedies available against a return decision in a language they understand? Do they always benefit from legal aid before lodging their appeal against a return decision?

11. How are the principles of proportionality and necessity, the best interests of the child, *non-refoulement*, safeguarded in legislation? How are these principles safeguarded in practice?

### **Detention and Risk of Absconding**

12. What are the grounds and criteria on the basis of which third country nationals subject to a return decision are detained? Does an individual assessment of necessity and proportionality of detention take place, and is the decision motivated? Which criteria do MS use for defining a risk of absconding? Which criteria are used for defining lack of cooperation on return or obstruction? Which criteria are used for defining 'a reasonable prospect of removal'? How many third-country nationals were placed in pre-removal detention in 2016, 2017, 2018, and 2019?

13. What are the rules for the detention of children and families? What are the rules for the detention of unaccompanied minors? How is the assessment of the best interest of the child conducted? How many unaccompanied children and children with families were detained in 2016, 2017, 2018, and 2019?

14. What are the actual (average and/or maximum) detention periods of irregular migrants? In which cases is the maximum time limit used? Is there any information about the impact of detention (and the length of it) on the actual return of the person or other types of impact?

15. What is the form of a periodical review of detention? Which body carries it out? Can detainees appeal their detention?

16. Which alternatives to detention are developed and applied, and with which effect? Which MS use such alternatives to detention? How many people were granted alternatives to detention in 2016, 2017, 2018, and 2019?

17. Did MS observe that higher numbers of detainees lead to more removals? Did MS observe a correlation between the length of detention and effectiveness of return (i.e. the number of actual returns)?

18. More generally, does detention have a deterrent effect on (potential) irregular migrants or other effects (such as absconding)?

### **Experiences with the implementation of soft law instruments**

19. How have the soft law instruments on Return (2017 Recommendations and 2017 Return Handbook) been implemented and used in MS? Have they been effective? What has been their impact?

**Questions relating to unaccompanied minors (apart from the detention question)**

20. Do MS issue return decision in relation to unaccompanied minors? How are the interest of the unaccompanied minors protected during the procedure and possible appeals against that decision? How many return decisions were issued to unaccompanied children and enforced in 2016, 2017, 2018, and 2019? If the answer to the first question is yes, how many unaccompanied minors were returned to their country of origin and how many to a country of transit or to another country of return in 2016, 2017, 2018, and 2019 (Article 3.3 of the Return Directive)? In addition, how many were returned to their relatives, how many to a nominated guardian and how many to a reception facility in the State of return in these years?

**Return Decision and its implementation**

21. To what extent do MS issue return decisions to irregularly staying third country nationals, in particular out of the total number of return decisions issued in 2016, 2017, 2018, and 2019, how many concerned individuals who: -entered irregularly in the territory of the MS; -had a visa or a residence permit, but it has expired;-received a negative final decision concerning their refugee status; -lost their refugee status?

22. To what extent do MS apply the exceptions provided for under Articles 6(4) of the Return Directive in relation to the obligation to issue a return decision?

23. In which moment of the return process is the risk of *refoulement* assessed? What does amount to *refoulement* according to states' domestic legislation?

24. Under which circumstances are return decisions suspended, and are there special rights during this suspension? Is there any specific framework, or rules, for obtaining a residence permit? The Directive neither obliges nor forbids MS regularising those third-country nationals whose return decisions cannot be enforced (C-146/14 PPU), leaving MS a margin of discretion to adopt such decisions. To what extent MS use of this option?

25. Out of the total number of third-country nationals returned (both via voluntary and forced return procedures) in 2016, 2017, 2018, and 2019, how many were returned to their country of origin, how many to a transit country, and how many to another third country?

26. What are the main deficiencies in MS on return procedures, and how could they be solved? What elements could be considered as 'best practices'?

27. Which actors monitor removals? What is their scope of action?

**Potential additional questions (depending on feasibility)**

28. Has the irregular stay or entry of non-EU nationals been criminalised? If yes, in which MS and in what way? How frequently criminal penalties are imposed for irregular entry or stay?

29. How is the right to data protection of persons falling under scope of the Return Directive safeguarded?

## Annex B: Questionnaire sent to the ten selected Member States (BE, BG, DE, EL, ES, FR, IT, NL, PL, and SE) on 7 February 2020

### Scope of the application of the Directive

1. Does your administration use the possibility under Article 2(2)(a) and (b) of the Directive not to apply the Directive to certain categories of third-country nationals?<sup>1</sup> If so, in which cases?

### Return decision and its implementation

2. To which of the following categories do people receiving return decisions in your country most frequently belong?
  - entered irregularly your territory (including from another Member State)
  - received a negative final decision concerning their asylum application
  - had a visa or a residence permit but it has expired or was withdrawn
  - lost their refugee status or subsidiary protection status?
3. In which circumstances does your administration apply the possibility under Article 6(4) of the Directive<sup>2</sup> to issue an authorisation to stay instead of return decision?
4. Does your administration have statistics related to the numbers of return decisions issued? If so, how many return decisions were issued in your country and enforced with respect to unaccompanied minors (in 2016, 2017, 2018, and 2019)?, What are the procedures in place to ensure that the best interests of the unaccompanied minors are protected during the return procedure?

What are the most common reasons for which a return decision is not enforced in your country? Does your administration face obstacles identified by the Commission,<sup>3</sup> such as

- Absconding and secondary movement of third-country nationals
- Lack of cooperation of third-country nationals

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<sup>1</sup> Under Article 2(2) of the Directive, States may decide not to apply the Directive to third-country nationals who:  
(a) are subject to a refusal of entry in accordance with Article 13 of the Schengen Borders Code, or who are apprehended or intercepted [...] in connection with the irregular crossing [...] the external border of a Member State and who have not subsequently obtained an authorisation or a right to stay in that Member State;  
(b) are subject to return as a criminal law sanction or as a consequence of a criminal law sanction, according to national law, or who are the subject of extradition procedures.

<sup>2</sup> Under Article 6(4), Member States may [...] decide to grant an autonomous residence permit or other authorisation offering a right to stay for compassionate, humanitarian or other reasons to a third-country national staying illegally on their territory. In that event no return decision shall be issued. Where a return decision has already been issued, it shall be withdrawn or suspended for the duration of validity of the residence permit or other authorisation offering a right to stay.

<sup>3</sup> European Commission, Proposal for a Directive of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third-country nationals (recast), COM(2018) 634, 12 September 2018, p. 1-2.

- Lack of exchange of necessary information between competent authorities to carry out return
- Lack of cooperation of countries of origin?

If the person remains on your territory, is the removal postponed according to Article 9 of the Directive?<sup>4</sup> During such period, what is the status of the person concerned?

### **Voluntary departure**

5. Does your administration automatically grant a voluntary departure period, or only following a request by the third-country national? In which circumstances is voluntary departure period not granted?
6. What is the average and/or maximum length of the voluntary departure period in practice? In which cases is this term reduced and when can it be prolonged?
7. Does your administration offer assisted voluntary return (and reintegration) options? What kind of support does it include? What criteria should returnees fulfil to be able to benefit from assisted voluntary return programmes?

### **Entry Ban**

8. In which circumstances are entry bans imposed in practice in your country? Does an individual assessment of proportionality of entry ban in the specific case take place or is such decision automatic?
9. What is the average length of the entry bans in practice?
10. Does your administration have statistics related to the issuance of entry bans? If so, how many entry bans were issued in your country (in 2016, 2017, 2018, and 2019)? How many of these bans were valid across the Schengen area (i.e. were registered in the Schengen Information System)?
11. What are the consequences for the individuals who are apprehended during the validity of entry ban?

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<sup>4</sup> Under Article 9 of the Directive

1. Member States shall postpone removal:
  - (a) when it would violate the principle of non-refoulement, or
  - (b) for as long as a suspensory effect is granted in accordance with Article 13(2) [during appeal]
2. Member States may postpone removal for an appropriate period taking into account the specific circumstances of the individual case. Member States shall in particular take into account:
  - (a) the third-country national's physical state or mental capacity;technical reasons, such as lack of transport capacity, or failure of the removal due to lack of identification.

**Detention**

12. In your country, on what grounds are third-country nationals most frequently detained pending removal? In which circumstances will the person be considered as posing a risk of absconding or obstructing/hampering return?
13. Does your administration have statistics related to the numbers of third-country nationals placed in pre-removal detention? If so, how many third-country nationals were placed in preremoval detention in 2016, 2017, 2018, and 2019? How many were granted alternatives to detention in these years? How many people subject to alternatives to detention absconded?
14. If these statistics are available: How many minors and families with minors were detained in 2016, 2017, 2018, and 2019? How is the assessment of the best interest of the child conducted in these cases?
15. In your country, what is the average length of detention in practice?

**Data protection**

16. How is the right to data protection of persons subject to return procedures safeguarded?

## Annex C: List of questionnaires received

Germany: Permanent Representation to the European Union

France: Forum Réfugiés-Cosi

Spain: Servicio Jesuita a Migrantes (SJM)

## Annex D: List of interviews conducted

1. Stefan Kessler, Jesuit Refugee Service (JRS) Germany
2. Forum Réfugiés-Cosi (FR)
3. Sweden Permanent Representation to the European Union
4. Tamás Molnar, European Union Agency for Fundamental Rights (FRA)
5. Sofia Häyhtiö, Network of Refugee Support Groups (FARR) (SE)
6. Belgium Permanent Representation to the European Union
7. Servicio Jesuita a Migrantes (SJM) (ES)
8. Angelina van Kampen, Dutch Council for Refugees (NL)
9. Valeria Ilareva, Foundation for Access to Rights (FAR) (BG)
10. Małgorzata Jaźwińska, Association for Legal Intervention (PL)
11. Deborah Weinberg, Centre federal Migration (MYRIA) (BE)
12. Alexandros Konstantinou, Greek Council for Refugees (EL)
13. Official, Eurostat: Asylum and managed migration statistics
14. Official, European Commission
15. Lucia Gennari, Association for Juridical Studies on Immigration (ASGI) (IT)
16. French Permanent Representation to the European Union
17. Annemarie Busser, Amnesty International Netherlands (NL)
18. Louise Diagre, Association pour le droit des étrangers (ADDE) (BE)

## Annex E: Principal country-specific sources

<p><b>Belgium</b></p> <p>Loi sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers:  <a href="http://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=fr&amp;la=F&amp;cn=1980121530&amp;table_name=loi">http://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=fr&amp;la=F&amp;cn=1980121530&amp;table_name=loi</a></p>
<p>Interview and email exchanges with Centre federal Migration (Myria)</p> <p>Interview and email exchanges with Association pour le droit des étrangers (ADDE)</p> <p>BE EMN NCP, The effectiveness of return in EU Member States, 2018</p> <p>BE EMN NCP, Challenges and Practices for Establishing the Identity of Third-country Nationals in Migration Procedures, 2017</p> <p>BE EMN NCP, Policies, Practices, and Data on Unaccompanied Minors, 2014</p> <p>BE EMN NCP, Good Practices in the Return and Reintegration of Irregular Migrants, 2014</p> <p>BE EMN NCP, The Use of Detention and Alternatives to Detention in the Context of Immigration Policies, 2014</p> <p>BE EMN NCP, Information on Voluntary Return, 2015.</p> <p>BG EMN NCP, Comparative overview of national protection statuses in the EU and Norway, 2019</p> <p>Myria, Un nouveau cadre pour la politique de retour en Belgique, 2014</p> <p>Myria, Retour, detention et éloignement des étrangers en Belgique, 2018</p> <p>Myria, Retour, detention et éloignement des étrangers en Belgique, 2017</p> <p>Myria, Le retour, la détention et l'éloignement des étrangers en 2018: Myriatics 11, 2020</p> <p>Flemish Refugee Action, AIDA Country Report: Belgium 2019, ECRE, 2020</p> <p>Global Detention Project: Detention profile: Belgium, 2020</p>
<p><b>Bulgaria</b></p> <p>Law on Aliens in the Republic of Bulgaria: <a href="https://www.lex.bg/laws/ldoc/2134455296">https://www.lex.bg/laws/ldoc/2134455296</a></p> <p>English version (until 2016): <a href="https://bit.ly/2xG9evM">https://bit.ly/2xG9evM</a></p>
<p>Interview and email exchanges with Foundation for Access to Rights (FAR)</p> <p>BG EMN NCP, Approaches to Unaccompanied Minors Following Status Determination, 2017</p> <p>BG EMN NCP, Returning Rejected Asylum Seekers, 2016</p> <p>BG EMN NCP, Good Practices in the Return and Reintegration of Irregular Migrants, 2014</p> <p>BE EMN NCP, Good Practices in the Return and Reintegration of Irregular Migrants, 2014</p> <p>BG EMN NCP, The Use of Detention and Alternatives to Detention in the Context of Immigration Policies, 2014</p> <p>BG EMN NCP, Comparative overview of national protection statuses in the EU and Norway, 2019</p> <p>CPT, Report to the Bulgarian Government on the visit to Bulgaria carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 10 to 17 December 2018, CPT/Inf (2019) 24, July 2019</p> <p>FAR, Analytical report on the exercise by detained immigrants of the right to be heard in Bulgaria, 2016</p> <p>Bulgarian Helsinki Committee, AIDA Country Report: Bulgaria 2019, ECRE, 2020</p> <p>Global Detention Project: Detention profile: Bulgaria, 2019</p>

<b>France</b>
Code de l'entrée et du séjour des étrangers et du droit d'asile: <a href="https://www.legifrance.gouv.fr/affichCode.do?cidTexte=LEGITEXT000006070158">https://www.legifrance.gouv.fr/affichCode.do?cidTexte=LEGITEXT000006070158</a>
<p>Interview with French Permanent Representation to the European Union</p> <p>Questionnaire filled out by Réfugiés-Cosi</p> <p>Interview and email exchanges with Forum Refugies</p> <p>FR EMN NCP, Policies, Practices, and Data on Unaccompanied Minors, 2014</p> <p>FR EMN NCP, Good Practices in the Return and Reintegration of Irregular Migrants, 2014</p> <p>FR EMN NCP, Information on Voluntary Return, 2015</p> <p>FR EMN NCP, Comparative overview of national protection statuses in the EU and Norway, 2019</p> <p>Assemblée Nationale, immigration, asile et intégration, 2019</p> <p>ASSFAM, La Cimade, Forum réfugiés, France terre d'asile et l'Ordre de Malte France, Centres et locaux de rétention administrative 2018</p> <p>Association nationale d'assistance aux frontières pour les étrangers (Anafé), Le controle des frontieres et l'enfermement en zone d'attente, 2019</p> <p>Forum Réfugiés – Cosi, AIDA Country Report: France 2019, ECRE, 2020</p> <p>Global Detention Project: Detention profile: France, 2018</p>
<b>Germany</b>
Act on the Residence, Economic Activity and Integration of Foreigners in the Federal Territory Residence Act: <a href="https://www.gesetze-im-internet.de/englisch_aufenthg/">https://www.gesetze-im-internet.de/englisch_aufenthg/</a>
<p>Questionnaire filled out by Germany Permanent Representation to the European Union</p> <p>Interview and email exchanges with Jesuit Refugee Service (JRS)</p> <p>DE EMN NCP, Approaches to Unaccompanied Minors Following Status Determination, 2017</p> <p>DE EMN NCP, Returning Rejected Asylum Seekers, 2016</p> <p>DE EMN NCP, Policies, Practices, and Data on Unaccompanied Minors, 2014</p> <p>DE EMN NCP, Good Practices in the Return and Reintegration of Irregular Migrants, 2014</p> <p>DE EMN NCP, The Use of Detention and Alternatives to Detention in the Context of Immigration Policies, 2014</p> <p>DE EMN NCP, The effectiveness of return in EU Member States, 2017</p> <p>DE EMN NCP, Challenges and Practices for Establishing the Identity of Third-country Nationals in Migration Procedures, 2017</p> <p>DE EMN NCP, Information on Voluntary Return, 2015</p> <p>Informationsverbund Asyl und Migration, AIDA Country Report: Germany 2018, ECRE, 2019</p> <p>Global Detention Project: Detention profile: Germany, 2017</p>
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<p>Interview and email exchanges with Greek Council for Refugees</p> <p>EL EMN NCP, Policies, Practices, and Data on Unaccompanied Minors, 2014</p> <p>EL EMN NCP, Good Practices in the Return and Reintegration of Irregular Migrants, 2014</p> <p>EL EMN NCP, The Use of Detention and Alternatives to Detention in the Context of Immigration Policies, 2014</p>

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**Spain**

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- BG: Law on Aliens in the Republic of Bulgaria: <https://www.lex.bg/laws/ldoc/2134455296>
- FR: Code de l'entrée et du séjour des étrangers et du droit d'asile:  
<https://www.legifrance.gouv.fr/affichCode.do?cidTexte=LEGI TEXT000006070158>
- DE: Act on the Residence, Economic Activity and Integration of Foreigners in the Federal Territory Residence Act:  
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- IT: Testo unico sull'immigrazione: <https://www.altalex.com/documents/news/2014/04/08/testo-unico-sull-immigrazione-titolo-ii#titolo2>
- NL: Aliens Act <https://wetten.overheid.nl/BWBR0011823/2020-01-01>  
 Aliens Decree: <https://wetten.overheid.nl/BWBR0011825/2019-07-01#Opschrift>
- PL: Aliens Act: <http://prawo.sejm.gov.pl/isap.nsf/download.xsp/WDU20130001650/U/D20131650Lj.pdf>
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# Part III: The External Dimension of the EU Return Directive

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Study

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## Executive summary

This study presents an overview of the externally applicable policy and legal frameworks that operationalise the return and readmission of irregularly staying third country nationals under the Return Directive.

The increasing emphasis by the European Commission on the rate of return as a primary indicator of effectiveness runs the risk of incentivising return ‘at all costs’. Against this backdrop, the study seeks to provide context by mapping the formal and informal agreements that operationalise return and readmission and the key fundamental rights obligations owed to persons in a return situation.

The study provides an analysis of the extent to which those agreements (against the current legal framework) make provision for safeguarding of fundamental rights. The study then proceeds to explore the avenues for accountability under those agreements, before exploring key implications on EU external affairs. In exploring the concept of “effectiveness”, the study seeks to learn whether it is presently possible to come to a concluded view about the effectiveness of the EU return and readmission policy and whether the return rate should be the primary indicator of “effectiveness”.

The study finds that EU return and readmission policy has increasingly resorted to informal cooperation in the external dimension, which has paralleled the emergence of an informalisation of EU return policy in the internal dimension. The emergence of informal means of cooperation has also witnessed an increased emphasis on operationalising returns and the rising prominence of Frontex in the field of return and in the external dimension, particularly in light of the recent conclusion of Status Agreements with third countries.

The study identifies four main types of agreements: (1) formal EU readmission agreements (“EURAs”), (2) informal agreements, (3) Frontex Working Arrangements and (4) Frontex Status Agreements.

Against the backdrop of key fundamental rights applicable to persons in a return context, it finds that although EURAs contain references to international human rights conventions, there is a disjunction in the procedural safeguards available to persons returned to third countries. Although often characterised as “technical instruments”, it is arguable that they cannot be viewed in isolation from EU secondary law and jurisprudence on international protection and return.

Some EURAs may also have an indirect effect on the legality of pre-removal detention. The informal agreements on return contain minimal references to fundamental rights. Central to determining immunity from criminal, civil, and administrative proceedings in third countries is the Operational Plan in Frontex Status Agreements, but which are absent in the context of return operations in third countries. The provisions on data processing in Status Agreements do not reflect the current prohibition under the EBCG Regulation against onward transfer of personal data.

In terms of accountability, the study finds a need for post-return monitoring to understand the fate of returned persons. It notes the lack of accountability of informal agreements both to the European Parliament and Court of Justice of the EU, and highlights the limited avenues for ex ante budgetary accountability by the Parliament for EU Trust Funds directed towards EU external migration policy as identified in an earlier study.

The inaccessibility, even to affected persons, of complete Frontex Operational Plans is identified as a significant obstacle to judicial accountability. Indeed, the ECHR and EU public liability mechanisms do not completely provide for the attribution of responsibility or liability in multiple-actor contexts in which Frontex operates.

The implications on EU external affairs has seen EU return and readmission policy resort to incentivisation. Conditionality has obscured the lines between international development and

humanitarian aid principles. The conclusion of readmission agreements has incentivised other third countries to conclude readmission agreements in a “domino effect” that shifts, rather than shares, responsibility for forced migrant populations.

Reliance on the return rate as the primary indicator of policy effectiveness is methodologically questionable, particularly in the absence of a qualitative assessment – underscoring the need for post-return monitoring and relevant indicators concerning the circumstances of returned individuals.

Funding instruments related to EU external migration subjected to scrutiny by the European Court of Auditors has underscored past challenges to assess impact on account of a lack of specificity of objectives and inadequate monitoring.

### Key findings

- EU return and readmission policy has increasingly resorted to informal cooperation in the external dimension, which has paralleled the emergence of an informalisation of EU return policy in the internal dimension. The emergence of informal means of cooperation has also witnessed an increased emphasis on operationalising returns and the rising prominence of Frontex in the field of return and in the external dimension.
- Although formal EU readmission agreements (“EURAs”) contain references to international human rights conventions, there is a disjunction in the procedural safeguards available to persons returned to third countries. Although often characterised as “technical instruments”, it is arguable that they cannot be viewed in isolation from EU secondary legislation and jurisprudence on international protection and return.
- The non-affected clauses contained in EURAs, although in some cases identifying international human rights treaties, do not provide any guarantee of the rights contained in those treaties to the persons to be readmitted or any obligation on the part of the third country to provide them.
- Some EURAs may have an indirect effect on the legality of pre-removal detention.
- EURAs are silent on human rights monitoring of returned persons.
- Informal agreements on return contain minimal references to fundamental rights.
- Only a limited number of Frontex Working Arrangements contain an express reference to “full respect for fundamental rights”.
- Suspension or termination of an action in cases of a breach of fundamental rights, a violation of the principle of *non-refoulement* or a breach of data protection rules under Status Agreements is discretionary, not an obligation to do so.
- Although Status Agreements allow for the ability to restrict access, use, onward transfer and destruction of personal data, the Status Agreements do not contain a prohibition on the onward transfer of personal data to third countries or third parties now contained in the EBCG Regulation.
- There is a lack of monitoring on the fate of persons returned to third countries.
- There is a lack of accountability of informal agreements both to the European Parliament and the Court of Justice of the EU. There are limited avenues for ex ante budgetary accountability by the Parliament for EU Trust Funds directed towards EU external migration policy, as identified in an earlier European Parliament study.
- Access to complete Frontex Operational plans, even to affected persons, presents a significant obstacle to judicial accountability. ECHR and EU public liability mechanisms do not completely provide for the attribution of responsibility or liability in multiple-actor contexts in which Frontex operates.

- A liability gap exists in relation to Frontex statutory staff under Frontex Status Agreements.
- The implications on EU external affairs has seen EU return and readmission policy resort to incentivisation. Conditionality has obscured the lines between international development and humanitarian aid principles. The conclusion of readmission agreements has incentivised other third countries to conclude readmission agreements in a “domino effect” that shifts, rather than shares, responsibility for forced migrant populations.
- Reliance on the return rate as the primary indicator of policy effectiveness is methodologically questionable, particularly in the absence of a qualitative assessment – underscoring the need for post-return monitoring and relevant indicators concerning the circumstances of returned individuals.
- Funding instruments related to EU external migration subjected to scrutiny by the European Court of Auditors has underscored past challenges to assess impact on account of a lack of specificity of objectives and inadequate monitoring.

## Policy recommendations

### Safeguarding of Fundamental Rights

- Recommendation 1: Avenues should be explored to obtain commitments from third countries of return that ensure readmitted persons have access to the substantive rights contained in the international human rights treaties identified in EURAs, including access to the asylum procedure if returned under the Safe Third Country concept provisions.
- Recommendation 2: Further research should be undertaken to determine the extent to which time limits contained in EURAs that are linked to a maximum period of detention in requesting states are used in practice and their impact, if any, on the legality a person’s detention.
- Recommendation 3: The European Commission should undertake fundamental rights impact assessments before concluding a EURA with a third country.
- Recommendation 4: Frontex Working Arrangements should contain express references to fundamental rights guarantees that reflect Frontex’s obligation to guarantee fundamental rights under the EBCG Regulation.
- Recommendation 5: To suspend or terminate an action under a Status Agreement in the case of a breach of fundamental rights should be obligation.
- Recommendation 6: Status Agreements should include a prohibition on the onward transfer of personal data consistent with the obligation under the EBCG Regulation.

### Accountability

- Recommendation 7: The European Commission should undertake a comprehensive and objective evaluation of EURAs and their implementation.
- Recommendation 8: Post-return monitoring of persons returned to third countries should be undertaken to ensure the fate of returned persons and the challenges they face.
- Recommendation 9: Obstacles to accessing complete Operational Plans by those directly affected should be removed.
- Recommendation 10: The European Parliament should be informed about cooperation instruments, ‘delegated’ working arrangements and documents of a similar character which emanate from, or consolidate, Frontex Working Arrangements.
- Recommendation 11: The liability of Frontex statutory staff exercising executive powers in a third country should be expressly contemplated in Frontex Status Agreements.

- Recommendation 12: Avenues should be explored, and reform undertaken, to ensure attribution of responsibility under ECHR and EU public liability law in multiple actor contexts.

#### Implications on EU External Affairs

- Recommendation 13: International development and humanitarian aid principles should be subject to greater demarcation from EU funding for migration-related outcomes.

#### Effectiveness

- Recommendation 14: Any quantitative assessment of the performance of EU return and readmission policy should be accompanied by a qualitative assessment.
- Recommendation 15: Avenues should be explored to identify measurable indicators pertinent to the readmitted individual to enable an evaluation of the circumstances of their return and fate.

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## List of acronyms

<b>ACP</b>	African, Caribbean and Pacific Countries
<b>CAMM</b>	Common Agenda on Migration and Mobility
<b>CAT</b>	United Nations Convention Against Torture
<b>CSDP</b>	Common Security and Defence Policy
<b>CFR</b>	EU Charter of Fundamental Rights
<b>CIS</b>	Commonwealth of Independent States
<b>DPD</b>	Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data on the free movement of such data
<b>CJEU</b>	Court of Justice of the European Union
<b>EAM</b>	European Agenda on Migration
<b>EBCG</b>	European Border and Coast Guard Agency/ Frontex
<b>ECA</b>	European Court of Auditors
<b>ECHR</b>	European Convention on Human Rights
<b>ECRE</b>	European Council on Refugees and Exiles
<b>ECtHR</b>	European Court of Human Rights
<b>EDF</b>	European Development Fund
<b>EDPS</b>	European Data Protection Supervisor
<b>EEAS</b>	European External Action Service
<b>ENP</b>	European Neighbourhood Partnership
<b>ENPI</b>	European Neighbourhood and Partnership Instrument
<b>EoL</b>	Exchange of Letters
<b>EURA</b>	European Union Readmission Agreement
<b>EUTF</b>	EU Trust Fund
<b>EUTF for Africa</b>	EU Emergency Trust Fund for stability and addressing the root causes of irregular migration and displaced persons in Africa
<b>FRA</b>	EU Fundamental Rights Agency
<b>FRD</b>	Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification
<b>FRT</b>	Facility for Refugees in Turkey
<b>GAM</b>	Global Approach to Migration

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<b>GAMM</b>	Global Approach to Migration and Mobility
<b>GDPR</b>	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)
<b>ICCPR</b>	International Covenant on Civil and Political Rights
<b>ILO</b>	Immigration Liaison Officer
<b>JRC</b>	Joint Readmission Committee
<b>LIBE</b>	European Parliament Committee on Civil Liberties, Justice and Home Affairs
<b>LTR</b>	Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long term residents
<b>MARRI</b>	Migration, Asylum, Refugees Regional Initiative
<b>MB</b>	Frontex Management Board
<b>MEE</b>	Measures having Equivalent Effect
<b>MFF</b>	Multiannual Financial Framework of the EU
<b>PACE</b>	Parliamentary Assembly of the Council of Europe
<b>PD</b>	Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status
<b>PF</b>	Partnership Framework
<b>RCD</b>	Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers
<b>RD</b>	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.
<b>SBC</b>	Schengen Borders Code
<b>SOP</b>	Standard Operating Procedures
<b>TEC</b>	Treaty Establishing the European Community
<b>TFEU</b>	Treaty on the Functioning of the European Union
<b>TPMA</b>	Thematic Programme for Migration and Asylum
<b>UDHR</b>	Universal Declaration of Human Rights
<b>UIDPR</b>	Regulation (EU) 2018/1725 of the European Parliament and of the Council of 23 October 2018 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data, and repealing Regulation (EC) No 45/2001 and Decision No 1247/2002/EC

# 1. Introduction

## 1.1. Background

The European Union's policy on the return of irregularly staying third-country nationals consists of both an internal and external dimension.

The internal dimension is governed by the operation of the Return Directive<sup>1</sup> which provides for harmonised rules on the return and removal of irregularly staying third country nationals from the territory of a Member State. A third country national may also fall within the scope of the Return Directive through the operation of EU secondary legislation on asylum on account of the person's unsuccessful substantive application or his or her inadmissible application under the Safe Third Country or First Country of Asylum concepts.<sup>2</sup> However, Member States retain the discretion not to apply the Return Directive in connection with an external border crossing or criminal sanction,<sup>3</sup> but which must, in any event, ensure certain standards of protection under the Directive, including respect for the principle of *non-refoulement*.<sup>4</sup>

The external dimension of the return policy is operationalised by EU readmission agreements ("EURAs") with third countries and informal agreements having an equivalent effect as well as operational measures carried out by the European Border and Coast Guard Agency ("Frontex") that facilitate return. The purpose of these agreements is to secure cooperation with third countries for "a swift and efficient readmission procedure"<sup>5</sup> to readmit their nationals and, in some circumstances, non-nationals, from the territories of EU Member States.

Cooperation with third countries can have human rights consequences for those subject to a return decision in EU Member States. EURAs are the medium through which EU internal removal policy

<sup>1</sup> [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 ("Return Directive").

<sup>2</sup> An asylum application may be substantively examined (that is, on its merits) or may be declared to be procedurally inadmissible (that is, the application is administratively precluded from being examined on its merits) on at least two bases. First, under the "first country of asylum" provisions where that a person has been recognised as a refugee in another country or "otherwise enjoys sufficient protection" and that the person will be readmitted to that country – see Articles 33(2)(b) and 35 of [Directive 2013/32/EU](#) of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast) ("the recast Procedures Directive"). Second, an application for international protection could be sent to a "safe third country" if certain general conditions in the third country are met (including the principle of *non-refoulement* "in accordance with the Geneva Convention" being "respected") – see Articles 33(2)(c) and 38 of the recast Procedures Directive. An applicant is granted a right to remain on the territory of a Member State up until a negative decision has been made on their application, after which (and subject to any remedy which also allows for the right to remain), the applicant is considered an illegally staying third country national and falls within the scope of the Return Directive. See Articles 9 of the recast Procedures Directive; and Recital 9, Articles 3(1) and (2) and 6(5) of the Return Directive; [Case C-357/09 PPU Kadzoev](#) 20 November 2009, Grand Chamber, para 41; [Case C-534/11 Arslan](#), 30 May 2013, para 49.

<sup>3</sup> Article 2(2)(a) and (b) of the Return Directive, namely in circumstances where a person is refused entry in accordance with the Article 13 (currently Article 14) of the [Schengen Borders Code](#), is apprehended or intercepted in relation to an irregular crossing of a Member State's external border or who is subject to return as, or as a consequence of, a criminal law sanction or who is subject to an extradition order.

<sup>4</sup> Article 4(a) and (b) of the Return Directive; Member States cannot exclude the scope of the Directive when a person is apprehended in connection with crossing an internal border when internal border controls have been set up, see [Case C-444/17 Préfet des Pyrénées-Orientales v Abdelaziz Arib and others](#), Judgment, Grand Chamber, 19 March 2019 paras 47, 59 and 67. The extradition or criminal sanctions exclude those stemming from an illegal entry or stay, see [Case C-329/11 Alexandre Achughbabian v Préfet du Val-de-Marne](#), Judgment, Grand Chamber, 6 December 2011.

<sup>5</sup> [European Commission \(2011\)](#), Communication from the Commission to the European Parliament and the Council – Evaluation of EU Readmission Agreements COM(2011) 76 final, 23 February, p.11

meshes with EU external affairs,<sup>6</sup> but which may be operationalised through the role of Frontex and the agency's Working Arrangements and Status Agreements with third countries.

There has been an increasing policy emphasis on increasing the rate of returns for irregularly staying third country nationals (that is, the total number of individuals ordered to return as against the number who have actually left the territory).<sup>7</sup>

Readmission agreements or cooperation with third countries on readmission have been deemed an important pillar to that success.<sup>8</sup> In parallel, the European Commission has signalled a policy shift towards forced removal over voluntary return,<sup>9</sup> thereby inverting the policy preferences of the current Return Directive which prioritises voluntary return over forced removal.<sup>10</sup>

There have been, and continue to be, rule of law, fundamental rights, budgetary and external affairs implications flowing from the pursuit, conclusion and implementation of EURAs and measures having an equivalent effect ("MEE"). In addition, whilst the rate of returns has been the Commission's primary indicator of the purported "effectiveness" of EU return policy,<sup>11</sup> such a narrow concept of effectiveness runs the risk of incentivising 'return at all costs'.

## 1.2. Purpose and Scope

The purpose of this study is to develop an overview of the externally applicable policy and legal frameworks that operationalise the return of irregularly staying third country nationals under the Return Directive and their readmission to third countries. The study seeks to map and assess the various arrangements that operationalise returns and readmissions and to identify some of the key implications in the context of fundamental rights, accountability and external affairs.

Whilst the study also raises questions about the purported "effectiveness" of EU return policy as it relates to the external dimension, an evaluation of the effectiveness of the external dimension of the EU return policy is outside the scope of this study.

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<sup>6</sup> [Carrera, S. \(2016\)](#), *Implementation of EU Readmission Agreements – Identity Determination Dilemmas and the Blurring of Rights*, Springer Nature, Switzerland, p.52.

<sup>7</sup> [European Commission \(2015a\)](#), Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – A European Agenda on Migration COM(2015) 240, 13 May, pp.9-10; [European Commission \(2015b\)](#), Communication from the Commission to the European Parliament and to the Council – EU Action Plan on return COM(2015) 453 final, 9 September, p.2 & 10; [European Commission \(2017a\)](#), 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, 2 March, p.2 & 13; [European Commission \(2017b\)](#), Commission Recommendation of 7.3.2017 on making returns more effective when implementing the Directive 2008/115/EC of the European Parliament and of the Council C(2017) 1600 final, 7 March, recommendation 2(a), p.6; [European Commission \(2019a\)](#), Communication from the Commission to the European Parliament, the European Council and the Council, Progress report on the Implementation of the European Agenda on Migration COM(2019) 481 final, 16 October, pp.15-16.

<sup>8</sup> European Commission (2011), Evaluation of EU Readmission Agreements, op. cit., p.2; European Commission (2015a), A European Agenda on Migration, op. cit., p.10; European Commission (2015b), EU Action Plan on return, op. cit., pp.10-11; European Commission (2017a), A Renewed Action Plan, op. cit., pp.12-14; European Commission (2019b), Progress report on the Implementation of the European Agenda on Migration, op. cit., p.2 & 16.

<sup>9</sup> [European Commission \(2018d\)](#), Proposal for a Directive of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third-country nationals (recast) COM(2018) 634 final, 12 September. See also, [European Parliamentary Research Service \(2019\)](#), *The proposed Return Directive (recast) – Substitute Impact Assessment*, Ex-ante Impact Assessment Unit, Brussels, pp.9, 43 and 144-147.

<sup>10</sup> Recital 10 and Article 7, Return Directive.

<sup>11</sup> See [European Parliamentary Research Service \(2019\)](#), op. cit., p.40.

The personal scope of the study covers third country nationals who are subject to a return decision under the Return Directive<sup>12</sup> and who are subject to readmission to a third country, including countries of which they are not nationals. For the purposes of this study, stateless persons are also contemplated when referring to third country nationals. As outlined earlier, this includes third country nationals who have fallen under the scope of the Return Directive by operation of the recast Procedures Directive due to an unsuccessful substantive application for asylum or an inadmissible application under the Safe Third Country or First Country of Asylum concepts.<sup>13</sup>

The geographic scope of the study includes both formal and informal agreements for readmission that have been concluded or facilitated by the EU with third countries. In addition to formal EU readmission agreements (EURAs) and readmission clauses in EU Partnership, Association and Cooperation Agreements, informal agreements such as Mobility Partnerships, Memoranda of Understanding, Joint Ways Forward, Standard Operating Procedures and Good Practices and Joint Migration Declarations will also be explored (where publicly available) and as set out in the Annex.

The role of the European Border and Coast Guard Agency (“EBCG” or “Frontex”) is relevant to the implementation of return policy,<sup>14</sup> as well as the agency’s cooperation with third countries on return.<sup>15</sup> Frontex Working Arrangements<sup>16</sup> and Status Agreements<sup>17</sup> with third countries will be included in the scope of this study. Frontex describes its Working Arrangements as “the highest level of commitment for long-term technical and operational cooperation across various areas within our mandate”.<sup>18</sup>

Due to time constraints, this study focusses primarily on EU-led initiatives. However, it is acknowledged that the question of EU competence in the field of readmission agreements is arguably concurrent with Member States and for which, in any event, Member States serve an implementing role. It is also acknowledged that the conclusion of Member State bilateral readmission agreements with third countries may have consequences on the operation of the Dublin system<sup>19</sup> whereby a risk exists for a Dublin transferee being *refouled* by the Member State responsible for determining his or her asylum application.<sup>20</sup>

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<sup>12</sup> Article 6(1), Return Directive.

<sup>13</sup> *Supra*, n.2.

<sup>14</sup> Articles 3(1)(i), 10(1)(j), (n), (p) and (r), 48, 50 and 53 of [Regulation \(EU\) 2019/1896](#) of the European Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard and repealing Regulations (EU) No 1052/2013 and (EU) 2016/1624 (“EBCG Regulation”).

<sup>15</sup> Article 10(1)(u) and 73(5), EBCG Regulation. This may also include the establishment of Antenna Offices, particularly under Article 63(3)(d), EBCG Regulation.

<sup>16</sup> Articles 73(4) and 76(4), EBCG Regulation.

<sup>17</sup> Articles 73(3) and 76(1), EBCG Regulation.

<sup>18</sup> [European Border and Coast Guard Agency \(2017\)](#), *Report to the European Parliament on Frontex cooperation with third countries in 2017*, European Union, Warsaw, p.5.

<sup>19</sup> That is, the system for determining the Member State responsible for the examination of an application for international protection as governed by [Regulation \(EU\) No 604/2013](#) of the European Parliament and of the Council of 26 June 2013 establishing a 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) (“Dublin Regulation”).

<sup>20</sup> The Dublin Regulation determines the Member State responsible for determining the applicant’s application for international protection through a hierarchy of criteria (Article 3(1) and Chapter III of the Dublin Regulation) but which also provides for a Member State to exercise their right to determine the claim even if it is not the Member State responsible under the criteria (Article 17). If the Member State responsible under the criteria has concluded a bilateral readmission agreement with a third country such that it would place an applicant for international protection at risk of *refoulement* in a third country, then the Member State in which the applicant is situated would be precluded from

## 1.3. Methodology and Limitations

### 1.3.1. Methodology

Given the legal and policy character and the limited timeframe of the study, the study has been concluded based on desk research with reference to primary and secondary law on migration, asylum and fundamental rights, together with the case law of the Court of Justice of the European Union (“CJEU”) and the European Court of Human Rights (“ECtHR”) and the Special Reports of the European Court of Auditors (“ECA”).

Initial stages of the research commenced with a mapping of all EURAs, informal agreements, Frontex Working Arrangements and Status Agreements, followed by a detailed comparative analysis of the agreements within each of those three categories. This analysis is contained in Annexes I to III and forms the basis of the analysis undertaken in Sections 4, 5 and 6. This analysis paralleled relevant academic research.

In Section 2, an analysis of the policy and legal bases of the EU return and readmission policy was undertaken. Through an analysis of the policy documents, primary and secondary law and academic research it sets out the development of the Union’s approach to return and readmission and the evolution of the role of Frontex in the external dimension.

In Section 3, an analysis of key international, European and EU standards fundamental rights standards pertinent to persons in a return and readmission context was undertaken, together with the identification and analysis of relevant provisions in EU secondary legislation. This Section formed the fundamental rights backdrop against which later sections would be assessed. This Section is not an exhaustive account of fundamental rights obligations owed to persons in a return and readmission context, but rather focusses on the most relevant issues that emerged from the comparative analysis contained in Annexes I to III and recurring issues identified in the academic research. An outline of the legal framework relating to return and readmission was also included in this Section.

In Section 4, based on the comparative analysis in Annex I to III and complemented by relevant academic research, the types of agreements in the EU return and readmission context and their key features were identified.

In Section 5, fundamental rights safeguards were identified and analysed consolidating upon the analysis contained in Annexes I to III and against the key fundamental rights principles and legal framework for return and readmission identified in Section 3. This consisted of primarily legal analysis, supported by relevant academic research and policy analysis to identify particular policy rationales.

In Section 6, a theoretical framework was established against which to explore accountability issues relating to affected individuals and institutions and drew upon legal analysis, supported by relevant academic research, to identify and analyse accountability mechanisms.

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sending the applicant to that Member State in accordance with Article 3 of the [Convention for the Protection of Human Rights and Fundamental Freedoms](#) (“ECHR”) and Article 4 of the [EU Charter of Fundamental Rights](#) (“CFR”) and consistent with the European Court of Human Rights (“ECtHR”) in [Application no. 30696/09, M.S.S. v Belgium and Greece](#), Judgment, Grand Chamber, 21 January 2011 and the Court of Justice of the European Union (“CJEU”) in [Case s C-411-10 and C-493-10, N.S. v Secretary of State for the Home Department and M.E., A.S.M., M.T., K.P., E.H. v Refugee Applications Commissioner, Minister for Justice, Equality and Law Reform](#), Grand Chamber, 21 December 2011.

In Section 7, relevant academic literature, policy documents, prior studies and relevant commentaries were evaluated to identify key implications that EU return and readmission policy has had on EU external affairs. At least two cross-cutting themes were identified and synthesised.

In Section 8, a theoretical framework was established which sought to disaggregate elements needed to determine policy effectiveness. This Section did not attempt to evaluate the effectiveness of EU return and readmission policy itself, but rather raised questions about the ability to evaluate the effectiveness in the absence of sufficient data, particularly data pertinent to the individual concerned and in the absence of a qualitative assessment.

### 1.3.2. Limitations

The limited timeframe for concluding this study precluded the possibility to conduct interviews or surveys of EU agencies, policymakers or officials, nor of Member State ministries or officials, to undertake case studies on the implementation of the external dimension of the Return Directive, to consider Member States' bilateral arrangements with third countries and to account for all implications on EU external affairs (including unintended consequences). Accordingly, the study is limited firstly, in its exploration of on-the-ground accounts of implementation of the external dimension of the Return Directive; secondly, in its scope to EU-led initiatives whilst acknowledging the role of Member States implementing readmission agreements and the consequences on the operation of the Dublin system on account of a Member State's bilateral readmission agreement with a third country;<sup>21</sup> and thirdly, to focussing on the implications in EU external affairs that contextualise other parts of the study.

A further limitation arose around the lack of public access to documents, which is visible in Annex III, particularly in relation to EU informal agreements with third countries. Accordingly, the study is limited in the completeness of its analysis of EU agreements on return and readmission.

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<sup>21</sup> See Section 1.2, above.

## 2. Policy Context and Legal Basis

Over the past 25 years, EU readmission policy has transitioned from a reliance on formal international treaties to informal cooperation with third countries.<sup>22</sup> According to Cassarino, EU readmission policy has evolved through three phases: first, a normative phase (1999-2005), a transition phase *towards* flexibility (2005-2009), and a phase driven *by* flexibility (2010 – present).<sup>23</sup> The informalisation of the external dimension of EU return policy has also paralleled an informalisation of the internal dimension of EU return policy.<sup>24</sup>

Preceding the harmonisation of the internal dimension of return by the Return Directive in 2008, standard readmission clauses were conceived with a view to be included initially on a selective basis (later on a systematic basis) in Community<sup>25</sup> and mixed agreements<sup>26</sup> with third countries from 1995, thereby establishing a connection between readmission and other external relations desired outcomes.<sup>27</sup>

Prior to the Community competence granted by the Treaty of Amsterdam in 1999 to enter into readmission agreements with third countries, Community agreements included a political declaration for the third country to conclude a readmission agreement with Member States which sought so to do. Mixed agreements, however, went a step further by obliging the parties to readmit their respective “illegally present” nationals “without further formalities” in addition to compelling the third country to conclude a readmission agreement with a Member State at the Member State’s request.<sup>28</sup> The readmission of third country nationals and stateless persons (that is, non-nationals of the readmitting state) was contemplated.<sup>29</sup>

Following the Treaty of Amsterdam in 1999, the Council of the EU modified its approach to both Community and mixed agreements. This approach consisted of firstly, adopting a standard clause that gave primacy to concluding Community readmission agreements (that is, over bilateral Member State readmission agreements) in line with the Community’s newly established competence;<sup>30</sup> and secondly, adopting a systematic, rather than selective, approach to including such clauses in these agreements.<sup>31</sup> Readmission clauses (as distinct from readmission agreements) are, however, limited in an operational sense because they do nothing more than compel third

<sup>22</sup> Molinari, C. (2019), ‘The EU and its perilous journey through the migration crisis: informalisation of the EU return policy and rule of law concerns’, *European Law Review*, Vol. 44, No. 6, pp.824-840 at pp.831-835.

<sup>23</sup> Cassarino, J.-P. (2018), *Informalizing EU Readmission Policy* in Ripoll Servent and Trauner (eds.) (2018), *The Routledge Handbook of Justice and Home Affairs Research*, Routledge, Abingdon, pp. 86-94.

<sup>24</sup> [Slominski, P., and Trauner, F. \(2020\)](#), ‘Reforming me softly – how soft law has changed EU return policy since the migration crisis’, *West European Politics*, 13 April.

<sup>25</sup> [Council of the European Union](#) (1995), Document 12509/95, 8 December.

<sup>26</sup> [Council of the European Union](#) (1996), Document 4272/96, 22 January.

<sup>27</sup> Coleman, N. (2009), *European Readmission Policy – Third Country Interests and Refugee Rights*, Martinus Nijhoff, Leiden, p.212. See also Billet, C. (2010), ‘EC Readmission Agreements: A Prime Instrument of the External Dimension of the EU’s Fight against Irregular Immigration. An Assessment after Ten Years of Practice’, *European Journal of Migration and Law*, Volume 12, pp.45-79 at pp.47-48; [Charles, C. \(2007\)](#), *Readmission Agreements and Respect for Human Rights in Third Countries. Review and Prospects for the European Parliament*, European Communities, October, Brussels, pp.5-6.

<sup>28</sup> [Council of the European Union](#) (1996), Document 4272/96, 22 January.

<sup>29</sup> Ibid.

<sup>30</sup> [Council of the European Union](#) (1999), Document 13409/99, 25 November.

<sup>31</sup> Coleman (2009), op. cit., pp. 212-213; Billet (2010), op. cit., pp.48-49.

countries to meet their obligations under international law to readmit their own nationals and do not establish procedures for evidencing nationality or the means for readmission.<sup>32</sup>

Since the Treaty of Amsterdam in 1999, the European Commission (by way of a mandate from the Council) has sought to conclude readmission agreements as binding international agreements with third countries under Article 63(3)(b) TEC. However, readmission agreements were notoriously difficult to negotiate and conclude – although cast in terms of reciprocal obligations, in practice, EURAs are asymmetric towards third countries.<sup>33</sup>

A number of challenges arose in connection with negotiating and concluding EURAs: first, the Council's insistence on the inclusion of the third country national clause in EURAs (requiring third countries to readmit not just their own nationals but also non-nationals and stateless persons who have transited their territory) was undesirable to third countries;<sup>34</sup> second, the Commission was hampered by the lack of leverage and procedural flexibility able to be offered towards third countries;<sup>35</sup> and third, competence struggles ensued between the Commission and Member States about whether the Community competence was exclusive or shared and the circumstances in which Member States could negotiate with third countries in accordance with the duty of sincere cooperation.<sup>36</sup>

Developments also occurred in relation to establishing the use of Immigration Liaison Officers (ILOs) in third countries, to the competent authorities of Member States or to international organisations by way of a 2004 Council Regulation citing Articles 63(3)(b) and 66 TEC as its legal basis.<sup>37</sup> The purpose of the Regulation was for ILOs (being “a representative of one of the Member States”) to “establish and maintain contacts with the authorities of the host country” in relating to “contributing to the prevention and combating of illegal immigration, the return of illegal immigrants and the management of legal migration”.<sup>38</sup> The role of ILOs included collecting information for strategic and/or operational use on the “ways and means to facilitate the return and repatriation of illegal immigrants to their countries of origin.”<sup>39</sup>

Subsequently, with the establishment of Frontex in 2004, provision was made, in very general terms, for the conclusion of working arrangements with Europol, international organisations and competent authorities of third countries.<sup>40</sup>

<sup>32</sup> Coleman (2009), op. cit., pp.216-217; Billet (2010), op. cit., p.49.

<sup>33</sup> [Cassarino, J.-P. \(2010a\)](#), *Dealing with Unbalanced Reciprocities: Cooperation on Readmission and Implications*, in Cassarino, J.-P. (ed.) (2010), *Unbalanced Reciprocities: Cooperation on Readmission in the Euro-Mediterranean Area*, Special Edition Viewpoints, Middle East Institute, Washington, Chapter 1; [Cassarino, J.-P. \(2007\)](#), ‘Informalising Readmission Agreements in the EU Neighbourhood’, *The International Spectator*, Vol. 42, No. 2, June, pp.179-196 at pp.181-184.

<sup>34</sup> Coleman (2009), op. cit., p.190-191, 195

<sup>35</sup> Coleman (2009), op. cit., p.190-191.

<sup>36</sup> Coleman (2009), op. cit., pp.75-80, 81-84; [Cassarino, J.-P. \(2010b\)](#), *Readmission Policy in the European Union*, European Parliament, Brussels, September, p.17.

<sup>37</sup> [Council Regulation \(EC\) No 377/2004](#) of 19 February 2004 on the creation of an immigration liaison officers network, OJ L 064, 2 March 2004, pp1-4 (“ILO Regulation”).

<sup>38</sup> ILO Regulation, Article 1(1).

<sup>39</sup> ILO Regulation, Article 2(2), point 8.

<sup>40</sup> [Council Regulation \(EC\) No 2007/2004](#) of 26 October 2004 establishing a European Agency for the Management of Operation Cooperation at the External Borders of the Member States of the European Union, Articles 13 and 14, para 2 (“Frontex Regulation 2004”).

The emergence of the Global Approach to Migration (“GAM”)<sup>41</sup> in 2005, saw the use of flexible arrangements concluded in the form of Mobility Partnerships<sup>42</sup> - political, non-legally binding statements<sup>43</sup> which are not readmission agreements *per se* but which combine a number of means (such as visa facilitation,<sup>44</sup> legal migration opportunities, capacity building in managing legal migration flows), and the cooperation of individual Member States. The third country was expected to make readmission commitments in return (including an expectation to make “[e]fforts to improve their border control and/or management” with the support of Member States and/or Frontex through “operational cooperation”).<sup>45</sup> Accordingly, conditionality and readmission cooperation became melded.<sup>46</sup>

An express legal basis for concluding EURAs was incorporated in the Treaty of Lisbon in 2009 and has become Article 79(3) of the Treaty on the Functioning of the European Union (TFEU).

In 2011, the Global Approach to Migration was facilitated to become the Global Approach to Migration and Mobility (“GAMM”)<sup>47</sup> in 2011 consisting of four pillars: (1) legal migration and mobility; (2) irregular migration and trafficking in human beings (including calling for a readmission agreement/visa facilitation nexus and for Frontex’s cooperation with non-EU authorities to be “fully utilised”);<sup>48</sup> (3) international protection and asylum; and (4) a development nexus.

In addition to the Mobility Partnership, GAMM added a further framework - the Common Agenda on Migration and Mobility (“CAMM”) - “where one side or other is not ready to enter into the full set of obligations and commitments”.<sup>49</sup> This was subsequently clarified to mean that CAMM applied to “countries outside the EU neighbourhood or countries where there is no mutual interest in entering in to negotiations on readmission and/or visa facilitation agreements”.<sup>50</sup> Conditionality is explicit in the “more for more” approach through “an appropriately sized support package” by the EU and

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<sup>41</sup> [Council of the European Union \(2005\)](#), Brussels European Council 15/16 December 2005 – Presidency Conclusions, Council Document 15914/05, 17 December, paras 8-10 and Annex I.

<sup>42</sup> See further, [Reslow, N. \(2013\)](#), *Partnering for mobility? Three-level games in EU external migration policy*, Datawyse/Universitaire Pers Maastricht, Maastricht.

<sup>43</sup> [European Commission \(2009\)](#), Commission Staff Working Document – Mobility partnerships as a tool of the Global Approach to Migration, SEC(2009) 1240 final, 18 September, Brussels, p.4.

<sup>44</sup> See [Trauner, F. and Kruse, I. \(2008\)](#), *EC Visa Facilitation and Readmission Agreements: Implementing a New Security Approach in the Neighbourhood*, CEPS Working Document No. 290/April, Centre for European Policy Studies, Brussels.

<sup>45</sup> [European Commission \(2007\)](#), Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions On circular migration and mobility partnerships between the European Union and third countries, COM(2007) 248 final, 16 May, Brussels, pp.4-8.

<sup>46</sup> Cassarino (2018), *op. cit.*, p.88.

<sup>47</sup> [European Commission \(2011a\)](#), Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – The Global Approach to Migration and Mobility, COM(2011) 743 final, 18 November. See further, Papagianni, G. (2013), ‘Forging an External EU Migration Policy: From Externalisation of Border Management to a Comprehensive Policy?’ *European Journal of Migration and Law*, Vol. 15, pp.283-299.

<sup>48</sup> *Ibid.*, p.16.

<sup>49</sup> *Ibid.*, p.11.

<sup>50</sup> Council of the European Union (2012), Outcome of Proceedings of High Level Working Group on Asylum and Migration (HLWG) on 19 June 2012, Council Document 11928/12, 11 July, Brussels, p.37 ([partially publicly accessible document](#) available 9 September 2016 in Document Register of General Secretariat of Council of the European Union; [alternative version of document](#) accessible from Statewatch in August 2012).

participating Member States along with concurrent negotiation of readmission and visa facilitation agreements.<sup>51</sup> Within GAMM broadly, “[r]eadmission and return should be firmly embedded”.<sup>52</sup>

In 2011, Frontex was given more expansive and detailed powers in relation to working arrangements with competent authorities of third countries as well as Europol and international organisations.<sup>53</sup> In addition, express provision was made for the deployment of Frontex liaison officers in third countries “in which border management practices comply with minimum human rights standards”.<sup>54</sup>

The European Agenda on Migration (“EAM”) in 2015 not only marked an express emphasis on return and increasing return rates,<sup>55</sup> but also the zenith of informal modes of cooperation with third countries in the context of readmission. The EAM called for the EU to “be ready to use all leverage and incentives at its disposal”,<sup>56</sup> including calling for a strengthened mandate for Frontex in the return of third country nationals, highlighting that the agency’s role was presently limited to coordinating returns and not initiating them.<sup>57</sup>

These objectives were strongly reinforced in the EU Action Plan on return, which proposed heightening the leverage towards third countries, including “a fine balance of pressure and incentives” that encompassed “tailor made support packages”, visa facilitation, legal migration opportunities and consolidating the “more-for-more principle”.<sup>58</sup> A stronger mandate and role for Frontex in returns were also proposed. This included: (1) a facilitative role between Member States and third countries to obtain travel documents; (2) establishing a Frontex Return Office and Rapid Return Intervention Teams; (3) providing technical support and capacity building to EU neighbourhood countries; (4) an enhanced analytical capacity; and (5) an increased budget.<sup>59</sup> Further, Frontex was to participate in bilateral meetings with the Commission, the European External Action Service (EEAS) and Member States and Sub-Saharan African countries of origin in the context of readmission obligations under the Cotonou Agreement.<sup>60</sup>

In support of this approach, a new Partnership Framework was proposed by the Commission, which noted that “third countries can be reluctant to cooperate on readmission and return”, calling for cooperation with countries of origin “to help facilitate identification and readmission of their nationals, and support for the reintegration of returnees” as well as “[i]ncreased cooperation with

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<sup>51</sup> European Commission (2011a), op. cit., p.11.

<sup>52</sup> Ibid, p.16.

<sup>53</sup> Articles 13 and 14(2), Frontex Regulation 2004, as amended by [Regulation \(EU\) No 1168/2011](#) of the European Parliament and of the Council of 25 October 2011 amending Council Regulation (EC) No 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, OJ L 304/1.

<sup>54</sup> Article 14(3), Frontex Regulation 2004, as amended by Regulation (EU) No 1168/2011 of the European Parliament and of the Council of 25 October 2011 amending Council Regulation (EC) No 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, OJ L 304/1.

<sup>55</sup> European Commission (2015a), op. cit., p.9.

<sup>56</sup> Ibid, p.9-10.

<sup>57</sup> Ibid, p.10; see also p.6 where Frontex’s role of assisting Member States to coordinate returns is also identified.

<sup>58</sup> European Commission (2015b), op. cit., pp. 13-14.

<sup>59</sup> Ibid, pp.7-9.

<sup>60</sup> Article 13 of the Cotonou Agreement provides for the readmission of the parties’ nationals “without further formalities”, ibid, p.11.

countries of transit”.<sup>61</sup> The Partnership Framework proposed that the “EU’s goal should now be specific and measurable increases in the number and rate of return and readmissions”.<sup>62</sup>

However, unlike Mobility Partnerships, where the objective was to conclude formal readmission agreements, the Partnership Framework called for “coordinated and coherent EU and Member State coordination on readmission where the paramount priority is to achieve fast and operational returns, and not necessarily formal readmission agreements.”<sup>63</sup>

As part of the 2016 European Border and Coast Guard (“EBCG”) Regulation, provisions for working arrangements with competent authorities of third countries,<sup>64</sup> international organisations<sup>65</sup> and immigration liaison officers<sup>66</sup> were consolidated under the one Regulation. In addition, provision was made for the conclusion of status agreements.<sup>67</sup> In December 2019, a new Frontex Regulation entered into force.<sup>68</sup> Key parts of the legislation include the capacity to establish an operational staff of up to 10,000 persons,<sup>69</sup> provisions to establish ‘antenna offices’ in third countries and Member States<sup>70</sup> and expanding the deployment of personnel to third countries beyond those neighbouring the external borders of a Member State.<sup>71</sup> As can be seen from Annex III, Frontex’s role is contemplated in a number of informal agreements with third countries.

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<sup>61</sup> [European Commission \(2016a\)](#), Communication from the Commission to the European Parliament, the European Council, the Council and the European Investment Bank on establishing a new Partnership Framework with third countries under the European Agenda on Migration, COM(2016) 385 final, 7 June, Strasbourg, p.7.

<sup>62</sup> *Ibid*, p.7.

<sup>63</sup> *Ibid*, p.7. See further, Santos Vara, J. (2019), *Soft international agreements on migration cooperation with third countries: a challenge to democratic and judicial controls in the EU* in Carrera, S., Santos Vara, J., and Strik, T. (eds.) (2019a), *Constitutionalising the External Dimensions of EU Migration Policies in Times of Crisis – Legality, Rule of Law and Fundamental Rights Reconsidered*, Edward Elgar, Cheltenham, p.27; and Reslow, N. (2019), *Transformation or continuity? EU external migration policy in the aftermath of the migration crisis* in Carrera et al., (2019), *op. cit.*, pp.95-115.

<sup>64</sup> Article 54(2), [Regulation \(EU\) 2016/2014](#) of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard and amending Regulation (EU) 2016/399 of the European Parliament and of the Council and repealing Regulation (EC) No 863/2007 of the European Parliament and of the Council, Council Regulation (EC) No 2007/2004 and Council Decision 2005/267/EC (“2016 EBCG Regulation”).

<sup>65</sup> Article 52(1) and (2), 2016 EBCG Regulation.

<sup>66</sup> Article 55, 2016 EBCG Regulation.

<sup>67</sup> Article 54(4) and (5), 2016 EBCG Regulation.

<sup>68</sup> [Regulation \(EU\) 2019/1896](#) of the European Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard and repealing Regulations (EU) No 1052/2013 and (EU) 2016/1624 (“EBCG Regulation”).

<sup>69</sup> Article 5(2), EBCG Regulation.

<sup>70</sup> Article 60, EBCG Regulation.

<sup>71</sup> Compare Articles 3(1)(g), 71 and 73(3), EBCG Regulation with Article 54(3), 2016 EBCG Regulation.

## 3. Fundamental Rights and Legal Framework

This Section sets out the key fundamental rights considerations and the EU secondary legal framework in relation to return and readmission. It is not an exhaustive account of all fundamental rights obligations applicable in a return and readmission context, but rather focuses on those most pertinent to the considerations of this study.

It highlights the principle of *non-refoulement* (including indirect *refoulement*), the right to an effective remedy, the prohibition on collective expulsion, the right to liberty and data protection considerations. This Section then proceeds to set out the legal framework pertaining to return and readmission, including the role of Frontex in return and readmission in the external dimension. These understandings will help to inform the analysis in the subsequent sections.

### 3.1. Fundamental Rights

#### 3.1.1. Non-refoulement

At the international level, the principle of *non-refoulement*, as expressed in Article 33(1) of the Refugee Convention,<sup>72</sup> prohibits the expulsion or return of a person to the frontiers of territories where the person's life or freedom would be threatened. The principle also finds expression in Article 3 of the Convention Against Torture ("CAT")<sup>73</sup> and Article 7 of the International Covenant on Civil and Political Rights ("ICCPR").<sup>74</sup>

In the European sphere, the prohibition against *refoulement* is contained within Article 3 ECHR and is arguably broader in scope as it provides for the absolute prohibition on torture or inhuman or degrading treatment or punishment. The sharing of documents with a third country in the context of organising a return could also place a person at real risk of being exposed to torture, inhuman or degrading treatment, contrary to Article 3.<sup>75</sup>

In the European Union sphere, the prohibition against torture or inhuman or degrading treatment or punishment is contained in Article 4 of the EU Charter of Fundamental Rights ("CFR") with that prohibition expressly contemplated in a removal, expulsion or extradition context in Article 19(2). The right to asylum contained in Article 18 CFR complements Article 19(2). Article 78(1) TFEU compels the development of a common asylum, subsidiary and temporary protections policy ensuring compliance with the principle of *non-refoulement*.

The prohibition against *refoulement* also extends to indirect *refoulement* (that is, where a person is removed to an intermediary country that then removes the person to a third country where the person may be at risk of persecution).<sup>76</sup> Indirect *refoulement* has been considered in the context of Article 3 CAT and the risk of *refoulement* is inclusive not only of the risk faced in the State to which the person is expelled, returned or extradited but also any subsequent State to which they may be

<sup>72</sup> UN General Assembly (1951), *Convention Relating to the Status of Refugees*, 28 July, United Nations, Treaty Series, vol. 189, p.137 ("the Refugee Convention").

<sup>73</sup> UN General Assembly (1984), *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December, United Nations, Treaty Series, vol. 1465 ("CAT")

<sup>74</sup> UN General Assembly (1966), *International Covenant on Civil and Political Rights*, 16 December, United Nations, Treaty Series, vol. 9999, p.171 ("ICCPR").

<sup>75</sup> [Application no. 28774/09](#) *F.N. and Others v Sweden*, Judgment, 18 December 2012, paras 73-79.

<sup>76</sup> See Goodwin-Gill, G. S. and McAdam, J., *The Refugee in International Law*, Oxford University Press, Oxford, pp.252-253.

expelled, returned or extradited.<sup>77</sup> Similarly, the ECtHR has held, in the context of Article 3 ECHR, that return to a third country is prohibited where the applicants were at risk of being arbitrarily returned to their country of origin by the country to which they were initially transferred.<sup>78</sup>

These protections also apply in a Dublin context in the EU where a transferee is at risk of the intermediary Member State removing the transferred person to a country where he or she would be at risk of torture, inhuman or degrading treatment or punishment.<sup>79</sup> The CJEU has also held that removal to a country cannot occur where it would amount to a breach of Article 4 CFR.<sup>80</sup> Discernible from this cumulative jurisprudence are two elements: (1) that a person may be subjected to the treatment prohibited under the subject Articles; and (2) that it is foreseeable that the receiving country would expel the person to his or her country of origin.<sup>81</sup>

EU secondary legislation also expressly contemplates the prohibition against non-*refoulement* in the recast Reception Conditions Directive,<sup>82</sup> the recast Qualification Directive,<sup>83</sup> the recast Procedures Directive,<sup>84</sup> the Return Directive<sup>85</sup> and the EBCG Regulation.<sup>86</sup>

Under the Return Directive, the principle of non-*refoulement* must be respected throughout the implementation of the Directive,<sup>87</sup> even when a Member State decides not to apply it to third country nationals refused entry under the Schengen Borders Code or apprehended or intercepted in connection with the crossing of an external border of an EU Member State.<sup>88</sup> The Return Directive

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<sup>77</sup> UN Committee Against Torture (CAT) (1997), General Comment No. 1: Implementation of Article 3 of the Convention in the Context of Article 22 (Refoulement and Communications), 21 November 1997, A/53/44, annex IX, para 2; UN Committee Against Torture (CAT) (2017), General Comment No. 4 (2017) on the implementation of article 3 of the Convention in the context of article 22, 9 February 2018, para 12; see also *Avedes Hamayak Korban v. Sweden*, CAT/C/21/D/088/1997, UN Committee Against Torture (CAT), 16 November 1998, para 7; *Z.T. v. Australia*, CAT/C/31/D/142/2000, UN Committee Against Torture (CAT), 19 November 2003, para 6.4.

<sup>78</sup> [Application no. 27765/09](#), *Hirsi Jamaa and Others v Italy*, ECtHR judgment, 23 February 2012 at paras 156-168; [Application no. 30471/08](#), *Abdolkhani and Karimnia v Turkey*, ECtHR judgment, 22 September 2009, para 88. [Application 47287/15](#), *Ilias and Ahmed v Hungary*, ECtHR judgment Grand Chamber, 21 November 2019, paras 163 and 178-179; See also [Application no. 1948/04](#), *Salah Sheekh v The Netherlands*, ECtHR judgment, 11 January 2007 at paras 147-149 (internal flight alternative).

<sup>79</sup> [Application no. 43844/98](#), *T.I. v the United Kingdom*, ECtHR decision, 7 March 2000 p.15; [Application no. 30696/09](#), *M.S.S. v Belgium and Greece*, ECtHR Grand Chamber judgment, 21 January 2011 at paras 347 and 358.

<sup>80</sup> [Joined Cases C-411/10 and C-493/10](#), *N.S. v Secretary of State for the Home Department (U.K.) and M.E. v Refugee Applications Commissioner, Minister for Justice, Equality and Law Reform (Ireland)*, Judgment, Grand Chamber, 21 December 2011 at para 106, risk of chain *refoulement* was pleaded as a contested issue in the referring Court in Case C-411/10 – see para 45.

<sup>81</sup> Majcher, I. (2019), *The European Union Returns Directive and Its Compatibility with International Human Rights Law – Analysis of Return Decision, Entry Ban, Detention and Removal*, Brill Nijhoff, Leiden, p.629-630.

<sup>82</sup> Recital 3, [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 (recast) (“recast Reception Conditions Directive”).

<sup>83</sup> Recitals 3 and Article 21, [Directive 2011/95/EU](#) of the European Parliament and of the 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 or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) (“recast Qualification Directive”).

<sup>84</sup> Recital 3, Articles 9(3), 28(2), 35, 38(1)(c), 38(4) and 41(1), Recast Procedures Directive.

<sup>85</sup> Recital 8, Articles 4(b), 5 and 9(1)(a), Return Directive.

<sup>86</sup> Recitals 84 and 103, Articles 36(1), 48(1), 50(3), 71(2), 72(3), 73(2), 80(1) and (2), 86(4), EBCG Regulation.

<sup>87</sup> Article 5, Return Directive.

<sup>88</sup> Articles 2(2) and 4(b), Return Directive.

expressly compels Member States to postpone removal when to do otherwise would violate the principle.<sup>89</sup>

Frontex is also required to act in accordance with the principle of *non-refoulement* in measures at the external borders,<sup>90</sup> during collecting return operations,<sup>91</sup> and in cooperating with third countries, including when that takes place on the territory of a third country.<sup>92</sup> Frontex is required to guarantee the protection of fundamental rights (including the principle of *non-refoulement*) in the performance of its tasks<sup>93</sup> and is required to “ensure that no person is disembarked in, forced to enter, conducted to, or otherwise handed over or returned to, the authorities of a country” where it would lead to direct or indirect *refoulement*.<sup>94</sup>

However, these provisions are in tension with the inability of Frontex to enter into the merits of return decisions<sup>95</sup> - meaning that observation of the principle of *non-refoulement* relies on the agency refraining from, or withdrawing from, an action. The Frontex Executive Director is required to withdraw financing or suspend or terminate any activity in the event of serious or persistent violations of fundamental rights or international protection obligations.<sup>96</sup> Similarly, the Executive Director is also required to “decide not to launch” an activity on the basis of “serious reasons at the beginning of the activity” that could lead to “violations of fundamental rights or international protection obligations of a serious nature.”<sup>97</sup> Transfers of data to third countries are not to prejudice the rights of an applicant for, or beneficiary of, international protections rights, particularly in relation to *non-refoulement*.<sup>98</sup>

As has been noted by the EPRS, the scope of the principle of *non-refoulement* is such that, even if a person is found not to meet the grounds of international protection under the recast Qualification Directive, the person may still be at risk of *refoulement* as contemplated in ECtHR and CJEU jurisprudence.<sup>99</sup> Accordingly, even if a person’s application for international protection has been rejected on the grounds set out in the recast Qualification Directive, it does not necessarily mean that all *non-refoulement* obligations have been exhausted.

### 3.1.2. Right to an Effective Remedy

The way that the principle of *non-refoulement* is protected under the ECHR is through the combined application of the right to an effective remedy under Article 13 ECHR. This arises because of the “potentially irreversible” effects that removal from the territory should removal prior to an examination being undertaken.<sup>100</sup> In circumstances where the applicant claims a breach of Article 2 or 3 ECHR as a result of removal, the complaint “must imperatively be subject to close scrutiny by a

<sup>89</sup> Article 9(1)(a), Return Directive.

<sup>90</sup> Article 36(2), EBCG Regulation.

<sup>91</sup> “Collecting returns” are returns where the third country provides the transport and return escorts, see Article 50(3), EBCG Regulation.

<sup>92</sup> Articles 71(2) and 73(1) and (2), EBCG Regulation.

<sup>93</sup> Article 80(1), EBCG Regulation.

<sup>94</sup> Article 80(2), EBCG Regulation.

<sup>95</sup> Article 50(1), EBCG Regulation.

<sup>96</sup> Article 46(4), EBCG Regulation.

<sup>97</sup> Article 46(5), EBCG Regulation.

<sup>98</sup> Article 86(4), EBCG Regulation.

<sup>99</sup> European Parliamentary Research Service (2019), op. cit., pp.65-66.

<sup>100</sup> [Application no. 51564/99](#), *Čonka v Belgium*, Judgment, 5 February 2002, para 70.

‘national authority’.<sup>101</sup> The nature of the examination where a person faces a real risk of being subjected to treatment contrary to Article 3 ECHR is “independent and rigorous scrutiny”.<sup>102</sup> An integral part of the right to an effective remedy when paired with Article 3 is that it is to have automatic suspensive effect.<sup>103</sup> Similarly, Article 47 CFR gives expression to the right to an effective remedy under EU law, with the CJEU finding that suspensive effect was “inherent” to guarantee the right to an effective remedy and the principle of non-*refoulement*.<sup>104</sup>

### 3.1.3. Prohibition on Collective Expulsion

Collective expulsion is prohibited under Article 4 of Protocol No. 4 ECHR. The ECtHR has indicated that a “reasonable and objective examination” on an individual basis of each person constituting the group is necessary to ensure compliance with Article 4 of Protocol No. 4.<sup>105</sup> Collective expulsion may occur upon the accumulation of a number of factors.<sup>106</sup> The Court has indicated that it is necessary for persons to have the opportunity to place arguments against their removal to competent authorities prior to their removal,<sup>107</sup> although this does not necessarily mean an individual interview in all the circumstances.<sup>108</sup>

Starkly juxtaposed against the Court’s jurisprudence on Article 4 Protocol 4 sits the recent Grand Chamber decision in *N.D.* which attributed the applicants’ own behaviour for them not receiving individual removal decisions because they did not resort to official entry procedures to enter Spain to claim their rights under the ECHR.<sup>109</sup> Importantly, reliance on readmission agreements (and any references to human rights compliance contained therein) do not absolve a party to the ECHR from its obligations under the Convention,<sup>110</sup> including the prohibition against collective expulsion, even in a Dublin context.<sup>111</sup> The obligations under Article 4 of Protocol No. 4 apply extraterritorially in accordance with the ECtHR’s jurisprudence on “effective control”.<sup>112</sup>

Under EU law, Article 19(1) CFR prohibits collective expulsions. Although not adjudicating on Article 19(1) CFR, the CJEU has at least highlighted recital 6 of the Return Directive, indicating that returns should be carried out by way of a fair and transparent procedure, with decisions made on a case-by-case basis and based on objective criteria.<sup>113</sup> Those principles may be analogous to the essential elements of the safeguards against collection expulsion. The Return Directive does not contain any express prohibition on collective expulsion.

<sup>101</sup> [Application no. 36378/02](#), *Shamayev and Others v Georgia and Russia*, Judgment, 12 April 2005, para 448.

<sup>102</sup> [Application no. 40035/98](#), *Jabari v Turkey*, Judgment, 11 July 2000, para 50.

<sup>103</sup> [Application no. 25389/05](#), *Gebremedhin v France*, Judgment, 26 April 2007, para 66; [Application No. 27765/09](#), *Hirsi Jamaa and Others v Italy*, Judgment Grand Chamber, 23 February 2012, para 200.

<sup>104</sup> [Case C-180/17](#), *X, Y v Staatsecretaris van Veiligheid en Justitie*, Judgment, 26 September 2018, para 29.

<sup>105</sup> Application no. 51564/99, *Čonka v Belgium*, Judgment, 5 February 2002, para 59.

<sup>106</sup> Application no. 51564/99, *Čonka v Belgium*, Judgment, 5 February 2002, paras 61-62.

<sup>107</sup> Application No. 27765/09, *Hirsi Jamaa and Others v Italy*, Judgment Grand Chamber, 23 February 2012; paras 184-186.

<sup>108</sup> [Application No. 16483/12](#), *Khlaifia and Others v Italy*, Judgment Grand Chamber, 15 December 2016, para 248.

<sup>109</sup> [Application Nos. 8675/15 and 8697/15](#), *N.D. and N.T. v Spain*, Judgment Grand Chamber, 13 February 2020, para 231.

<sup>110</sup> Application No. 27765/09, *Hirsi Jamaa and Others v Italy*, Judgment Grand Chamber, 23 February 2012, para 129.

<sup>111</sup> [Application No. 16643/09](#), *Sharifi and Others v Italy and Greece*, Judgment, 21 October 2014, para 223.

<sup>112</sup> Application No. 27765/09, *Hirsi Jamaa and Others v Italy*, Judgment Grand Chamber, 23 February 2012, paras 178-182.

<sup>113</sup> [Case C-146/14 PPU](#), *Bashir Mohamed ali Mahdi*, Judgment, 5 June 2014 para 40; [Case C-554/13](#) *Z. Zh. v Staatssecretaris voor Veiligheid en Justitie and Staatssecretaris voor Veiligheid en Justitie v I. O.*, Judgment, 11 June 2015, para 49.

### 3.1.4. Right to Liberty

For a variety of reasons, persons detained in a removal context may experience long periods of detention whilst awaiting removal to their country of origin or to a third country in which they have transited.<sup>114</sup> The focus here is on the arbitrariness of detention given the potentially prolonged situations returnees face.

The right to liberty under Article 9(1) ICCPR also contains a prohibition on arbitrary detention. In its jurisprudence, the Human Rights Committee observed that arbitrariness “is not to be equated with ‘against the law’, but must be interpreted more broadly to include elements of inappropriateness, injustice and lack of predictability” and that deprivation of liberty “must not only be lawful but be reasonable in all the circumstances”.<sup>115</sup> Detention is not to continue past the point where the State can no longer provide an appropriate justification.<sup>116</sup> Detention runs the risk of amounting to arbitrary detention when there is no longer a “reasonable prospect” of expulsion.<sup>117</sup>

The right to liberty and security of the person guaranteed by Article 5 ECHR may only be subject to the specified exceptions, including persons “against whom action is being taken with a view to deportation” under the second limb of Article 5(1)(f). In its jurisprudence, the ECtHR has indicated that deportation proceedings must be in progress and carried out with “due diligence”.<sup>118</sup> The Court has established the necessary requirements in order for detention under both limbs of Article 5(1)(f)<sup>119</sup> not to be arbitrary:

*To avoid being branded as arbitrary, therefore, such detention must be carried out in good faith; it must be closely connected to the purpose of preventing unauthorised entry of the person to the country; the place and conditions of detention should be appropriate, bearing in mind that “the measure is applicable not to those who have committed criminal offences but to aliens who, often fearing for their lives, have fled from their own country”;<sup>120</sup> [...] and the length of detention should not exceed that reasonably required for the purpose pursued.<sup>121</sup>*

Further, the Court has also indicated that there must be a realistic prospect of expulsion,<sup>122</sup> contributing factors to which may be the inability of the requested state to issue travel documents and the detained person’s willingness to cooperate.<sup>123</sup> Authorities are under an obligation to assess “whether removal is a realistic prospect and whether detention with a view to removal is from the outset, or continues to be, justified”.<sup>124</sup>

<sup>114</sup> Lutz, F. (2018), ‘Non-removable Returnees under Union Law: Status Quo and Possible Developments’, *European Journal of Migration and Law*, Vol. 20, pp.28-52 at pp.30-31.

<sup>115</sup> *Van Alphen v The Netherlands*, Communication no. 305/1988, CCPR/C/39/D/305/1988, 23 July 1990, para 5.8.

<sup>116</sup> *A v Australia*, Communication no. 560/1993, CCPR/C/59/D/1993, 30 April 1997, para 9.4.

<sup>117</sup> *Jalloh v The Netherlands*, Communication no. 794/1998, CCPR/C/74/D/794/1988, 15 April 2002, para 8.2.

<sup>118</sup> [Application No. 22414/93](#), *Chahal v United Kingdom*, Judgment, Grand Chamber, 15 November 1996 at para 113; [Application No. 60538/00](#), *Singh v Czech Republic*, Judgment, 25 January 2005, paras 61-68; [Application No. 31465/08](#), *Raza v Bulgaria*, Judgment, 11 February 2010, paras 71-75; [Application No. 41416/08](#), *M and Others v Bulgaria*, Judgment, 26 July 2011, paras 61-77; [Application No. 4639/10](#), *Auad v Bulgaria*, Judgment, 11 October 2011, paras 127-135.

<sup>119</sup> [Application No. 13229/03](#), *Saadi v United Kingdom*, Judgment, Grand Chamber, 29 January 2008, para 73.

<sup>120</sup> [Application No. 19776/92](#), *Amuur v France*, Judgment, 25 June 1996, para 43.

<sup>121</sup> [Application No. 13229/03](#), *Saadi v United Kingdom*, Judgment, Grand Chamber, 29 January 2008, para 74.

<sup>122</sup> [Application No. 24340/08](#), *Louled Massoud v Malta*, Judgment, 27 July 2010, para 69.

<sup>123</sup> [Application No. 10664/05](#), *Mikolenko v Estonia*, Judgment, 8 October 2009, paras 64-65.

<sup>124</sup> [Application 10112/16](#), *Al Husin v Bosnia and Herzegovina (No.2)*, Judgment, 25 June 2019, para 98.

In an EU context, the right to liberty is guaranteed by Article 6 CFR. The Return Directive provides that detention is to be “for as short a period as possible” and “only maintained as long as removal arrangements are in progress and executed with due diligence”.<sup>125</sup> Further, the Return Directive provides that when a reasonable prospect of removal no longer exists (based on legal or other considerations), the detention is no longer justified and the person must be immediately released.<sup>126</sup> However, these provisions are in tension with the ability of Member States to increase the period of detention by up to 12 months where the removal process is likely to last longer on account of a lack of cooperation by the person detained or “delays in obtaining the necessary documentation from third countries.”<sup>127</sup> In considering the tension between those two provisions, the CJEU has indicated that “a reasonable prospect of removal does not exist where it appears unlikely that the person concerned will be admitted to a third country, having regard to those periods.”<sup>128</sup> Once a person is released from detention on account of there no longer being a reasonable prospect of removal under the Return Directive, Member States are still required to furnish the person with “written confirmation of his situation”.<sup>129</sup> When cooperating with third countries, Frontex is required act within the EU external action policy, including the prohibition of arbitrary detention.<sup>130</sup>

### 3.1.5. Data Protection

Article 8 CFR provides for the right to the protection of personal data, including its fair processing on the basis of consent or another legitimate basis laid down by law. Data protection is governed as directed towards Member States<sup>131</sup> and EU institutions, bodies and agencies.<sup>132</sup> Both Regulations seek to avoid the undermining of their protections by transfer of personal data to third countries or international organisations.<sup>133</sup> Transfers of data to third countries or international organisations may only occur on the basis of an adequacy decision by the European Commission.<sup>134</sup> Where an adequacy decision has not been made, transfers of personal data to third countries or an international organisation may only occur where appropriate safeguards and enforceable data subject rights and legal remedies for data subjects are available.<sup>135</sup> In the absence of an adequacy decision or appropriate safeguards being in place, transfers to a third country or international organisation may be made where it is “necessary for important reasons of public interest”.<sup>136</sup> It is

<sup>125</sup> Article 15(1), second para, Return Directive; and [Case C-61/11](#) PPU *El Dridi*, Judgment, 28 April 2011, para 40.

<sup>126</sup> Article 15(4), Return Directive; and [Case C-357/09](#) PPU *Kadzoev*, Judgment, Grand Chamber, para 63.

<sup>127</sup> Article 15(5), Return Directive

<sup>128</sup> Those periods being the initial six-month period and additional 12 month extended period: *Case C-357/09 PPU Kadzoev*, Judgment, Grand Chamber, para 66.

<sup>129</sup> [Case C-146/14](#) PPU *Bashir Mohamed Ali Mahdi*, Judgment, 5 June 2014, para 89.

<sup>130</sup> Article 73(2), EBCG Regulation.

<sup>131</sup> [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) (“GDPR”).

<sup>132</sup> [Regulation \(EU\) 2018/1725](#) of the European Parliament and of the Council of 23 October 2018 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data, and repealing Regulation (EC) No 45/2001 and Decision No 1247/2002/EC (“UIDPR”).

<sup>133</sup> Article 44, GDPR and Article 46, UIDPR.

<sup>134</sup> Article 45, GDPR and Article 47, UIDPR. In relation to the GDPR, the [European Commission](#) has made adequacy decisions in relation to Andorra, Argentina, Canada, Faroe Islands, Guernsey, Israel, Isle of Man, Japan, Jersey, New Zealand, Switzerland, Uruguay, and the United States of America limited to the Privacy Shield framework.

<sup>135</sup> Article 46, GDPR and Article 48, UIDPR.

<sup>136</sup> Article 49, GDPR and Article 50, UIDPR.

arguable that these provisions are for application on a case-by-case or one-off application given the title heading of “[d]erogations for *specific situations*” (emphasis added).

The recast Procedures Directive expressly prohibits disclosing information about an application for international protection to alleged actors of persecution or serious harm.<sup>137</sup>

Under the EBCG Regulation, and as a Union agency, Frontex is bound by the Regulation on the protection of natural persons with regard to the processing of personal data by Union institutions, bodies, offices and agencies and on the free movement of such data (“UIDPR”).<sup>138</sup> The EBCG Regulation contains significant changes to data collection and sharing over its 2016 legislative predecessor:

First, it establishes an “integrated return management platform” to *process* information, including personal data such as biographic data and passenger lists, as well as to *transmit* biographic and biometric data, and documents evidencing proof or prima facie proof of nationality of persons to be returned.<sup>139</sup> This data may be transferred to a third country or international organisation.<sup>140</sup>

Second, it contains a statement in the recitals that return “represents an important issue of substantial public interest”, in what appears to be a reference to the UIDPR provisions relating to the absence of an adequacy decision or appropriate safeguards being in place (see above). As was noted by the EU Fundamental Rights Agency (“FRA”) in its Opinion on the EBCG Proposal, this “may be perceived as giving the green light for a blanket sharing with the third country of all information that may be considered relevant for returns”.<sup>141</sup>

The EBCG Regulation requires transfers not to prejudice the rights of applicants for, and beneficiaries of, international protection particularly in relation non-*refoulement* and expressly refers to the prohibition in the recast Procedures Directive discussed earlier.<sup>142</sup> Whilst acknowledging this provision, the FRA also expressed concerns that there was no requirement that the timing of data sharing to third countries occur only after an asylum claim had been rejected – which could potentially place family members in the country of origin at risk.<sup>143</sup>

## 3.2. Legal Framework

Whilst the Return Directive governs the return of third country nationals staying on the territory of a Member State without a legal basis, it is also possible for Member States to exclude third country nationals from the scope of the Directive. This is particularly relevant for persons who have been

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<sup>137</sup> Article 30, Recast Procedures Directive.

<sup>138</sup> Article 86(1), EBCG Regulation.

<sup>139</sup> Article 49, EBCG Regulation.

<sup>140</sup> Article 86(3), EBCG Regulation.

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

<sup>142</sup> Article 86(4), EBCG Regulation; Article 30, Recast Procedures Directive.

<sup>143</sup> FRA Opinion (2018), op. cit., p.40.

refused entry to a Member State<sup>144</sup> or who have been apprehended or intercepted in relation to an irregular crossing of an external border of a Member State.<sup>145</sup>

Although persons may be excluded from the scope of the Return Directive in those circumstances, the Directive requires Member States to respect the principle of *non-refoulement*<sup>146</sup> as well as to ensure that the treatment of such persons is no less favourable in certain provisions of the Directive.<sup>147</sup>

The Return Directive also dictates to *where* the person can be returned. There are three possibilities: (1) the person's country of origin; (2) a transit country "in accordance with Community bilateral readmission agreements or other arrangements"; and (3) another third country voluntarily chosen by the person and in which he or she will be accepted.<sup>148</sup>

The Dublin Regulation also expressly provides for a Member State to send an applicant for international protection to a Safe Third Country.<sup>149</sup> The Safe Third Country concept is embodied in the Recast Procedures Directive.<sup>150</sup> Its practical effect is to allow Member States to administratively preclude applicants for international protection from a full examination of their application on its merits on the basis that the applicant should have sought and obtained asylum in a country he or she transited. It also has the effect of creating an implicit obligation for applicants to seek international protection in a country that they have transited. The concept is based on an interpretation of Article 31(1) of the Refugee Convention to suggest that applicants apply for international protection in the first country in which they arrive.<sup>151</sup>

Frontex has a defined mandate in relation to return<sup>152</sup> that includes the technical and operational aspects of coordinating Member State return activities and the financing or co-financing of operations, interventions and activities.<sup>153</sup> The current Regulation also introduces Frontex's operation of the 'integrated return management platform'.<sup>154</sup> Frontex's involvement in return broadly falls under two categories: (1) return operations;<sup>155</sup> and (2) return interventions.<sup>156</sup>

*Return operations* consist of two types. The first type are 'standard' return operations whereby Frontex provides technical and operational assistance and coordinates or organises return operations. Frontex (with the Member State's agreement) has the discretion to initiate the

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<sup>144</sup> That is, a refusal under Article 14 (formerly Article 13) of [Regulation 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").

<sup>145</sup> Article 2(2), Return Directive.

<sup>146</sup> Article 4(4)(b), Return Directive.

<sup>147</sup> Article 4(4)(a), Return Directive; no less favourable treatment provisions: Articles 8(4) and (5) (coercive measures), 9(2)(a) (postponement of removal), 14(1)(b)(d) (emergency health care and needs of vulnerable persons), and 16 and 17 (detention conditions).

<sup>148</sup> Article 3(3), Return Directive.

<sup>149</sup> Article 3(3), Dublin Regulation.

<sup>150</sup> Articles 33 and 38, Recast Procedures Directive.

<sup>151</sup> See Bouteillet-Pacquet, D. (2003), 'Passing the Buck: A Critical Analysis of the Readmission Policy Implemented by the European Union and Its Member States', *European Journal of Migration and Law*, No. 5, pp.359-377 at p. 367.

<sup>152</sup> "Return" is defined under Article 2(26) of the EBCG Regulation by reference to Article 3(3) of the Return Directive, as discussed above. Frontex' mandate on return includes voluntary departures.

<sup>153</sup> Articles 48(1)(f) and 50(8), EBCG Regulation

<sup>154</sup> Article 49, EBCG Regulation

<sup>155</sup> Article 50, EBCG Regulation

<sup>156</sup> Article 53, EBCG Regulation.

coordination or organisation of return operations.<sup>157</sup> A rolling operational plan is foreseen for return operations.<sup>158</sup> Frontex is expressly precluded from “entering into the merits of the return decision”.<sup>159</sup>

The second type are “collecting return operations” which use the third country of return’s transport and forced-return escorts. Frontex can be requested by Member States or by its own proposal to coordinate or organise these collecting return operations and provide the necessary assistance.<sup>160</sup> A Return Plan, drawn up by the Executive Director, is necessary for collecting return operations, and is binding on Frontex and any participating Member State.<sup>161</sup> Return operations are financed or co-financed from Frontex’s budget.<sup>162</sup>

*Return interventions* also consist of two types, depending on the nature of the circumstances in the Member State. The first type is where a Member State is facing a “burden” in implementing returns. In addition to organising return operations from the Member State, Frontex may also send “return teams”.<sup>163</sup>

The second type is where a Member state is facing “specific and disproportionate challenges” in implementing returns. At the Member State’s request, or on Frontex’ own initiative with the agreement of a Member State, Frontex provides technical and operational assistance by a “rapid return intervention”.<sup>164</sup> This includes the “rapid deployment of return teams” to the host Member State to assist implementing return procedures and organise return operations from the host Member State.<sup>165</sup> In both circumstances an Operational Plan<sup>166</sup> is drawn up by the Executive Director.<sup>167</sup> Return interventions are financed or co-financed from Frontex’s budget.<sup>168</sup>

In terms of personnel, Frontex forms a standing corps of staff in four categories (1) statutory staff; (2) Member State long term secondments; (3) Member State short term deployments; and (4) a reserve for “rapid reaction” made up of Member State staff.<sup>169</sup>

From this standing corps, return teams are formed for return interventions.<sup>170</sup> Team members are to comply with Union, international law and observe fundamental rights and the national law of the host Member State.<sup>171</sup> Frontex statutory staff may be deployed as Liaison Officers in third countries but the requirement under the 2016 EBCG Regulation that they only be deployed in countries “in which border management practices comply with minimum human rights standards”<sup>172</sup> has been omitted in the 2019 EBCG Regulation. The stated priority is to deploy Liaison Officers to countries of

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<sup>157</sup> Article 50(1), EBCG Regulation.

<sup>158</sup> Article 50(2), EBCG Regulation.

<sup>159</sup> Articles 48(1) and 50(1), EBCG Regulation.

<sup>160</sup> Article 50(3), EBCG Regulation.

<sup>161</sup> Article 50(4), EBCG Regulation.

<sup>162</sup> Article 50(8), EBCG Regulation.

<sup>163</sup> Article 53(1), EBCG Regulation.

<sup>164</sup> Article 54(2), EBCG Regulation.

<sup>165</sup> Article 53(2), EBCG Regulation.

<sup>166</sup> Operational Plans and their content are governed by Article 38, EBCG Regulation.

<sup>167</sup> Article 53(3), EBCG Regulation.

<sup>168</sup> Article 53(5), EBCG Regulation.

<sup>169</sup> Article 54(1), EBCG Regulation.

<sup>170</sup> Article 52 and 54(2), EBCG Regulation.

<sup>171</sup> Article 82(3), EBCG Regulation.

<sup>172</sup> See Article 55(1), 2016 EBCG Regulation.

origin and transit<sup>173</sup> (which leaves open the possibility to be deployed to a refugee-producing country) whose tasks include the return of returnees and the acquisition of travel documents.<sup>174</sup>

Two Codes of Conduct are contemplated: the first, applying to “all border control operations” coordinated by Frontex and to “all persons participating in” Frontex activities; the second, dealing specifically with Frontex-organised or coordinated return operations and return interventions.<sup>175</sup> However, Fink notes that these Codes of Conduct are not legally binding *per se*, but form part of the Handbooks to the (legally binding) Operational Plans.<sup>176</sup>

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<sup>173</sup> Article 77(2), EBCG Regulation.

<sup>174</sup> Article 77(3), EBCG Regulation.

<sup>175</sup> Article 81(1) and (2), EBCG Regulation.

<sup>176</sup> Fink, M. (2018), *Frontex and Human Rights – Responsibility in ‘Multi-Actor Situations’ under the ECHR and EU Public Liability Law*, Oxford University Press, Oxford, p.62. See also Slominski, P., and Trauner, F. (2018), ‘How do Member States Return Unwanted Migrants? The Strategic (non-)use of ‘Europe’ during the Migration Crisis’, *Journal of Common Market Studies*, Vol. 56, No. 1, pp. 101-118, at p.108, who observe that the Fundamental Rights Strategy and the Code of Conduct for Joint Return Operations “are of a legally non-binding nature, rendering it virtually impossible to launch legal proceedings in cases of violations of these soft law documents”.

## 4. Types of Agreements

There are four types of agreements which relate to the external dimension of the readmission of returnees from the territory of the EU Member States: (1) formal EU readmission agreements (EURAs); (2) readmission clauses imbedded in international agreements; (3) informal arrangements; and (4) Frontex agreements in the form of Working Arrangements and Status Agreements.

### 4.1. Formal EU Readmission Agreements (EURAs)

The formal readmission agreements are negotiated by the Commission on the receipt of a negotiation mandate from the Council. The competence to conclude such agreements is expressly provided for by Article 79(3) TFEU (and, formerly, Article 63(3)(b) TEC). These have the status of binding international treaties subject to international law between the European Union and the third country<sup>177</sup> and are publicly available.<sup>178</sup>

Although the formal readmission agreements may have fundamental rights consequences for returnees, the agreements are between the concluded parties and to the exclusion of returnees. As at March 2020, 18 such agreements have been concluded (the latest being with Belarus) as set out in Annex I. The purpose of the agreements is to ensure “rapid, effective procedures for the identification and safe and orderly return”<sup>179</sup> of persons irregularly present on the territory of each party to the agreement. Accordingly, the agreements are textually premised on reciprocal obligations. EURAs set out the modalities for return, including annexes listing the evidential bases for identity, nationality and (where readmission of third country nationals and stateless persons are concerned) transit, and anticipate further implementing protocols by Member States.

EURAs oblige the contracting states to readmit their irregularly present nationals as well as third country nationals and stateless persons who had a valid visa or residence permit issued by the requested state at the time of entering the requesting state. The obligation to readmit third country nationals can be both narrowed (limiting the obligation to readmit to those who arrived directly from the requested state to the requesting state)<sup>180</sup> and broadened (to include the spouse of a national where the spouse has another nationality as well as the child of a national regardless of that child’s nationality).<sup>181</sup>

The readmission process is commenced by application in a standardised form. In cases where the national has a valid travel document or the third country national or stateless person holds a valid visa or residence permit, an application is not necessary.

The evidence of nationality and the grounds for third country nationals and stateless persons to be readmitted are set out in the Annexes to the agreement. A two-tier scheme of evidence is

<sup>177</sup> The term “third country” is here used to include reference to Hong Kong and Macau with which EURAs have been concluded.

<sup>178</sup> See European Union External Action Service, [Treaties Office Database](#) and European Commission, Migration and Home Affairs, [Return and Readmission](#).

<sup>179</sup> This formulation is used in all readmission agreements except with Hong Kong, Macao and Russia which omit the words “safe and orderly”. See Recital 2 in EURAs with Albania, FYROM, Bosnia and Herzegovina, Montenegro, Serbia, Moldova, Pakistan, Georgia, Armenia, Azerbaijan; Recital 3 in EURAs with Hong Kong, Macao, Sri Lanka and Ukraine; Recital 4 in EURA with Russia; Recital 5 in EURA with Cape Verde.

<sup>180</sup> See, for example, Articles 3(1)(b) in the EURAs with Pakistan and Cape Verde.

<sup>181</sup> See EURAs with FYROM (Article 2(2)), Bosnia & Herzegovina (Article 2(2)), Montenegro (Article 2(2)), Serbia (Article 2(2)), Moldova (Article 2(2)), Georgia (Article 2(a) and (b)), Armenia (Article 3(2)), Azerbaijan (Article 3(2)), Turkey (Article 3(2)) and Cape Verde (Article 2(2)).

established, first, setting out documents that prove nationality or grounds for readmission, and second, providing for *prima facie* evidence<sup>182</sup>. Where the requesting state is relying on *prima facie* evidence, nationality is deemed proved, or grounds are deemed established, unless the requested state “prove[s] otherwise”.<sup>183</sup>

This effectively reverses the burden of proof to the requested state to disprove nationality (where the requesting state asserts person concerned is a national of the requested state) or the grounds for readmission (in the case of non-nationals of the requested state or stateless persons). The application must be lodged and replied within prescribed time limits. Much like a Dublin request, failure to reply within the time limits is deemed an agreement to the transfer of the person.<sup>184</sup> The transfer of the person must occur within three months of the reply from the requested state.

Eleven of the EURAs provide for accelerated procedures for those apprehended in the border region. The distance inward from the border constituting the border region varies between agreements. An application under the accelerated procedure must be made within two or three days (depending on the agreement) from the date of apprehension with a reply from the requested state within two days or two working days from receipt of the application. A failure to so reply results in a deemed agreement to transfer.

Costs are always borne by the requesting state. Application of the agreement is monitored by a Joint Readmission Committee (“JRC”) constituted by members of the European Commission and representatives of the third country.<sup>185</sup> In addition, the JRC decides on implementing arrangements for the Agreement, exchanges of information on the implementing Protocols, and recommends amendments to the agreements and Annexes. The JRC establishes its own rules of procedure. The decisions of each JRC are binding on the State parties (except for Pakistan).<sup>186</sup>

## 4.2. Readmission Clauses

As discussed previously, early in the history of Community involvement in readmission arrangements, readmission clauses were systematically included in Community international agreements from 1995. The clauses range in their degrees of obligation.<sup>187</sup> In any event, the clauses are “not self-executive” (meaning that the clauses are incapable of taking effect without

<sup>182</sup> *Prima facie* evidence is evidence which is sufficient to establish a fact or facts but which can be rebuttable. It can alternatively be described as establishing a rebuttable presumption.

<sup>183</sup> In the EURA with Turkey, this provision contains an additional requirement of “...unless following an investigation and within the time limits laid down in Article 11, the Requested State demonstrates otherwise” – see Articles 9(2) and 10(2). In the EURA with Pakistan, the term *prima facie* evidence is not used. Instead, the EURA refers to two different lists of documents in the Annex for nationality and conditions for readmitting third country nationals and stateless persons respectively. A reference to documents presented from the list of documents in the latter list (Annex II for nationality or IV for third country nationals and stateless persons) form the basis for the requested state to initiate an investigation – there is no automatic deeming of their recognition of nationality or conditions fulfilled: see Articles 6(3) and 7(2) of the agreement.

<sup>184</sup> See Article 22(7) of the Recast Dublin Regulation.

<sup>185</sup> Members of the European Parliament (MEPs) have repeatedly called for participation by the European Parliament in meetings of the JRCs. See, for instance, Rapporteur Vitanov’s explanatory statement to the Recommendation on the draft Council decision on the conclusion of the Agreement between the European Union and the Republic of Belarus on the readmission of persons residing without authorisation ([12158/2019 – C9-0004/2020 – 2019/0181\(NLE\)](#)), 4 May 2020, p. 8.

<sup>186</sup> The EURA with Pakistan does not expressly provide for the binding nature of the decisions of the JRC as in the EURAs with other states, rather Article 16(2) provides that “The decisions of the Committee shall be taken by unanimity and implemented accordingly”.

<sup>187</sup> See Peers, S. (2003), [Readmission Agreements and EC External Migration Law](#), Statewatch analysis no. 17, p.3

implementing agreements)<sup>188</sup> but which may be used as a springboard and precondition for negotiating a more tailored agreement at a later date.<sup>189</sup> Of these, the Partnership Agreement with African, Caribbean and Pacific (ACP) countries (Cotonou Agreement) concluded in 2000 (as amended in 2010)<sup>190</sup> is illustrative. Article 13(5)(c)(ii) of the Agreement provides for each party to accept the return and readmission of any of its nationals “illegally present” on the territory of the other, on request, and “without further formalities”. Either party can request negotiations on bilateral arrangements for specific obligations on readmission and return, including for third country nationals and stateless persons “if deemed necessary by any of the Parties” and with “adequate assistance” to ACP States.<sup>191</sup> Like EURAs, this document is publicly available.

### 4.3. Informal Arrangements

As at March 2020, 24 informal agreements have been concluded between the European Union (and participating Member States) and third countries which include provisions on return and readmission. These informal agreements take the form of Mobility Partnerships or Common Agendas on Migration and Mobility under the GAM or GAMM as well as other forms of informal agreements such as a Joint Communiqué, Joint Migration Declaration, Joint Way Forward, Standard Operating Procedures, and Good Practices as set out in Annex III. These informal agreements, although appearing to have the form and language of a legally binding international treaty, are expressly proclaimed to be political or operational in nature. Unlike formal agreements, a number are not publicly available.<sup>192</sup>

The rationale for informal agreements has been that they provide flexibility to emerging developments,<sup>193</sup> present a lower cost in case of non-compliance, are less visible in the context of political sensitivities in third countries and are malleable towards security issues.<sup>194</sup> However, they are effectively shielded from scrutiny by the European Parliament and the European Court of Justice (see Section 6).

The content of the Joint Way Forward with Afghanistan, the Standard Operating Procedures with Mali and the Admission Procedures for the Return of Ethiopians from European Union Member States strongly mirror the subject matter of the EURAs, but are focussed on the evidential basis for determining nationality and do not maintain the pretence of reciprocity with the European Union.

The Mobility Partnerships frequently reference cooperation on documentation. The Standard Operating Procedures for Mali contemplate an invitation (with a Member State) from Frontex for “identification missions”, with costs borne by the requesting country or Frontex. The Joint Way Forward with Afghanistan foreshadows joint flights coordinated by Frontex.<sup>195</sup>

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<sup>188</sup> Roig, A., and Huddleston, T. (2007), ‘EC Readmission Agreements: A Re-evaluation of the Political Impasse’, *European Journal of Migration and Law*, Vol. 9, pp.363-387 at p.370-371.

<sup>189</sup> Billet (2010), *op. cit.*, p.49.

<sup>190</sup> Agreement amending for the second time the Partnership Agreement between the members of the African, Caribbean and Pacific Group of States, of the one part, and the European Community and its Member States, of the other part, signed in Cotonou on 23 June 2000, as first amended in Luxembourg on 25 June 2005, OJ L287, 4 November 2010, p.3 (“Cotonou Agreement”)

<sup>191</sup> Cotonou Agreement, Article 13(5)(c)(ii).

<sup>192</sup> See Annex III for further details.

<sup>193</sup> Cassarino, J-P (2018), *op. cit.*, pp.89-94.

<sup>194</sup> Cassarino, J-P. (2007), *op. cit.*, at pp. 187-190; Cassarino, J-P. (2010a), *op. cit.*, pp.8-10; Cassarino, J-P. (2010b), pp.26-32.

<sup>195</sup> See Joint Way Forward on migration issues with between Afghanistan and the EU, 3 October 2016, Part II, paras 3 and 4.

A number of the arrangements expressly contemplate the involvement of Frontex in the implementation of the agreement,<sup>196</sup> or the discretion to involve Frontex,<sup>197</sup> or perhaps indirectly allude to Frontex cooperation.<sup>198</sup> Frontex Working Arrangements are either foreshadowed<sup>199</sup> or reference is made to ones already concluded.<sup>200</sup>

## 4.4. Frontex-related Agreements

### 4.4.1. Working Arrangements

Frontex cooperation with authorities of third countries (as opposed to the State at large) is contemplated in the form of Working Arrangements.<sup>201</sup> The legal status of Working Arrangements, according to scholars, appears to be below an international treaty and corresponds with Frontex having legal personality distinct from other EU institutions but not international legal personality.<sup>202</sup> The text of the Working Arrangements (with the exception of the Migration, Asylum, Refugees Regional Initiative (“MARRI”) and the Commonwealth of Independent States (“CIS”)) expressly declare that Working Arrangements do not constitute an international treaty but are “on establishing operational cooperation”.<sup>203</sup>

Marin has also identified two further non-public instruments which would appear to consolidate Frontex cooperation initiated by Working Arrangements: first, cooperation instruments (such as the cooperation plan with Moldova)<sup>204</sup> and, second, ‘delegated’ working arrangements (such as a security agreement or protocol “on the requirements and procedures to be adopted by Frontex”<sup>205</sup> and the competent authorities of the third country) which were contemplated in Working Arrangements with Armenia, Azerbaijan and Nigeria.<sup>206</sup>

As at March 2020, 17 Working Arrangements have been concluded, one Terms of Reference and one Memorandum (see Annex II). Of those Working Arrangements that have been concluded and that have identified a legal basis, all have identified the first Frontex Regulation of 2004 as their legal basis. The subject matter of the Working Arrangements covers cooperation in operations, returns,

<sup>196</sup> See, for example, the Mobility Partnerships with Moldova, Georgia, Morocco and Jordan, as set out in Annex I.

<sup>197</sup> See, for example, the Mobility Partnerships concluded with Armenia, Azerbaijan and Belarus, the CAMM concluded with Ethiopia, and the Standard Operation Procedures concluded with Mali as set out in Annex I.

<sup>198</sup> See, for example, the CAMM concluded with India and the India, Joint Migration Declaration concluded with Mali, as set out in Annex III.

<sup>199</sup> See Mobility Partnership concluded with Morocco, as set out in Annex I.

<sup>200</sup> See for example, Mobility Partnerships concluded with Azerbaijan and Belarus, as set out in Annex I.

<sup>201</sup> Article 73(4), EBCG Regulation.

<sup>202</sup> Fink, M. (2012), ‘Frontex Working Arrangements: Legitimacy and Human Rights Concerns Regarding Technical Relationships’, *Merkurios*, Vol. 28, Issue 75, pp. 20-35 at pp.25-27; Rijpma, J. J. (2017), ‘External Migration and Asylum Management: Accountability for Executive Action outside EU-territory’, *European Papers*, Vol. 2, No. 2, pp.571-596 at pp.590-591; Marin, L (2020), ‘The Cooperation Between Frontex and Third Countries in Information Sharing: Practices, Law and Challenges in Externalizing Border Control Functions’, *European Public Law*, Vol. 26 No.1, pp.157-180 at p.161. See also [Ott, A., Vos, E., and Coman-Kund, F. \(2013\), \*EU Agencies and their international mandate: A new category of global actors?\*, Centre for the Law of EU External Relations, Working Papers 2013/7, T.M.C. Asser Institute, The Hague, generally and at p.32 on legal status of Working Arrangements.](#)

<sup>203</sup> See Annex I for identification of the relevant provisions in the Working Arrangements.

<sup>204</sup> [European Border and Coast Guard Agency \(2018\), \*Frontex and Moldova sign new cooperation plan\*, 26 March.](#)

<sup>205</sup> See Part 3(ii) in the Working Arrangement with Armenia; Part 3(ii) in the Working Arrangement with Azerbaijan; and Part 4.2 in the Working Arrangement with Nigeria.

<sup>206</sup> Marin (2020), op. cit., pp.163-164.

training, information processing and exchange, research and development, pilot projects, technical assistance, operability, and additional forms of cooperation foreseen in particular agreements.<sup>207</sup>

#### 4.4.2. Status Agreements

The EBCG Regulation requires that Status Agreements are concluded with third countries where border management teams from the standing corps are deployed to third countries and where its members exercise executive powers.<sup>208</sup> The parties to the agreement are the European Union (not Frontex) and the third country<sup>209</sup> based on a model agreement drawn up by the European Commission.<sup>210</sup>

Status Agreements have been signed with Albania (5 October 2018),<sup>211</sup> Montenegro (7 October 2019)<sup>212</sup> and Serbia (19 November 2019).<sup>213</sup> Status Agreements with the Former Yugoslav Republic of Macedonia ("FYROM") (now North Macedonia) (18 July 2018)<sup>214</sup> and Bosnia and Herzegovina (5 February 2019)<sup>215</sup> have been initialled. For the purposes of this study, the five agreements are compared.<sup>216</sup> It should be noted that the initialled Status Agreements may be subject to further amendment prior to signing. Accordingly, the study presents a comparison based on the state of the documents available at the time of writing.

The Status Agreements cover a range of aspects as required by the EBCG Regulation, including "the scope of the operation, civil and criminal liability, the tasks and powers of the members of the

<sup>207</sup> Jones, C. (2017), *Briefing – Frontex: cooperation with non-EU states*, Statewatch, March, pp.10-19.

<sup>208</sup> Article 73(3), EBCG Regulation.

<sup>209</sup> Article 76(1), EBCG Regulation.

<sup>210</sup> Article 54(5), EBCG Regulation; [European Commission \(2016b\)](#), Communication from the Commission to the European Parliament and the Council – Model status agreement as referred to in Article 54(5) of Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard, COM(2016) 747 final, 22 November.

<sup>211</sup> [European Commission \(2018e\)](#), *Border management: EU signs agreement with Albania on European Border and Coast Guard Cooperation*, 5 October; and Council of the European Union (2018), [Document 10290/18](#), 10 July (Status Agreement between the European Union and the Republic of Albania on actions carried out by the European Border and Coast Guard Agency in the Republic of Albania ("Status Agreement with Albania").

<sup>212</sup> Council of the European Union (2019), *Border management: EU signs agreement with Montenegro on European Border and Coast Guard cooperation*, 7 October; and Council of the European Union (2019), [Document No. 6846/19](#), 12 March (Status Agreement between the European Union and Montenegro on actions carried out by the European Border and Coast Guard Agency in Montenegro ("Status Agreement with Montenegro").

<sup>213</sup> [Council of the European Union \(2019\)](#), *Border management: EU signs agreement with Serbia on European Border and Coast Guard cooperation*, 19 November; and Council of the European Union (2019), [Document No. 15579/1/18 REV 1](#), 21 January (Status Agreement between the European Union and the Republic of Serbia on actions carried out by the European Border and Coast Guard Agency in the Republic of Serbia ("Status Agreement with Serbia").

<sup>214</sup> [European Commission \(2018c\)](#), *European Border and Coast Guard: agreement on operational cooperation reached with the former Yugoslav Republic of Macedonia*, 18 July; and Council of the European Union (2018), [Document No. 12043/18](#), 25 September (Status Agreement between the European Union and the former Yugoslav Republic of Macedonia on actions carried out by the European Border and Coast Guard Agency in the former Yugoslav Republic of Macedonia ("initialled Status Agreement with FYROM").

<sup>215</sup> [European Commission \(2019a\)](#), *European Border and Coast Guard: agreement on operational cooperation reached with Bosnia and Herzegovina*, 5 February; and Council of the European Union (2019), [Document No. 7196/19](#), 26 March (Status Agreement between the European Union and Bosnia and Herzegovina on actions carried out by the European Border and Coast Guard Agency in Bosnia and Herzegovina ("initialled Status Agreement with Bosnia and Herzegovina").

<sup>216</sup> For the purpose of this study, when referring to "the Status Agreements", this will mean all five agreements collectively unless otherwise indicated.

teams”, establishing an antenna office and respect for fundamental rights.<sup>217</sup> The actions foreseen in the status agreements include return operations (that is, from Member States only)<sup>218</sup> as well as rapid border interventions<sup>219</sup> and joint operations.<sup>220</sup>

Fink notes the extraordinary nature of Status Agreements is that, “in the case of joint operations led by and carried out in third states, member states (partially) place their border guards and other experts under the third state authority on the basis of an agreement concluded between the EU and the third state” – a characteristic Fink observes that is not even replicated in the EU’s Common Security and Defence Policy (CSDP) missions where command is retained by the Member State.<sup>221</sup> As will be discussed in Section 6 the agreements have significant consequences for the legal liability of team members, affecting the justiciability of actions by affected persons, as well as judicial and parliamentary scrutiny.

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<sup>217</sup> Article 73(3), EBCG Regulation. Note “members of the team” is defined under Article 2(17) of the EBCG Regulation as “a member of the European Border and Coast Guard standing corps deployed through border management teams, migration management support teams and return teams”. Under the Articles 2(f), 2(6) and 2(6) of the Status Agreements with Serbia, Montenegro and Albania respectively, this is further clarified to mean “a member either of the Agency staff or a member of a team of border guards and other relevant staff from participating Member States, including border guards and other relevant staff that are seconded by Member States to the Agency to be deployed during an action”. Article 2(6) of the initialled Status Agreement with FYROM includes a slightly different definition to allow the inclusion of “other relevant staff whose functions will be defined in the Operational Plan”. Only the initialled Status Agreement with Bosnia and Herzegovina expressly excludes local staff as constituting members of the team under Article 2(6).

<sup>218</sup> Article 2(d) of the Status Agreement with Serbia (express reference to the EURA); Article 2(4) of the Status Agreement with Montenegro; Article 2(4) of the Status Agreement with Albania; Article 2(4) of the initialled Status Agreement with FYROM (express reference to EURA); and Article 2(4) of the initialled Status Agreement with Bosnia and Herzegovina (express reference to EURA).

<sup>219</sup> Article 2(c) of the Status Agreement with Serbia; Article 2(3) of each of the Status Agreements with Montenegro and Albania, Article 2(3) of each of the initialled Status Agreements with FYROM and Bosnia and Herzegovina.

<sup>220</sup> Article 2(b) of the Status Agreement with Serbia; Article 2(2) of each of the Status Agreements with Montenegro and Albania; and Article 2(2) of each of the initialled Status Agreements with FYROM and Bosnia and Herzegovina.

<sup>221</sup> Fink (2018), op. cit., p.43.

## 5. Safeguarding of Fundamental Rights

This Section seeks to explore the incorporation of fundamental rights safeguards in the agreements relating to the external dimension of return and readmission. It highlights how the fundamental rights provisions contained in the agreements are largely construed as an inter-state matter. Accordingly, the direct assertion of the fundamental rights referenced in the agreements is not possible due to the absence of specific guarantees and procedural safeguards in the agreements for the readmitted person in the receiving state. Reliance has largely been placed on inter-state trust and the procedural safeguards available to the person prior to removal or readmission.

### 5.1. EURAs

Each EURA contains a ‘non-affected’<sup>222</sup> clause but with variations as to the express inclusion of international treaties (or, in the case of Turkey, express references to EU secondary legislation). The inclusion of specific human rights conventions was an initiative of the European Parliament (EP).<sup>223</sup>

As Giuffré points out, the significance of including international treaties in the non-affected clause is that it incorporates all the provisions of those treaties rather relying on general international law, noting that not all provisions of the Refugee Convention are customary international law.<sup>224</sup>

The non-affected clause in the EURA with Ukraine refers back to the international treaties cited in the recitals.<sup>225</sup> In the EURAs with Hong Kong,<sup>226</sup> Macao,<sup>227</sup> Sri Lanka<sup>228</sup> and Pakistan<sup>229</sup> there are no express references to specific international treaties. The remainder make express mention at least of the Refugee Convention and its Protocol and the European Convention on Human Rights and Fundamental Freedoms (“ECHR”), whilst variously identifying the UN Convention Against Torture (“CAT”), the UN Universal Declaration Against Human Rights (“UDHR”) or the International Convention on Civil and Political Rights (“ICCPR”).<sup>230</sup>

The EURA with Turkey is the most extensive,<sup>231</sup> which also includes EU secondary legislation such as the Return Directive, the Long Term Residents Directive,<sup>232</sup> the Family Reunification Directive<sup>233</sup> and

<sup>222</sup> The non-affected clause determines how the agreement relates to other rights, responsibilities and obligations that the parties have under international law. The non-affected clause provides that the agreement is “without prejudice” to those rights, responsibilities and obligations under international law. The effect is that the agreement is secondary to those other rights, responsibilities and obligations should the agreement ever be conflict with them.

<sup>223</sup> See Billet (2010), op. cit., pp.72-73.

<sup>224</sup> Giuffré, M. (2013), “Readmission Agreements and Refugee Rights: From a Critique to a Proposal”, *Refugee Survey Quarterly*, Vol. 32, No. 3, pp.79-81 at p.96.

<sup>225</sup> Article 14(1) and Recital 5 in EURA with Ukraine.

<sup>226</sup> Article 16(1) in EURA with Hong Kong.

<sup>227</sup> Article 16(1) in EURA with Macao.

<sup>228</sup> Article 16(1) in EURA with Sri Lanka.

<sup>229</sup> Article 15(1) and (3) in EURA with Pakistan.

<sup>230</sup> See Table in Annex I.

<sup>231</sup> See further, Yavuz, C. A. (2019), ‘Analysis of the EU-Turkey Readmission Agreement: A Unique Case’, *European Journal of Migration and Law*, Vol. 21, p.486-508, particularly at p.501-504.

<sup>232</sup> [Council Directive 2003/109/EC](#) of 25 November 2003 concerning the status of third-country nationals who are long-term residents (“Long Term Residents Directive”).

<sup>233</sup> [Council Directive 2003/86/EC](#) of 22 September 2003 on the right to family reunification (“Family Reunification Directive”).

the first generation<sup>234</sup> Procedures Directive<sup>235</sup> and Reception Conditions Directive<sup>236</sup> and identifies particular rights within that secondary legislation (for example, the right to remain is expressly identified in relation to the Procedures Directive).<sup>237</sup> However, Turkey applies a geographic limitation on the Refugee Convention to people originating from Europe.<sup>238</sup>

Under the EURAs, there are no procedural rights afforded to returnees to enforce their substantive rights under those treaties. To the extent that there are any incompatibilities between a EURA and a Member State bilateral agreement, the EURAs provide that its provisions shall prevail.<sup>239</sup>

The European Commission takes the view that EURAs are “technical instruments bringing procedural improvements to cooperation between administrations. The situation of the person subject to readmission has not been regulated, leaving those issues to relevant international, EU and national applicable law.”<sup>240</sup> The Commission underscores their operational focus<sup>241</sup> and considers that the proper repository of fundamental rights safeguards are the existing instruments and “in particular the EU/asylum return acquis.”<sup>242</sup> Accordingly, the Commission’s position is that the non-affected clause “confirm[s] the applicability of and respect for human rights instruments”.<sup>243</sup> The European Commission has maintained this view in a recent presentation to the European Parliament’s Committee on Civil Liberties, Justice and Home Affairs (LIBE).<sup>244</sup>

Whilst the 2010 report of the Parliamentary Assembly of the Council of Europe (“PACE”) acknowledged the European Commission’s view about the difficulties of negotiating with third countries to provide fundamental rights protections in practice, it also contended that human rights clauses should not be excluded from EURAs and that other negotiation contexts should perhaps be pursued.<sup>245</sup> EURAs have been described as “complementary” to the EU safe third country policies and as an instrument to give effect to those policies.<sup>246</sup> However, it is also arguable that EURAs cannot be viewed in isolation from the EU secondary legislation and jurisprudence on international protection and return.

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<sup>234</sup> Noting that the first generation secondary legislation on asylum, unlike the recasts, is cast in terms of “minimum standards”.

<sup>235</sup> [Council Directive 2005/85/EC](#) of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status.

<sup>236</sup> [Council Directive 2003/9/EC](#) of 27 January 2003 laying down minimum standards for the reception of asylum seekers.

<sup>237</sup> Article 18 in EURA with Turkey.

<sup>238</sup> See further, [European Council on Refugees and Exiles \(ECRE\)](#) (2020), *Country Report: Turkey*, ECRE, Brussels pp.19, 109-111.

<sup>239</sup> See, for example, Article 21 in the EURAs with Azerbaijan, Armenia and Turkey.

<sup>240</sup> European Commission (2011), *op. cit.*, p.10.

<sup>241</sup> *Ibid.*, p.11 part (ii), “(ii) The main aim of EURAs (or any readmission agreement for that matter) is to agree with the administration of the partner country on a swift and efficient readmission procedure. This principle must not be compromised by including measures which could give grounds to a revision of previous final return decisions or final refusals of asylum applications, unless the relevant EU acquis so allows.”

<sup>242</sup> *Ibid.*, p.11.

<sup>243</sup> *Ibid.*, p.11.

<sup>244</sup> [European Parliament](#), Committee on Civil Liberties, Justice and Home Affairs, 28 January 2020 at 9:55 to 9:57; 10:06.39 to 10:07.30; and, in relation to the inclusion of human rights considerations in the visa facilitation agreement with Belarus 10:29.27 to 10:30.22.

<sup>245</sup> [Council of Europe, Parliamentary Assembly \(“PACE”\) \(2010a\)](#), *Readmission agreements: a mechanism for returning irregular migrants*, Document 12168, 17 March, Strasbourg, paras 82-83.

<sup>246</sup> Coleman (2009), *op. cit.*, p.67.

There is no requirement in the body of the Recast Procedures Directive that the ability to readmit an applicant for international protection to a third country is a precondition for applying the safe third country concept. However, it is instructive to note that, in the recitals to the Directive, the presence of grounds for admission or readmission into a third country is identified as a factor that should vitiate a Member State's obligations for assessing the substance of an asylum claim.<sup>247</sup> It would appear that applying the first country of asylum concept is conditional upon the applicant for international protection's readmission to that third country.<sup>248</sup>

In the context of avoiding indirect *refoulement*, EURAs are silent on ensuring that the readmitting third country guarantees to the returnee access to the asylum procedure and provides adequate material support (if returned under the Safe Third Country concept). The Safe Third Country concept only requires that the person may *request* refugee status as opposed to being granted access to the procedure.<sup>249</sup> The non-affection clauses do not provide any guarantee of those rights to the persons to be readmitted or any obligation on the part of the third country to provide them.

As Giuffré notes, the unilateral determination of the safe third country provisions by EU secondary legislation and applied by the Member States do not create a corresponding obligation on the third country to which the person will be admitted.<sup>250</sup> This is also reflected in body of EURAs which makes no distinction between applicants for international protection from third-country nationals – the only safeguard being under the recast Procedures Directive that a person readmitted under the Safe Third Country concept is handed a document informing the authorities of the country of readmission in the language of that country that the person's application has not been substantively examined.<sup>251</sup> Accordingly, there is a gap in protection.

**Recommendation 1: Avenues should be explored to obtain commitments from third countries of return that ensure readmitted persons have access to the substantive rights contained in the international human rights treaties identified in EURAs, including access to the asylum procedure if returned under the Safe Third Country concept provisions.**

In the EURAs between Turkey<sup>252</sup> and Pakistan<sup>253</sup> the maximum period of detention in the requesting state is expressly contemplated in the calculation of the time limits for responding to a readmission application. In both cases, the failure to reply to a readmission application by the end of the maximum period of detention in the requesting state deems the requested state to have agreed to the transfer.

This may affect the legality of the person's detention through the assessment of whether removal is realistic and continues to be justified. The issue here is that authorities may assert that the readmission application has been accepted, but only by operation of the deeming provisions. However, this may not necessarily reflect the reality of prolonged readmission arrangements beyond a deemed acceptance of a readmission application that may otherwise render the detention arbitrary.<sup>254</sup>

<sup>247</sup> Recital 44, Recast Procedures Directive.

<sup>248</sup> Article 35, Recast Procedures Directive, states "A country can be considered to be a first country of asylum for a particular applicant if [...] provided that he or she will be readmitted to that country".

<sup>249</sup> Article 38(1)(e) Recast Procedures Directive.

<sup>250</sup> Giuffré (2013), op. cit., p.98; see also Coleman (2009), op. cit., p.67.

<sup>251</sup> Article 38(3)(b), Recast Procedures Directive; see also Coleman (2009), op. cit., p.312.

<sup>252</sup> Article 11(2), EURA with Turkey.

<sup>253</sup> Article 8(2), EURA with Pakistan.

<sup>254</sup> See Section 3.14, above, concerning the prohibition of arbitrary detention.

**Recommendation 2: Further research should be undertaken to determine the extent to which time limits contained in EURAs that are linked to a maximum period of detention in requesting states are used in practice and their impact, if any, on the legality a person’s detention.**

The ability to suspend agreements represents an important, although not complete, fundamental rights safeguard. The majority of EURAs contain insufficient means to suspend the implementation of the agreements and none contain specific reference to fundamental rights standards as a basis for suspension. Two EURAs contain suspension clauses without grounds,<sup>255</sup> whilst four contain suspension clauses only in relation to third country nationals or stateless persons on account of reasons of “security, protection of public order or public health”.<sup>256</sup> However, in the face of any fundamental rights concerns, a Member State always retains the possibility to refrain from sending a person to a third country.

EURAs are silent on human rights monitoring. The Joint Readmission Committees (“JRCs”) established under the EURAs are not specifically charged to undertake post removal monitoring.<sup>257</sup> It has been suggested that such monitoring should be undertaken, particularly with the aim to eliminate the risk of indirect *refoulement*.<sup>258</sup> Even prior to entering into negotiations on EURAs, it has been argued that fundamental rights should be included in criteria for commencing cooperation as well as undertaking a fundamental rights assessment of the partner country before reaching an agreement.<sup>259</sup> The necessity of such an approach has been underscored following the European Ombudsman’s decision concerning a human rights impact assessment of the EU-Turkey Agreement.<sup>260</sup>

**Recommendation 3: The European Commission should undertake fundamental rights impact assessments before concluding a EURA with a third country.**

EURAs may be seen as contributing to a number of indirect consequences. First, the absence of express human rights commitments from readmitting third countries may incentivise responsibility shifting through chain expulsion. In negotiating EURAs, the EU has encouraged the conclusion of readmission agreements between third countries and other third countries.<sup>261</sup> As noted by Strik, this has consequences for the maintenance of returnees’ dignity in a long “chain of transit” where material reception conditions are insufficient<sup>262</sup> and the prospect of durable solutions are remote.

Second, although the EURAs do not themselves cause fundamental rights challenges if all other guarantees are respected, EURAs operate in the context of informal practices.<sup>263</sup> In light of the

<sup>255</sup> EURAs with Armenia and Azerbaijan.

<sup>256</sup> See Article 22(4) in each of the EURAs with Serbia, Montenegro, Bosnia and Herzegovina and the Former Yugoslav Republic of Macedonia.

<sup>257</sup> Billet (2010), op. cit., p.73.

<sup>258</sup> Cassarino (2010), op. cit., p.21.

<sup>259</sup> Strik, T. (2019), *Migration deals and responsibility sharing: can the two go together?* in Carrera et al (eds.) (2019), op. cit., p.60. See also Giuffré (2013), op. cit., p.99. See also, Peers (2003), op. cit., p.5. For an alternative view see, Coleman (2009), op. cit., pp.67-68.

<sup>260</sup> European Ombudsman (2017), *Decision of the European Ombudsman in the joint enquiry into complaints 506-509-674-784-927-1381/2016/MHZ against the European Commission concerning a human rights impact assessment in the context of the EU-Turkey Agreement*, 18 January.

<sup>261</sup> See, for example, EU/Moldova Action Plan (2005), para 47, point 2, “Encourage Moldova to conclude readmission agreements with the main countries of origin and transit” and discussion on this issue in Part 7 below.

<sup>262</sup> Strik, T. (2019), op. cit., p.59.

<sup>263</sup> Giuffré (2013), op. cit., p.88.

accelerated procedures under EURAs that compel tight time frames for readmission requests, there are concerns that EURAs place fundamental rights at risk,<sup>264</sup> such as collective expulsion where individual arguments as to a person's non-return cannot be presented to authorities, or the selective acceptance of readmission requests of certain nationals based on whether a readmission agreement has been concluded with their country of origin.<sup>265</sup>

Third, with the exception of the EURA with Hong Kong, each agreement also provides that the parties may resort to the return of a person under other formal or informal arrangements, which can contribute to the risk that the parties avoid the use of the EURAs and adopt informal modalities for readmission.<sup>266</sup>

## 5.2. Informal Agreements

As can be seen from Annex III, the human rights references contained in the informal agreements are meagre, with a number having generalised references to fundamental rights. Any fundamental right commitments contained in the agreements are undermined either by expressly stating that the agreements are political in nature or that the provisions "are not designed to create legal rights or obligations under international law."

However, Molinari observes that the fundamental rights consequences informal agreements have on migrants is a necessary factor to be considered when evaluating whether informal agreements produce legal effects between the signatories.<sup>267</sup> A number of the informal agreements contemplate monitoring of the agreements but do not make express provision for fundamental rights monitoring.

Suspension clauses are not used with the exception of the Standard Operating Procedures ("SOP") with Mali but which requires six months' notice – such a timeframe would undermine the responsiveness to human rights concerns (acknowledging, however, that Member States are under no obligation to readmit persons and may refrain from removal if such concerns arose). The Joint Way Forward with Afghanistan only provides for Afghanistan to discontinue 30 days prior to the end of the initial two-year period of the agreement but otherwise does not provide for its suspension. The Admission Procedures with Mali only provide for modification by mutual agreement, not suspension.

## 5.3. Frontex-related Agreements

### 5.3.1. Working Arrangements

Only the Frontex Working Arrangements with Nigeria, Armenia, Azerbaijan and Kosovo and the Memorandum of Understanding with Turkey, expressly contemplate "full respect for human rights" in the implementation of the cooperation. The Working Arrangement with United States makes an oblique reference to compliance with human rights in its reference to carrying out activities in the Working Arrangement "in accordance with applicable laws, regulations and policies."

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<sup>264</sup> Council of Europe Parliamentary Assembly (2010), op. cit., paras 70-72.

<sup>265</sup> See the example of Turkey discussed in Gregou, M. (2014), 'Drawing the Geographic Boundaries of Expulsion and Readmission in Greece: The Dynamics of an Elusive Process', *European Journal of Migration and Law*, Vol. 16, p.505-533 at p.525.

<sup>266</sup> See, by analogy, in the context of formal bilateral readmission agreements between Member States and Third Countries, Giuffré (2013), op. cit., p.92.

<sup>267</sup> Molinari (2019), op. cit., p.836.

**Recommendation 4: Frontex Working Arrangements should contain express references to fundamental rights guarantees that reflect Frontex’s obligation to guarantee fundamental rights under the EBCG Regulation.**

### 5.3.2. Status Agreements

The obligation for Frontex team members to fully respect fundamental rights in the performance of their tasks and in the exercise of their powers is provided for in the Status Agreements. Although no international treaties are identified, a non-exhaustive reference is made to key fundamental rights principles, including *non-refoulement*. The Status Agreements compel the proportionate exercise of powers where team members take measures which interfere with fundamental rights and freedoms and to “respect the essence of these fundamental rights and freedoms”.<sup>268</sup>

A complaint mechanism is required by each Party to the agreement to deal with allegations of fundamental rights.<sup>269</sup> However, slight differences exist – the agreement with Serbia provides for “an existing mechanism”<sup>270</sup> whereas the other agreements provide that each Party “shall have a complaint mechanism”.<sup>271</sup> However, no other safeguards are provided such as the duty to inform or redress mechanisms.<sup>272</sup>

Central to the Status Agreements is the Operational Plan.<sup>273</sup> The Operational Plan is concluded with the third country as well as the Member State or Member States bordering the third country. The Operational Plan is required to contain provisions “in respect of fundamental rights including personal data protection”.<sup>274</sup> However, the Operational Plan only sets out the organisation and procedural aspects of a joint operation or a rapid border intervention<sup>275</sup> – that is, return operations are not the subject of an Operational Plan under the Status Agreements and which appear to have been expressly omitted from being subject to an Operational Plan according to the model Status Agreement prepared by the European Commission.<sup>276</sup> Under the Status Agreements, compliance with the Operational Plan, as certified by the Frontex Executive Director, is determinative of whether a team member enjoys criminal, civil and administrative law immunity from the host country under

<sup>268</sup> Article 9(1) of each of the Status Agreements with Serbia and Montenegro; Article 9(1) of the initialled Status Agreement with FYROM; Articles 8(1) of the Status Agreement with Albania; and Article 8(1) of the initialled Status Agreement with Bosnia and Herzegovina.

<sup>269</sup> Article 9(2) of each of the Status Agreements with Serbia and Montenegro; Article 9(2) of the initialled Status Agreement with FYROM; Article 8(2) of the Status Agreement with Albania; Article 8(2) of the initialled Status Agreement with Bosnia and Herzegovina.

<sup>270</sup> Article 9(2) of the Status Agreement with Serbia.

<sup>271</sup> Article 9(2) of the Status Agreement with Montenegro; Article 9(2) of the initialled Status Agreement with FYROM; Article 8(2) of the Status Agreement with Albania; Article 8(2) of the initialled Status Agreement with Bosnia and Herzegovina.

<sup>272</sup> [Coman-Kund, F. \(2020\), \*The Territorial Expansion of Frontex Operations to Third Countries: On the Recently Concluded Status Agreements in the Western Balkans and Beyond...\*, Verfassungsblog, 6 February.](#)

<sup>273</sup> See further, Fink, M. (2018), *Frontex and Human Rights – Responsibility in ‘Multi-Actor Situations’ under the ECHR and EU Public Liability Law*, Oxford University Press, Oxford, pp.59-61.

<sup>274</sup> *Ibid.*

<sup>275</sup> Article 4(2) of each of the Status Agreements with Serbia and Montenegro; Article 4(2) of the initialled Status Agreement with FYROM; Article 3(2) of the Status Agreement with Albania; Article 3(2) of the initialled Status Agreement with Bosnia and Herzegovina.

<sup>276</sup> Article 4(1) of each of the Status Agreements with Serbia and Montenegro; Article 4(1) of the initialled Status Agreement with FYROM; Article 3(1) of the Status Agreement with Albania; and Article 3(1) of the initialled Status Agreement with Bosnia and Herzegovina; European Commission (2016b), *op. cit.*, footnote 12.

the Status Agreement.<sup>277</sup> The significance of omitting Return Operations from the necessity of an Operational Plan as regards immunity from criminal, civil and administrative law is unclear.

Only the Status Agreement with Serbia and the initialled Status Agreement with FYROM indicate that it is without prejudice to the parties' obligations under other international treaties and agreements.<sup>278</sup>

The Status Agreements provide for both the suspension of the action and the agreement itself. The Executive Director may suspend or terminate the action where the instructions to the team are not in accordance with the Operational Plan (noting the exceptional situation for return operations highlighted above)<sup>279</sup> or for non-compliance with the Status Agreement or Operational Plan by one of the Parties.<sup>280</sup>

Special provision for suspension or termination of the action is made in cases of a breach of fundamental rights, a violation of the principle of *non-refoulement* or a breach of data protection rules, but this is discretionary not an obligation to do so.<sup>281</sup> The criteria under the Status Agreements for suspending or terminating an action in the case of a breach of fundamental rights does not require the breach to be "serious" or "likely to persist" as contemplated under the EBCG Regulation.<sup>282</sup> The Status Agreement itself is capable of unilateral suspension or termination.<sup>283</sup>

**Recommendation 5: To suspend or terminate an action under a Status Agreement in the case of a breach of fundamental rights should be obligation.**

The provisions on data processing<sup>284</sup> show differences, with the Status Agreement with Serbia providing that a record of data processed under the data processing provisions of the agreement must be retained for three years from the date of collection.<sup>285</sup> There is no counterpart in the other agreements. The Status Agreements cast data processing broadly when necessary "for the implementation of this Agreement" (with the exception of the initialled Status Agreement with Bosnia and Herzegovina which provides "necessary for and proportionate to the implementation of

<sup>277</sup> Article 7(2) and (3) of the Status Agreement with Serbia; Article 7(3) and (4) of the Status Agreement with Montenegro; Articles 7(3) and (4) of the initialled Status Agreement with FYROM; Article 6(2) and (3) of the Status Agreement with Albania; Article 6(2) and (3) of the initialled Status Agreement with Bosnia and Herzegovina.

<sup>278</sup> Article 12 of the Status Agreement with Serbia; Article 13 of the initialled Status Agreement with FYROM.

<sup>279</sup> Article 5(3) of each of the Status Agreements with Serbia and Montenegro; Article 5(3) of the initialled Status Agreement with FYROM; Article 4(3) of the Status Agreement with Albania; Article 5(1) and (3) of the initialled Status Agreement with Bosnia and Herzegovina.

<sup>280</sup> Article 6(1) and (2) of each of the Status Agreements with Serbia and Montenegro; Article 6(1) and (2) of the initialled Status Agreement with FYROM; Article 5(1) and (2) of the Status Agreements with Albania; Article 5(1) and (2) of the initialled Status Agreement with Bosnia and Herzegovina. The Status Agreement with Serbia refers to the "implementation" of the Status Agreement whereas the others refer to it not being "respected".

<sup>281</sup> Article 6(3) of each of the Status Agreements with Serbia and Montenegro; Article 6(3) of the initialled Status Agreement with FYROM; Article 5(3) of the Status Agreement with Albania; and Article 5(3) of the initialled Status Agreement with Bosnia and Herzegovina.

<sup>282</sup> Article 46(4), EBCG Regulation.

<sup>283</sup> Article 14(3) of the Status Agreement with Serbia; Article 12(3) of each of the Status Agreements with Montenegro and Albania; Article 12(3) of the initialled Status Agreement with FYROM; Article 11(3) of the initialled Status Agreement with Bosnia and Herzegovina.

<sup>284</sup> Article 10 of each of the Status Agreements with Serbia and Montenegro; Article 10 of the initialled Status Agreement with FYROM; Article 9 of the Status Agreements with Albania; Article 9 of the initialled Status Agreement with Bosnia and Herzegovina.

<sup>285</sup> Article 10(5) of the Status Agreement with Serbia.

this Agreement")<sup>286</sup> and expressly reference the GDPR and UIDPR (or their statutory predecessors) as they relate to Member States and Frontex respectively.<sup>287</sup>

As regards transfer of data, the Status Agreements contemplate the ability to restrict access, use, onward transfer and destruction,<sup>288</sup> as well as the submission of a common report at the end of each action to the Frontex fundamental rights officer and data protection officer.<sup>289</sup> However, the prohibition of onward transfer of personal data to third countries or third parties now contained in the EBCG Regulation is not reflected in the Status Agreements.<sup>290</sup>

**Recommendation 6: Status Agreements should include a prohibition on the onward transfer of personal data consistent with the obligation under the EBCG Regulation.**

The Status Agreements also differ on the access granted to national databases: in the agreements with Montenegro and Albania, both States may "authorise members of the team to consult its national databases",<sup>291</sup> suggesting the possibility of direct access by team members. The "consultation" is required to be carried out "in accordance with the national data protection law" of the State.<sup>292</sup> However, the other Status Agreements suggest greater direct oversight by the national competent authorities and less opportunity for direct access by team members, with the initialled Status agreement with FYROM expressly providing that only authorised persons from FYROM who have access to the appropriate national database.<sup>293</sup>

The scope of access to the national databases also differs: the Status Agreements with Montenegro and Albania (both referring to databases which may be "consulted") and the initialled Status Agreement with FYROM (which refers to data that may be "shared") provide "if necessary for fulfilling operational aims specified in the operational plan and for *return operations* [emphasis added]".<sup>294</sup> The Status Agreement with Serbia provides that data may be communicated, "if necessary for fulfilling the operational aims specified in the operational plan and for *implementing actions* [emphasis added]".<sup>295</sup> The initialled Status Agreement with Bosnia and Herzegovina only refers to providing data "if necessary for fulfilling the operational aims in the operational plan",<sup>296</sup> meaning that return operations may be excluded from the purpose for which a team member may be provided data from that national database.

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<sup>286</sup> Article 10(1) of each of the Status Agreements with Serbia and Montenegro; Article 10(1) of the initialled Status Agreement with FYROM; Article 9(1) of the Status Agreement with Albania; and Article 9(1) of the initialled Status Agreement with Bosnia and Herzegovina.

<sup>287</sup> Article 10(3) of each of the Status Agreements with Serbia and Montenegro; Article 10(3) of the initialled Status Agreement with FYROM; Article 9(3) of the Status Agreement with Albania; and Article 9(3) of the initialled Status Agreement with Bosnia and Herzegovina.

<sup>288</sup> Article 10(4) of each of the Status Agreements with Serbia and Montenegro; Article 10(4) of the initialled Status Agreement with FYROM; Article 9(4) of the Status Agreement with Albania; Article 9(4) of the initialled Status Agreement with Bosnia and Herzegovina.

<sup>289</sup> Article 10(6) of the Status Agreement with Serbia and Article 10(6) of the Status Agreement with Montenegro.

<sup>290</sup> Article 85(5), EBCG Regulation.

<sup>291</sup> Article 5(7) of the Status Agreement with Montenegro; Article 4(7) of the Status Agreement with Albania.

<sup>292</sup> *Ibid.*

<sup>293</sup> See Article 5(7) of the Status Agreement with Serbia; Article 4(7) of the Status Agreement with Albania; Article 4(7) of the initialled Status Agreement with Bosnia and Herzegovina; and Article 5(7) of the initialled Status Agreement with FYROM.

<sup>294</sup> Article 5(7) of the Status Agreement with Montenegro; Article 5(7) of the initialled Status Agreement with FYROM; Article 4(7) of the Status Agreement with Albania.

<sup>295</sup> Article 5(7) of the Status Agreement with Serbia.

<sup>296</sup> Article 5(7) of the initialled Status Agreement with Bosnia and Herzegovina.

The Status Agreements with Serbia, Montenegro and Albania also specify the purpose for which information from national databases may be given to team members. The Status Agreements with Serbia and Montenegro specify that the data is to be “necessary for performing their tasks and exercising their powers”.<sup>297</sup> The Status Agreement with Albania arguably specifies a narrower purpose by providing that the data to be consulted is to be “necessary for performing their tasks and exercising their powers *as specified in the operational plan or as necessary for return operations* [emphasis added]”.<sup>298</sup>

In the Status Agreements with Montenegro and Albania and the initialled Status Agreement with Bosnia and Herzegovina, access to national databases are subject to national data protection law<sup>299</sup> (the initialled Status Agreement with FYROM simply states “in accordance with national legislation”<sup>300</sup>). However, the Status Agreement with Serbia provides no such comparable provision.

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<sup>297</sup> Article 5(7) of the each of the Status Agreements with Serbia and Montenegro.

<sup>298</sup> Article 4(7) of the Status Agreement with Albania.

<sup>299</sup> Article 5(7) of the Status Agreement with Montenegro; and Articles 4(7) of the Status Agreement with Albania; Article 4(7) of the initialled Status Agreement with Bosnia and Herzegovina.

<sup>300</sup> Article 5(7) of the initialled Status Agreement with FYROM.

## 6. Accountability

This section explores issues around accountability from the perspectives of affected individuals and institutions. The approach taken will be consistent with Bovens' conceptualisation of accountability – namely, “a relationship between an actor and a forum, in which the actor has an obligation to explain and to justify his or her conduct, the forum can pose questions and pass judgement, and the actor may face consequences”.<sup>301</sup>

Bovens contends that accountability is made up of three stages: (1) the information stage – that is, “to inform the forum about his or her conduct”; (2) the questioning stage – that is “for the forum to interrogate the actor and to *question* the information or legitimacy of the conduct”; and (3) the judgment stage which is inclusive of consequences that can be imposed upon the actor.<sup>302</sup> *Ex post* and *ex ante* avenues for accountability will also be identified.<sup>303</sup>

### 6.1. EURAs

As formal agreements constituting an agreement between the Union and third countries, EURAs undergo the procedure contemplated by Article 218 TFEU and can only be concluded with the consent of the European Parliament.<sup>304</sup> The Parliament must be immediately and fully informed at all stages of the procedure.<sup>305</sup>

A further avenue for accountability exists in the European Parliament's ability to obtain the opinion of the Court of Justice on the compatibility of an agreement with the Treaties before it enters into force – with the agreement unable to enter into force until the agreement is amended or the Treaties are revised.<sup>306</sup> As noted by Eisele, the European Commission has engaged in regular presentations to the European Parliament's LIBE Committee on the developments concerning the Union's readmission policy since September 2010.<sup>307</sup> The last LIBE scrutiny session of readmission agreements took place on 28 January 2020.<sup>308</sup> However, the last evaluation of EURAs undertaken by the European Commission dates from 2011.<sup>309</sup>

**Recommendation 7: The European Commission should undertake a comprehensive and objective evaluation of EURAs and their implementation.**

EURAs do not contain procedural guarantees to give access to the substantive rights contained in the international treaties identified in them – this is particularly pertinent for those subjected to safe

<sup>301</sup> Bovens, M. (2007), 'Analysing and Assessing Accountability: A Conceptual Framework', *European Law Journal*, Vol. 13, No. 4 pp.447-468 at p.450.

<sup>302</sup> *Ibid*, pp. 451-452.

<sup>303</sup> *Ibid*, pp.453.

<sup>304</sup> Article 218(6)(a), TFEU.

<sup>305</sup> Article 218(10), TFEU. On the importance of the information requirement, see also [Case C-658/11 Parliament v Council](#), Judgment, Grand Chamber, 24 June 2014, paras 80-82; and [Case C-263/14 Parliament v Council](#), Judgment, Grand Chamber, 14 June 2016, para 71.

<sup>306</sup> Article 218(11), TFEU.

<sup>307</sup> Eisele, K. (2019), *The EU's readmission policy: of agreements and arrangements* in Carrera, S., Santos Vara, J., and Strik, T. (eds.) (2019a), *Constitutionalising the External Dimensions of EU Migration Policies in Times of Crisis – Legality, Rule of Law and Fundamental Rights Reconsidered*, Edward Elgar, Cheltenham, p.146-147.

<sup>308</sup> [European Parliament](#), Committee on Civil Liberties, Justice and Home Affairs, 28 January 2020.

<sup>309</sup> European Commission (2011), *op. cit.*

third country provisions under the recast Procedures Directive.<sup>310</sup> Rather, EURAs are premised on a two-fold reliance that: first, prior to removal, that a person has access to effective remedies under the Return Directive or the EU asylum *acquis* and the obligation of Member States to refrain from removing a person where the person's fundamental rights are at risk of being breached; and second, after removal, the requested state will honour their international human rights obligations on the basis of inter-state trust.

In light of the ECtHR's jurisprudence under Article 3 ECHR, the absence of post-return monitoring presents not only a fundamental rights blind spot, but also raises questions about the standing of the Union and the Member States to evaluate the effectiveness of the EURAs.

The Return Directive compels Member States to establish an effective forced return monitoring system<sup>311</sup> yet is silent on the scope of that monitoring.<sup>312</sup> However, the European Commission takes the view in its 2017 *Return Handbook* that forced return monitoring under the Return Directive should be limited to monitoring "until reception in the country of return", noting expressly that "[i]t does not include post-return monitoring, i.e. the period following reception of the returnee in a third country".<sup>313</sup>

It has been previously noted that the Joint Return Committees do not include human rights monitoring within their scope. However, such a role for Joint Readmission Committees (JRC) has been recommended,<sup>314</sup> including by the European Commission in its 2011 evaluation.<sup>315</sup> Yet any such role for the JRCs would also need corresponding levels of transparency and accountability of the JRCs given the confidentiality of the deliberations and decisions of the JRCs, as well as the implementing protocols of the EURAs.<sup>316</sup>

In addition to enhancing transparency and accountability, ongoing post-return monitoring has the capacity to inform the judiciary and policy makers of the safety of people once returned as well as identifying the chief obstacles they are likely to face.<sup>317</sup> Return monitoring had also been advanced as a policy option by the European Parliamentary Research Service (EPRS) in its Cost of non-Europe Study in the area of asylum.<sup>318</sup> In that EPRS study, the precise scope of the monitoring contemplated was unclear but which would, in any event, need to be more than country-of-origin style generalised information and include monitoring individual returnees.<sup>319</sup> Following the Decision of the European

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<sup>310</sup> Carrera (2016), op. cit., pp.54-55.

<sup>311</sup> Article 8(6), Return Directive.

<sup>312</sup> See Majcher (2019), op. cit., p.662.

<sup>313</sup> Annex to the [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, 19 December 2017, OJL 339, pp.119.

<sup>314</sup> Council of Europe (2010), op. cit., para 75; Cassarino (2010b), op. cit., pp.18-23.

<sup>315</sup> European Commission (2011), op. cit., pp.13-14.

<sup>316</sup> Carrera (2016), op. cit., pp.41-42.

<sup>317</sup> Pirjola, P. (2015), 'Flights of Shame or Dignified Return? Return Flights and Post-return Monitoring', *European Journal of Migration and Law*, Vol. 17, p.305-328, at p.328 and more generally at pp.326-328.

<sup>318</sup> European Parliamentary Research Service (2018), [The Cost of Non-Europe in Asylum Policy](#), European Parliamentary Research Service, Study, October 2018, Brussels.

<sup>319</sup> *Ibid.*, see pp. 75-76, 95-96, 135, 147-148, noting particularly at p.148 where the costs are estimated to be "comparable to costs already borne in relation to, for example, the compilation of COI reports."

Ombudsman in relation to the EU-Turkey Statement, it is arguable that the European Commission should undertake a human rights impact assessment before concluding a EURA.<sup>320</sup>

**Recommendation 8: Post-return monitoring of persons returned to third countries should be undertaken to ensure the fate of returned persons and the challenges they face.**

## 6.2. Informal Agreements

The use of informal agreements impacts both judicial and Parliamentary accountability as such agreements are seen to fall outside the scope of the information, consent and scrutiny requirements otherwise compelled or authorised by EU primary law.<sup>321</sup> Informal agreements do not follow the procedures for Parliamentary consent and information under Article 218 TFEU, which has also shielded informal agreements from the *ex-ante* scrutiny of the Court of Justice under Article 218(11) TFEU.

In a broader perspective, it has been argued that Member States have adopted a strategic ‘use’ and ‘non-use’ of non-Europe in returning migrants, which has manifested, *inter alia*, in the use of informal agreements for which the EU-Turkey Statement set a precedent for cooperation with third countries.<sup>322</sup> Ambiguity concerning the authorship of the EU-Turkey deal resulted in an ultimately impenetrable barrier for justiciability at the EU level. In *NF v European Council*, the General Court of the Court of Justice,<sup>323</sup> later confirmed by the Grand Chamber,<sup>324</sup> held that the applicants’ claim was inadmissible because the Court found that the characterisation of Members of the European Council contained in the EU-Turkey Statement really meant “Heads of State and Government of the Member States of the European Union”.<sup>325</sup>

The European Ombudsman has, however, emphasised the need for the European Commission to undertake an ongoing human rights impact assessment for the duration of the EU-Turkey statement.<sup>326</sup> The Ombudsman indicated that compliance with the EU fundamental rights obligations are not in any way weakened by the political nature or its characterisation as an “Agreement” or “Statement”,<sup>327</sup> taking the view that “observance of and respect for fundamental rights” is good administration.<sup>328</sup>

Molinari attributes four significant consequences to the use of informal agreements on democracy and the rule of law: first, they do not specify the legal basis upon which they were made, as required

<sup>320</sup> EU Ombudsman (2017), op. cit., see para 30, “Regrettably, in this case, no human rights impact assessment was done before the Agreement was signed.”

<sup>321</sup> See, Santos Vara (2019), op. cit., pp.29-35.

<sup>322</sup> Slominski and Trauner (2018), op. cit., pp. 108-110.

<sup>323</sup> [Case T-192/16 NF v European Council](#), Judgment, 28 February 2017.

<sup>324</sup> [Joined cases C-208/17 P to C-210/17 P, NF, NG and NM v European Council](#), Judgment, Grand Chamber, 12 September 2018.

<sup>325</sup> Case T-192/16 *NF v European Council*, Judgment, 28 February 2017, para 69. See further, Gatti, M., and Ott, A. (2019), *The EU-Turkey statement: legal nature and compatibility with EU institutional law*, in Carrera et al. (eds.) (2019), op. cit., pp.175-200; [Carrera, S., Den Hertog, L., Stefan, M. \(2017\), It wasn't me! The Luxembourg Court Orders on the EU-Turkey Refugee Deal](#), CEPS Policy Insights, No. 2017-15, April, Centre for European Policy Studies, Brussels; [Cannizzaro, E. \(2017\), Denialism as the Supreme Expression of Realism – A Quick Comment on NF v. European Council](#), European Papers, Vol. 2, No. 1, pp.251-257; [Garcia Andrade, P. \(2018\), External Competence and Representation of the EU and its Member States in the Area of Migration and Asylum](#), EU Immigration and Asylum Law and Policy, 17 January.

<sup>326</sup> European Ombudsman (2017), op. cit., para 30.

<sup>327</sup> *Ibid*, para 25.

<sup>328</sup> *Ibid*.

by Article 296(2) TFEU; second, the negotiation procedure and the required consent of the European Parliament under Article 218 is not seen to apply; third, the requirement for publication under Article 297 TFEU which applies to formal readmission agreements is seen not to apply to informal agreements; and fourth, informal agreements pose severe justiciability challenges for bringing a direct action under Article 263 TFEU because any applicant would have to show that the agreement was “intended to produce legal effects vis-à-vis third parties”.<sup>329</sup>

The issue of justiciability is further compounded because, as Molinari observes, the ambiguity around who are the authors of the agreement and, therefore, the duty bearers, makes it difficult to determine the proper defendant bearing in mind that only actions that can be ascribed to the EU can be the subject of a direct action under Article 263 TFEU, a preliminary ruling under Article 267 TFEU or if damages are sought under Article 340(2) TFEU.<sup>330</sup>

Notwithstanding the restricted formal role of the European Parliament in the monitoring and scrutiny of informal agreements, Reslow notes that the Parliament has adopted more informal means to seek accountability and scrutiny since 2015.<sup>331</sup> This has included articulating concerns, directing questions towards Commissioners, holding hearings, making resolutions and arranging visits by parliamentary delegations to third countries.<sup>332</sup> However, Reslow notes that the Parliament did not seek any judicial redress against the EU-Turkey Statement.<sup>333</sup>

The budgets which support informal agreements consist of instruments under the Multiannual Financial Framework (MFF) and those that exist outside of it (such as the European Development Fund (“EDF”). The purpose here is not to evaluate the instruments but rather to identify the means of monitoring and oversight as well as to highlight concerns.

The EU funding landscape for projects in third countries is very unclear, incoherent and for which overall oversight is lacking,<sup>334</sup> and which has been characterised by a degree of ‘re-packaging’.<sup>335</sup> It is not possible to come to definitive conclusions regarding the use of funding towards specific EU return and readmission objectives, even if this is a policy priority for the EU and Member States<sup>336</sup> – this would require an examination into each of the projects, their objectives and their level of implementation – an exercise which is outside the scope of this study. However, the funding instruments do sit within the broader context of the EU’s external policy objectives (for example, under the EU Emergency Trust Fund for stability and addressing the root causes of irregular migration and displace persons in Africa (“EUTF for Africa”), which expressly identifies the EUTF for

<sup>329</sup> Molinari (2019), op. cit., pp.837-838.

<sup>330</sup> Molinari (2019), op. cit., pp. 838-839.

<sup>331</sup> [Reslow, N. \(2018\)](#), *Crisis, Change and Continuity: The Role of the European Parliament in EU External Migration Policy*, Paper prepared for ECPR Conference, Hamburg, 22-25 August, pp.6ff.

<sup>332</sup> *Ibid.*, pp. 6-8.

<sup>333</sup> *Ibid.*, pp. 8-9.

<sup>334</sup> [Den Hertog, L. \(2016b\)](#), *Money Talks – Mapping the funding for EU external migration policy*, CEPS Paper in Liberty and Security in Europe, No. 95, November, Centre for European Policy Studies, Brussels.

<sup>335</sup> See also, [Den Hertog, L. \(2016a\)](#), *EU Budgetary Responses to the ‘Refugee Crisis’ – Reconfiguring the Funding Landscape*, CEPS Paper in Liberty and Security in Europe, No. 93, May, Centre for European Policy Studies, Brussels, pp.5-6.

<sup>336</sup> Carrera, S., Den Hertog, L., Núñez Ferrer, J., Musmeci, R., Vosliute, L., Pilati, M. (2018), *Oversight and Management of the EU Trust Funds – Democratic Accountability Challenges and Promising Practices*, Study, European Parliament, Directorate General for Internal Policies, Policy Department D: Budgetary Affairs, May, European Parliament, Brussels, p.80

Africa's role in implementing the Partnership Framework with Ethiopia)<sup>337</sup> in addition to some pertinent examples, such as the funding of the Libyan Coastguard.<sup>338</sup>

A European Parliament study on the EU trust funds ("EUTFs") and the Facility for Refugees in Turkey ("FRT") identified a number of concerns in democratic accountability given the European Parliament's more limited role to ensure accountability at the *ex ante* stage over EUTFs compared to those funding instruments already in place under the MFF.<sup>339</sup> Concern was expressed that the basis of EUTF for Africa was established through the EDF<sup>340</sup> but which may be supplemented by other EU instruments *within* the EU budget.<sup>341</sup>

As a result, the funds from those EU budget instruments end up in a framework established *outside* the EU budget and without the EP's scrutiny under comitology.<sup>342</sup> The only remaining moment for the Parliament's scrutiny occurs when the non-EDF funds are transferred to EDF-based trusts rather than at the point when the trusts were set up.<sup>343</sup>

In terms of ongoing democratic accountability, the EP study noted that whilst the Parliament had or will have the ability to attend EUTF board meetings as a *de facto* observer, it is not represented at the Operational Committees where the decisions on what will be financed are taken.<sup>344</sup> The EP study observed that the EP would normally (that is, not in the context of the EDF) have scrutiny rights under comitology in relation to the action fiches or action plans.<sup>345</sup>

The EP study did note the European Commission's active efforts to distribute information to the Parliament to enable a degree of scrutiny consistent with not "disproportionately harming the exercise of executive powers".<sup>346</sup> However, given the permanent nature of the decisions, the EP study recommended that the rights of information and scrutiny should be extended to the Parliament as under comitology proper.<sup>347</sup>

In terms of *ex post* democratic accountability, the EP study noted the Parliament's role in receiving annual accounts and reports of the EUTFs, as well as its role in executing its discharge procedure and its ability to request the discontinuation of a EUTF.<sup>348</sup> How the European Parliament has exercised its available rights in practice with respect to the Trust Funds could be the subject of further research. The EP study also identified the lack of demarcation between a Member State's role

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<sup>337</sup> Ibid, p.33 and 79.

<sup>338</sup> [European Commission \(2017\)](#), *EU Trust Fund for Africa adopts EUR 46 million programme to support integrated migration and border management in Libya*, 28 July, Brussels.

<sup>339</sup> In terms of process, a Trust Fund is set up via a constitutive agreement that does not require the consent of the European Parliament. The European Parliament does have a right of scrutiny *ex ante* because the Trust Funds are set up under an implementing decision under Article 291 TFEU. Accordingly, comitology applies and the EP has a right of scrutiny – see Carrera S., et al (2018), EP Study, op. cit., pp.29-30.

<sup>340</sup> The European Commission has proposed that the EDF be integrated into the EU Budget in its proposal for the MFF for 2021-2027 – see [European Commission \(2018b\)](#), Communication from the Commission – A Modern Budget for a Union that Protects, Empowers and Defends – The Multiannual Financial Framework for 2021-2027 COM(2018) 321 final, 2 May 2018.

<sup>341</sup> Carrera S., et al (2018), EP Study, op. cit., pp. 30, 46-47.

<sup>342</sup> Ibid., pp.46-47.

<sup>343</sup> Ibid., p.30.

<sup>344</sup> Ibid., p.47.

<sup>345</sup> Ibid., pp.47-48.

<sup>346</sup> Ibid., p.49.

<sup>347</sup> Ibid., p.49

<sup>348</sup> Ibid., pp.50-51.

on Operational Committees (as a donor) and the role of a Member State's agency (as an implementing partner).<sup>349</sup> The EP study recommended an express provision in the EUTF constitutive agreements prohibiting implementing organisations sitting on governance bodies,<sup>350</sup> particularly in light of the European Court of Auditors' ("ECA") Special Report on the Bêkou EUTF for the Central African Republic which identified "potential conflicts of interest" where organisations sitting on the fund's Operational Committee select implementing organisations.<sup>351</sup>

The Facility for Refugees in Turkey is a coordination mechanism constituted by a Commission Decision based on Articles 210(2) and 214(6) TFEU and which leave the instruments funding the Facility within the EU budget.<sup>352</sup> Concern was expressed about the presence of Turkey in the steering committee of the FRT and the potential for the politicisation of humanitarian aid based on external relations factors.

The ECA provides another important safeguard of budgetary accountability under Article 287 TFEU. It has delivered special reports in relation to the Thematic Programme for Migration and Asylum ("TPMA") and European Neighbourhood and Partnership Instrument ("ENPI"),<sup>353</sup> the Facility for Refugees in Turkey<sup>354</sup> and the EUTF for Africa.<sup>355</sup> The reports highlight shortcomings in coherence, operational objectives, monitoring, information gathering, needs and means assessments at both EU and Member State levels. These special reports will be discussed further in Section 8.

### 6.3. Frontex-related Agreements

Frontex is under a duty to inform the Parliament, the Council and the Commission of its activities in the context of cooperation with third countries and to provide "detailed information on compliance with fundamental rights".<sup>356</sup>

It is also required to make public agreements, working arrangements, pilot projects and technical assistance projects with third countries, as well as return operations and return interventions, including in third countries.<sup>357</sup> Every six months the Executive Director is also under a duty to send a detailed evaluation report to the Parliament, the Council and the Commission on return operations.<sup>358</sup> However, there appears to be an asymmetry in the ability to sanction under the EBCG Regulation other than through the discharge of the budget.<sup>359</sup>

A significant information deficiency relates to the public availability of Operational Plans, which are not identified under the EBCG Regulation to be made publicly available. These are central to

<sup>349</sup> Ibid., pp.41-42.

<sup>350</sup> Ibid., pp.87.

<sup>351</sup> [European Court of Auditors \(2017\)](#), *The Bêkou EU trust fund for the Central African Republic: a hopeful beginning despite some shortcomings*, Special Report No. 11, 20 June, Luxembourg, para 40.

<sup>352</sup> Carrera S, et al (2018), EP Study, op. cit., pp.35-37.

<sup>353</sup> [European Court of Auditors \(2016\)](#), *EU external migration spending in Southern Mediterranean and Eastern Neighbourhood countries until 2014*, Special Report No. 9, 25 February, Luxembourg.

<sup>354</sup> [European Court of Auditors \(2018a\)](#), *The Facility for Refugees in Turkey: helpful support, but improvements needed to deliver more value for money*, Special Report No. 27, 2 October 2018, Luxembourg,

<sup>355</sup> [European Court of Auditors \(2018b\)](#), *European Union Emergency Trust Fund for Africa: flexible but lacking focus*, Special Report No. 32, 16 October, Luxembourg.

<sup>356</sup> Article 73(7), EBCG Regulation.

<sup>357</sup> Articles 73(7) and 114(2), EBCG Regulation.

<sup>358</sup> Article 50(7), EBCG Regulation.

<sup>359</sup> Article 116(11), EBCG Regulation.

determining immunity in Status Agreements by the Executive Director and against which decisions to withdraw, terminate or suspend activities are made. Fink observes that although access to *past* Operational Plans is possible, the key parts of Operational Plans are not publicly available – even for those directly affected.<sup>360</sup>

Further, the right to request access to documents is limited to EU citizens or persons residing in a Member State.<sup>361</sup> As a consequence, there exists a major obstacle to the attribution of responsibility to various actors participating in operations as well as determining the proper defendant and proper forum in which to bring proceedings.<sup>362</sup>

**Recommendation 9: Obstacles to accessing complete Operational Plans by those directly affected should be removed.**

The Frontex fundamental rights complaint mechanism established under the 2016 EBCG Regulation has been amended in the current EBCG Regulation to include the ability of a person to submit a complaint about not only actions but also “a failure to act on the part of staff”, including in relation to return operations or joint interventions.<sup>363</sup>

Fink observes that this subtle amendment may go some way to increasing Frontex accountability for omissions – a shortcoming that has persisted on account of the role of Frontex being characterised as “coordinating” in such a way to shift fundamental rights responsibilities to Member States but which now sits incongruously with firstly, Frontex’s standing corps which include its own staff as border guards endowed with executive powers; secondly, positive obligations under Article 80 of the EBCG Regulation to “guarantee the protection of fundamental rights”; and thirdly, the positive obligations under the ECHR to protect applied analogously by Article 53(3) CFR.<sup>364</sup>

In any event, the complaint mechanism does not fulfil the requirements of an effective remedy under Article 47 CFR on account of its non-judicial and internal character.<sup>365</sup>

### 6.3.1. Working Arrangements

Before concluding a Working Arrangement, Frontex is required to obtain the Commission’s approval and to inform the Parliament.<sup>366</sup> The authorisation of the European Data Protection Supervisor (EDPS) is needed before concluding Working Arrangements on exchanging classified information.<sup>367</sup>

<sup>360</sup> Fink (2018), op. cit., p.340.

<sup>361</sup> Article 2(1), [Regulation EC No. 1049/2001](#) of the European Parliament and of the Council of 30 May 2001 regarding public access to the European Parliament, Council and Commission documents. See also Article 114(1), EBCG Regulation.

<sup>362</sup> Fink (2018), op. cit., p.61, pp.339-341.

<sup>363</sup> Article 111(2), EBCG Regulation

<sup>364</sup> [Fink, M. \(2020b\)](#), *Frontex: Human Rights Responsibility and Access to Justice*, EU Immigration and Asylum Law Policy, 30 April. Article 53(3) provides that where the CFR contains a corresponding right guaranteed by the ECHR, the meaning and scope of those rights will be the same as in the ECHR. However, it is arguable that Article 53(3) CFR is somewhat tempered by Article 51(2) CFR which provides that the CFR “does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties” which may be interpreted as a curtailment of the scope of the ECHR’s concept of “positive obligations”: see Provera, M. (2013), *The Detention of Asylum Seekers in the European Union and Australia – A Comparative Analysis*, Wolf, Oisterwijk, at pp.37-38.

<sup>365</sup> [Fink, M. \(2020a\)](#), *The Action for Damages as a Fundamental Rights Remedy: Holding Frontex Liable*, German Law Journal, Vol. 21, pp.532-548 at p.548.

<sup>366</sup> Article 76(4), EBCG Regulation.

<sup>367</sup> Article 73(4), EBCG Regulation.

The European Commission is required to consult Frontex and “other relevant Union bodies, offices or agencies” including FRA and EDPS before drafting model working arrangements.<sup>368</sup>

However, characterisation of Frontex Working Arrangements as a ‘non-treaty’ places them outside the primary law requirement to be subject to the consent of Parliament, and for the possibility of an opinion to be obtained from the CJEU on their compatibility with the treaties.<sup>369</sup> The Working Arrangements are otherwise currently publicly available and the majority specify a legal basis.

Marin notes that scrutiny and accountability concerns arise in arrangements that emanate both from and beyond Frontex Working Arrangements. These relate, firstly, to cooperation instruments and secondly, to ‘delegated’ working arrangements (that is, because further agreements or protocols are concluded in the context of an existing Working Arrangement which may itself contemplate the further agreement) which are not publicly available.<sup>370</sup>

As these further arrangements would appear to represent consolidated cooperation with third countries, it is arguable that the Parliament should be informed. The existence of these further arrangements raises the question about whether and to what extent Frontex Working Arrangements are being used as a means to propagate further informal cooperation arrangements.<sup>371</sup>

**Recommendation 10: The European Parliament should be informed about cooperation instruments, ‘delegated’ working arrangements and documents of a similar character which emanate from, or consolidate, Frontex Working Arrangements.**

### 6.3.2. Status Agreements

The consent of the Parliament under Article 218 TFEU applies to Frontex Status Agreements.<sup>372</sup> The EDPS must be consulted on the data transfer provisions of Status Agreements if they “differ substantially from the model status agreement”.<sup>373</sup> The Member States, Frontex, FRA and EDPS are required to be consulted by the European Commission prior to it drafting a model status agreement.<sup>374</sup>

The Status Agreements provide for the criminal,<sup>375</sup> civil and administrative immunity<sup>376</sup> for team members provided that the acts were performed in the exercise of their official functions in the course of the actions carried out in the Operational Plans. The Frontex Executive Director certifies whether the act was performed in the exercise of official functions in accordance with the Operational Plan or not. If the Executive Director so certifies, then proceedings must not be initiated

<sup>368</sup> Article 76(2), EBCG Regulation.

<sup>369</sup> Article 218, TFEU.

<sup>370</sup> Marin (2020), op. cit., p.164.

<sup>371</sup> Ibid, p.164 and p.172.

<sup>372</sup> Article 73(3), EBCG Regulation.

<sup>373</sup> Article 73(3), EBCG Regulation.

<sup>374</sup> Article 76(1), EBCG Regulation.

<sup>375</sup> Article 7(2) of the Status Agreement with Serbia; Article 7(3) of the Status Agreement with Montenegro; Article 7(3) of the initialled Status Agreement with FYROM; Article 6(2) of the Status Agreement with Albania; and Article 6(2) of the initialled Status Agreement with Bosnia and Herzegovina.

<sup>376</sup> Article 7(3) of the Status Agreement with Serbia; Article 7(4) of the Status Agreement with Montenegro; Article 7(4) of the initialled Status Agreement with FYROM; Article 6(3) of the Status Agreement with Albania; and Article 6(3) of the initialled Status Agreement with Bosnia and Herzegovina.

in the third country. Where the Executive Director certifies to the contrary, then proceedings may be initiated.

Accordingly, the Operational Plan is at the core of determining immunity from criminal, civil and administrative proceedings in the third country. However, under the Status Agreements, an Operational Plan is only required for joint operations or rapid border interventions – it does not cover return operations.<sup>377</sup> It will be recalled that team members may only perform tasks and exercise executive<sup>378</sup> powers in the third country “under instructions from and, as a general rule, in the presence of” border guards or other relevant staff of the third country.<sup>379</sup> However, the “as a general rule” qualification regarding the presence of border guards or other relevant authorities is not contained in the Frontex Status Agreement with Serbia or the initialled Status Agreement with FYROM.<sup>380</sup> The third country is responsible for issuing instructions to the team in accordance with the operational plan.<sup>381</sup> The third country may authorise team members to act on its behalf<sup>382</sup> – however, no such provision is contained in the initialled Status Agreement with FYROM.

Any immunity whilst under the jurisdiction of the third country does not exempt the team member from the jurisdictions of the home Member States. In all Frontex Status Agreements with the exception of that with Montenegro, the home Member State may waive immunity.<sup>383</sup> Immunity cannot be invoked by a team member against a counter-claim if they have initiated civil or administrative proceedings, but no such provision is contained in the Status Agreement with Serbia and the initialled Status Agreement with Bosnia and Herzegovina.<sup>384</sup>

In the Frontex Status Agreements with Montenegro and the initialled Status Agreement with Bosnia and Herzegovina, team members may be compelled to give evidence as witnesses,<sup>385</sup> whereas the Status Agreements with Serbia and Albania and the initialled Status Agreement with FYROM expressly exclude team members from being obliged to give evidence.<sup>386</sup> A liability gap is

<sup>377</sup> See Section 5.3.2 above; See also European Commission (2016b), op. cit., footnote 12.

<sup>378</sup> Article 5(1) of each of the Status Agreements with Serbia and Montenegro; Article 5(1) of the initialled Status Agreement with FYROM; Article 4(1) of the Status Agreements with Albania; and Article 4(1) of the initialled Status Agreement with Bosnia and Herzegovina.

<sup>379</sup> Article 5(3) of each of the Status Agreements with Montenegro and Albania; and Article 5(3) of the initialled Status Agreement with Bosnia and Herzegovina.

<sup>380</sup> Article 5(3) of the Status Agreements with Serbia; and Article 5(3) of the initialled Status Agreement with FYROM.

<sup>381</sup> Article 5(3) of each of the Agreements with Serbia and Montenegro; Article 5(3) of the initialled Status Agreement with FYROM; Article 4(3) of the Status Agreements with Albania; and Article 4(3) of the initialled Status Agreement with Bosnia and Herzegovina.

<sup>382</sup> The ability of the third country to authorise team members to act on its behalf is qualified by “exceptionally” in the Status Agreements with Montenegro and Albania: see Article 5(3) of the Status Agreement with Montenegro and Article 4(3) of the Status Agreement with Albania. In the initialled Status Agreement with Bosnia and Herzegovina, the possibility to authorise team members to act on its behalf is qualified by “in line with the exceptions envisaged in the operational plan”: see Article 4(3) of the initialled Status Agreement with Bosnia and Herzegovina. The Status Agreement with Serbia contains a condition that “as long as the overall responsibility and command and control functions remain with the border guards or other police officers of the Republic of Serbia present at all times”: see Article 5(3) of the Status Agreement with Serbia.

<sup>383</sup> Article 7(4) of the Status Agreement with Serbia; Article 6(4) of the Status Agreements with Albania; Article 6(4) of the initialled Status Agreement with Bosnia and Herzegovina; and Article 7(5) of the initialled Status Agreement with FYROM.

<sup>384</sup> Article 7(4) of the Status Agreement with Montenegro; Article 6(3) of the Status Agreement with Albania; Article 7(3) of the initialled Status Agreement with FYROM.

<sup>385</sup> Article 7(6) of the Status Agreement with Montenegro; Article 6(5) of the initialled Status Agreement with Bosnia and Herzegovina.

<sup>386</sup> Article 7(5), Status Agreement with Serbia; Article 6(5) of the Status Agreement with Albania; Article 7(6) of the initialled Status Agreement with FYROM.

encountered in relation to statutory Frontex staff who do not have a home state but who may be exercising executive powers in a third country.<sup>387</sup>

**Recommendation 11: The liability of Frontex statutory staff exercising executive powers in a third country should be expressly contemplated in Frontex Status Agreements.**

The Frontex Status Agreements raise challenges in relation to scrutiny and accountability for those subject to return operations. Given the absence of return operations from operational plans under the Status Agreements, it is unclear whether immunity in the host country applies to team members in the context of a return operation.

Notwithstanding that ambiguity, Rijpma notes the practical and legal obstacles to judicial accountability in a number of scenarios: firstly, the responsibility of the third country for issuing instructions creates difficulties for an applicant seeking to attribute responsibility to a Member State because the required ECtHR threshold of “effective jurisdiction” would not be reached in order for the Member State to be said to be acting extra-territorially (that is, in the third country);<sup>388</sup> secondly, Frontex cannot be brought to account before the ECtHR due to the EU not having acceded to the ECHR;<sup>389</sup> thirdly, establishing a “sufficiently serious breach” under EU liability law in circumstances where Frontex or the Member State did not have decision-making powers in the territory of a third country (other than to suspend or terminate the action in the case of fundamental rights violations) is a significant juridical hurdle even if Frontex would be acting within the scope of EU law and, therefore, falling within the scope of the EU Charter.<sup>390</sup> Rijpma concludes that “[i]n both practical and legal terms, the EU and ECHR liability regimes do not sufficiently reflect the multi-actor reality in EU external administrative action.”<sup>391</sup>

Fink observes that the reason for some cooperative actions in joint operations not resulting in an allocation of responsibility under the ECHR or EU public liability law is because “neither of these responsibility mechanisms systematically appreciate the fact that several public actors can do more together than each of them alone”,<sup>392</sup> concluding that express and extensive provisions are needed to overcome these deficiencies.

**Recommendation 12: Avenues should be explored, and reform undertaken, to ensure attribution of responsibility under ECHR and EU public liability law in multiple actor contexts.**

<sup>387</sup> See [European Council on Refugees and Exiles \(ECRE\) \(2018\)](#), *ECRE Comments on the Commission Proposal for a Regulation on the European Border and Coast Guard COM(2018) 631 Final*, ECRE, November, Brussels, p.17.

<sup>388</sup> Rijpma, J. J., (2017), op. cit., at pp.593-594.

<sup>389</sup> Ibid, p.594

<sup>390</sup> Ibid, p.594 also citing M Fink, *Frontex and Human Rights Responsibility in ‘Multi-Actor Situations’* under the ECHR and EU Public Liability Law (PhD dissertation, Leiden University, forthcoming 2018).

<sup>391</sup> Ibid, p.594; See also Carrera, S., Den Hertog, L., Parkin, J. (2013), “The Peculiar Nature of EU Home Affairs Agencies in Migration Control: Beyond Accountability versus Autonomy?”, *European Journal of Migration and Law*, Vol. 15, pp.337-358 at p.352.

<sup>392</sup> Fink (2018), op. cit., p.21.

## 7. Implications on EU External Affairs

This Section explores two of the key implications of EU return and readmission policy on EU external affairs: (1) the use of incentives or conditionality to conclude EURAs and other arrangements; (2) the incentivisation of other readmission agreements. It must be emphasised that, although the focus on these two implications are for the purposes of this Study, this is not to diminish other key implications on EU external affairs (including any unintended consequences, which may even be presently unknown). This Section focuses on the use of incentives or conditionality in light of firstly, the recent amendments to the Visa Code which now contemplates a form of positive and negative incentives; and secondly, the European Commission's proposal to 'budgetise' the EDF.<sup>393</sup> This Section focuses on the incentivisation of other readmission agreements in order to contextualise firstly, the disjunction between the lack of procedural rights and guarantees afforded to returned persons under readmission agreements or other arrangements (see Sections 5 and 6) and the proliferation of such agreements; and secondly, the inversion of the European Commission's policy choices from voluntary to forced return in its proposed recast of the Return Directive.<sup>394</sup>

### 7.1. Incentives/Conditionality

The use of incentives in the context of EURAs had its origins in European Commission negotiations with third countries and the pursuit of the third-country national and stateless person clause in EURAs that third countries found unattractive combined with the insufficient leverage held by the European Commission when negotiating.<sup>395</sup>

As outlined earlier, EURAs are predicated on "unbalanced reciprocities" between the EU and the third country,<sup>396</sup> meaning that even though the texts of the agreements are reciprocal, in practice it is more in the interests of the EU to return the partner country's nationals, third country nationals and stateless persons than it is for a single third country to return EU citizens. Further, third countries have also had inadequate means to be able to implement EURAs.<sup>397</sup> Initial responses included financial and operational support, followed then by efforts to link visa facilitation and the conclusion of EURAs, followed lastly by the integration of readmission into EU external affairs.<sup>398</sup> EU readmission policy has become "grafted on to other issues of 'high politics'".<sup>399</sup>

Notwithstanding its initial use in exceptional cases only,<sup>400</sup> visa facilitation has become a standard incentive to conclude EURAs.<sup>401</sup> However, Trauner and Kruse observed that visa facilitation makes distinctions between privileged and non-privileged citizens' access to the EU and the potential for

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<sup>393</sup> European Commission (2018b), op. cit.

<sup>394</sup> European Commission (2018d), op. cit.

<sup>395</sup> Coleman (2009), op. cit., pp.194-197.

<sup>396</sup> Cassarino (2010), op. cit.

<sup>397</sup> Billet (2010), op. cit., pp.74-75.

<sup>398</sup> Coleman (2009), op. cit., pp.195-197.

<sup>399</sup> Cassarino (2010), EP Study, op. cit., p. 26.

<sup>400</sup> Schieffer, M. (2003), 'Community Readmission Agreements with Third Countries – Objectives, Substance and Current State of Negotiations', *European Journal of Migration and Law*, Vol. 5, p343-357 at p.356; Coleman (2009), op. cit., p.195.

<sup>401</sup> Hernández i Sagrera, R. (2010), 'The EU-Russia readmission-visa facilitation nexus: an exportable migration model for Eastern Europe?', *European Security*, Vol. 19 No. 4, pp.569-584; Trauner and Kruse (2008), op. cit.

differentiated treatment of partner countries within the European Neighbourhood Partnership (“ENP”) region.<sup>402</sup> Visa facilitation, of itself, may be of questionable attractiveness to third countries.

The European Commission’s impact assessment on the amendments to the Visa Code (which introduces positive and negative incentives based on a third country’s practical cooperation on readmission) notes that, “apart from anecdotal experience in the EU with regard to one third country – there is no hard evidence on how visa leverage can translate into better cooperation of third countries on readmission”.<sup>403</sup> Indeed, the use of negative conditionality is predicated on the EU having the greatest leverage or being perceived as the most significant actor which has become more complex, notably in Africa, where Chinese investment may affect the degree of leverage the EU can exert.<sup>404</sup>

For some third countries, the more overarching objective is visa liberalisation (for which visa facilitation may be a first step<sup>405</sup>). This was particularly seen in the negotiation of the EURA with Turkey which insisted on a Visa Liberalisation Roadmap before concluding the EURA, with visa exemptions for Turkish nationals being linked to the coming into effect of the third country national provisions of the EURA.<sup>406</sup> However, Turkey did not implement returns under the EURA on account of insufficient progress on visa liberalisation, resulting in the legal basis of returns from Greece to Turkey reverting to the bilateral agreement between Greece and Turkey<sup>407</sup> and the politicisation of migrants.

In the context of Mobility Partnerships, the insufficiency of visa facilitation as an incentive for a third country to enter into a EURA may be at least partly attributable to the lack of competence of the EU in relation to stays beyond short stay visas – that is, Member States retain competence on legal migration<sup>408</sup> and for which third countries are more motivated to seek bilateral arrangements with Member States. In the context of Morocco, Den Hertog has concluded that funding under Mobility Partnerships is a means of compensating for the EU’s lack of competence in the field of legal migration<sup>409</sup> and that the intended purpose of the projects contained in the Annexes to the Mobility Partnership are to create an impression of balance, thereby taking the spotlight off the EU’s need to conclude a EURA, even if this is a core objective.<sup>410</sup> It has been argued that further incentives to Morocco do not necessarily translate into the conclusion of a EURA – other regional and political issues are of significance.<sup>411</sup>

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<sup>402</sup> Trauner and Kruse (2008), op. cit., pp.427-428.

<sup>403</sup> [European Commission \(2018a\)](#), Commission Staff Working Document Impact Assessment Accompanying the document – Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 810/2009 Establishing a Community Code on Visas (Visa Code), SWD(2018) 77 Final, 14 March, p.31.

<sup>404</sup> [Collet, E. and Ahad, A. \(2017\)](#), *EU Migration Partnerships: A work in progress*, Migration Policy Institute, December, p.28.

<sup>405</sup> Hernández i Sagregra (2010), p.579.

<sup>406</sup> Yavuz, A. C. (2019), op. cit., at pp. 499-500; See also İçduygu, A., and Aksel D. B. (2014), ‘Two-to-Tango in Migration Diplomacy: Negotiating Readmission Agreement between the EU and Turkey’, *European Journal of Migration and Law*, Vol. 16, pp.337-363.

<sup>407</sup> Carrera, S., Den Hertog, L., Stefan, M., *The EU-Turkey deal: reversing ‘Lisbonisation’ in EU migration and asylum policies*, in Carrera et al. (2019), p. 163.

<sup>408</sup> Den Hertog, L. (2016c), “Funding the EU-Morocco ‘Mobility Partnership’: Of Implementation and Competences”, *European Journal of Migration and Law* Vol. 18, pp.275-301, at p.277.

<sup>409</sup> *Ibid*, p.296.

<sup>410</sup> *Ibid*, pp.288-299.

<sup>411</sup> Carrera, S., Cassarino, J.-P., El Quadim, N., Lahlou, M., Den Hertog, L. (2016), [EU-Morocco Cooperation on Readmission, Borders and Protection: A model to follow?](#), CEPS Paper in Liberty and Security in Europe, No. 87, January, Centre for European Policy Studies, Brussels.

Cassarino observed that “reversed conditionality” (that is, where potential partner third countries set conditions prior to the conclusion of readmission agreements or other cooperation on readmission) resulted from some third countries becoming aware of their strategic importance in the field of police cooperation and border controls<sup>412</sup> and which has contributed to the conclusion of more informal readmission cooperation.<sup>413</sup>

The emphasis on conditionality in terms of return and readmission since the 2015 European Agenda on Migration and the EU Action Plan on Return have seen an obscuring of development and humanitarian principles in return for migration outcomes. The concern is that funding earmarked for development risks being redirected away from development and poverty eradication goals and from those poorest of countries or with the most pressing needs which may have little correlation with the migration routes and origins of migration that are the focus of EU funding.<sup>414</sup> This is particularly concerning in the context of the EDF-based EUTF for Africa and the FRT. In the context of the EUTF for Africa, the establishment of the trust fund was predicated on an ‘emergency’ without an articulation of what emergency it was endeavouring to address.<sup>415</sup>

In addition, the EUTF for Africa emanated in the context of the EU-Africa Valetta Summit on Migration and recipient countries included those that were the focus of the Migration Partnership Framework.<sup>416</sup> The European Commission acknowledged the EUTF for Africa’s “important role in the implementation of the Partnership Framework” and its role, *inter alia*, in supporting “return, readmission and reintegration”.<sup>417</sup>

Oxfam has expressed its concern that Official Development Assistance is connected to the prevention of irregular migration and the conclusion of readmission agreements and that “development projects have been approved in parallel with progress in the negotiations of agreements on returns and readmissions.”<sup>418</sup>

Conditionality also raises questions about compatibility with Article 208(1) TFEU which provides that “Union development cooperation shall have as its primary objective the reduction and, in the long term, the eradication of poverty”. In relation to the FRT, concerns have been expressed regarding the role of Turkey in the steering committee and whether foreign relations may impact adherence to the European Consensus on Humanitarian Aid<sup>419</sup> - namely, neutrality, humanity, independence, impartiality and the respect of international humanitarian law.<sup>420</sup> Further, assistance to Turkey under

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<sup>412</sup> Cassarino (2007), op. cit., p.192.

<sup>413</sup> Cassarino (2010), EP Study, op. cit., p.33-34; Cassarino (2010), Unbalanced Reciprocities, op. cit., pp.16-17.

<sup>414</sup> [Cortinovis, R., and Conte, C. \(2018\)](#), *Migration – Migration-related conditionality in EU external funding*, Resoma Discussion Brief, Research Social Platform on Migration and Asylum, July, p.8; see also Carrera et al. (2018), EP Study, pp.84-85.

<sup>415</sup> Carrera (2018), et al., EP Study, p.33.

<sup>416</sup> Being Nigeria, Niger, Mali, Senegal, and Ethiopia - European Commission (2016a), op. cit., pp.14-15.

<sup>417</sup> [European Commission \(2017\)](#), *2016 Annual report - The Emergency Trust Fund for stability and addressing root causes of irregular migration and displaced persons in Africa*, European Commission, Brussels, p.4.

<sup>418</sup> [Oxfam \(2020\)](#), *The EU Trust Fund for Africa – Trapped between aid policy and migration politics*, Briefing Paper, January, Oxfam International, Oxford, p.4. See also [CONCORD Europe \(2018\)](#), *Partnership or Conditionality? Monitoring the Migration Compacts and EU Trust Funds for Africa*, CONCORD Europe, Brussels,

<sup>419</sup> Carrera et al. (2018), EP Study, p.39.

<sup>420</sup> [Council of the European Union \(2008\)](#), Joint Statement by the Council and the Representatives of the Governments of the Member States meeting within the Council, the European Parliament and the European Commission OJ C 25/1, 30 January.

the FRT was expressly conditional upon Turkey complying with the EU-Turkey Joint Action Plan and the EU-Turkey Statements of 29 November 2015 and 18 March 2016.<sup>421</sup>

**Recommendation 13: International development and humanitarian aid principles should be subject to greater demarcation from EU funding for migration-related outcomes.**

## 7.2. Incentivisation of Other Readmission Agreements

A consequence of concluding readmission agreements with third countries has been an either indirect or express incentivisation by the EU for that third country to conclude agreements with other third countries – creating a web of onward readmission agreements.

From a strategic perspective, the Community sought to incentivise neighbouring third countries, with whom it was negotiating EURAs to conclude readmission agreements with other countries of source and transit<sup>422</sup> – a strategy adopted with Poland with respect to eastern European nationals which resulted in Poland concluding readmission agreements with its neighbouring countries.<sup>423</sup> Albania successfully sought a delay in the implementation of the third country clause of its EURA in order to conclude readmission agreements with countries of origin.<sup>424</sup>

Indeed, the Council of the EU expressly encouraged third countries “to conclude readmission agreement with each other and with countries in their respective regions”.<sup>425</sup> Moldova was expressly encouraged to conclude readmission agreements with countries of origin and transit.<sup>426</sup> However, such an approach may also have the effect of creating tension between the third country and their neighbours,<sup>427</sup> and which seems to have been at the forefront of Morocco’s considerations in light of its intentions to enhance its relations with the African Union.<sup>428</sup> In more recent times, Yavuz noted Turkey’s request for a delay of three years from the date of concluding a visa liberalisation agreement for the implementation of the third country clause.<sup>429</sup> In the interim period, Turkey was to readmit third country nationals and stateless persons from countries with which it has already concluded readmission agreements.<sup>430</sup>

Such an approach not only facilitates chain expulsion and heightens the risk of chain *refoulement*, but it also results in ‘responsibility shifting’ for forced migrant populations. The strategy behind, and consequences of, this approach calls into question its compatibility with the Global Compact on

<sup>421</sup> [Council of the European Union \(2018\)](#), Updated Common Understanding Establishing a Governance and Conditionality Framework for the Facility for Refugees in Turkey, Doc. 11329/18, 20 July, para 24.

<sup>422</sup> Coleman (2009), op. cit., pp.65-67.

<sup>423</sup> Charles, C. (2007), op. cit., pp.4-5.

<sup>424</sup> Coleman (2009), op. cit., pp.65. See also, Kruse, I (2006), ‘EU Readmission Policy and its Effects on Transit Countries – The Case of Albania’, *European Journal of Migration and Law*, Vol. 8, No. 2 pp.115-142 at p.133.

<sup>425</sup> [Council of the European Union \(2004\)](#), 2614<sup>th</sup> Council Meeting, General Affairs and External Relations General Affairs, 2 November, Brussels, 13588/1/04 REV 1 (Presse 295).

<sup>426</sup> EU/Moldova Action Plan (2005), para 47, point 2, “Encourage Moldova to conclude readmission agreements with the main countries of origin and transit”.

<sup>427</sup> Roig and Huddleston (2007), op. cit., pp. 380-381.

<sup>428</sup> Den Hertog (2016c), op. cit., pp.280-281.

<sup>429</sup> Yavuz (2019), op. cit., p.489, fn.16

<sup>430</sup> Ibid.

Refugees' objectives of seeking "to achieve more equitable and predictable burden-sharing and responsibility-sharing with host countries and communities".<sup>431</sup>

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<sup>431</sup> [United Nations General Assembly \(2018\)](#), *Report of the United Nations High Commissioner for Refugees, Part II Global compact on refugees*, United Nations, A/73/12 (Part II), para 15.

## 8. Effectiveness

This Section seeks to explore the extent to which an assessment of the effectiveness of the EU's readmission policy is possible. It does not seek to assess the effectiveness of the EU's readmission policy. The European Commission has emphasised the return rate as the primary indicator of policy effectiveness. An alternative emphasis could, for example, be the sustainability of returns.<sup>432</sup> It is contended that a quantitative assessment of "effectiveness" is an unreliable indicator in the absence of a qualitative assessment and other indicators pertaining to the removed person.

In response to the unsettled scholarly debate over the effectiveness of migration policies, Czaika and de Haas developed a conceptual framework to enhance the accuracy of assessing the effectiveness of migration policy.<sup>433</sup> The scholars sought to address conceptual ambiguities in empirical analyses of the effectiveness of migration policies by identifying and disaggregating the various facets and levels that contribute to a migration policy field.

In terms of assessing "effectiveness" of migration policies, Czaika and de Haas have distinguished between "effectiveness" (that is, a desired effect) and "an effect" (that is, an actual result) and have cautioned that a correlation between a policy and an outcome does not necessarily mean that a causal link exists between that policy and an outcome (as well as the converse - that a negative correlation may not be conclusive of an ineffective policy).<sup>434</sup>

The scholars identify discursive,<sup>435</sup> implementation<sup>436</sup> and efficacy<sup>437</sup> gaps that can lead to conclusions that a migration policy has been ineffective. A policy may be inefficient rather than ineffective.<sup>438</sup> Quantitative assessments are prone to the assumption that official policy has been implemented.<sup>439</sup> There is a need for quantitative assessments to be seen in the context of a qualitative assessment because it is "essential to assess which of the gaps appear to be the most important in explaining policy ineffectiveness".<sup>440</sup> The authors noted that "the effects of migration policies on immigration are relatively small compared to other social, economic, and political determinants, which may confound the effectiveness of intended migration policy".<sup>441</sup> Accordingly, the effects of a migration policy may be subsumed or countered by those social, economic and political factors.

A reliance on the return rate as the primary indicator of policy effectiveness does not sufficiently account for such discursive, implementation and efficacy gaps nor is it contextualised against a qualitative assessment.

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<sup>432</sup> [European Parliamentary Research Service \(2019\)](#), op. cit., p.40.

<sup>433</sup> Czaika, M., and de Haas, H. (2013), 'The Effectiveness of Migration Policies', *Population and Development Review*, Vol. 39 No. 3, pp.487-508 at pp.490-491. See also De Haas, H., and Czaika, M. (2013), 'Measuring Migration Policies: Some Conceptual and Methodological Reflections', *Migration and Citizenship*, Vol. 1, No. 2, pp.40-47.

<sup>434</sup> Czaika, M., and de Haas, H. (2013), op. cit., at pp.490-491.

<sup>435</sup> A discursive gap is a "discrepancy between discourses and actual migration policies in the form of laws, regulations, and measures on paper", Ibid, p.494.

<sup>436</sup> An implementation gap is "the discrepancy between policies on paper and their actual implementation", Ibid, p.496.

<sup>437</sup> An efficacy gap is "the degree to which the implemented laws, regulations, and measures have the intended effect on the volume, timing, direction, and composition of migration flows", Ibid, p.497.

<sup>438</sup> Ibid, p.497.

<sup>439</sup> Ibid.

<sup>440</sup> Ibid, p.498.

<sup>441</sup> Ibid, p.503.

Indeed, the 2014 study by the German EMN contact point noted that, in its national context, an evaluation of return measures would “have to take into consideration various elements like the rationale behind the decision to return, structural factors (conditions in the country of origin/destination), individual factors (personality traits, social ties), political measures and the sustainability of returns”.<sup>442</sup> In addition, there have long been calls for not just a quantitative assessment in the form of return rates, but also for a qualitative assessment which includes the fate of the returned person - particularly important in the context of onward removal to a third country to avoid the risk of inhuman or degrading treatment and, notably, direct or indirect *refoulement*.<sup>443</sup>

It has also been argued that reliance on the rate of return as an indicator of effectiveness also discounts compliance with fundamental rights.<sup>444</sup> To prioritise the return rate as the primary indicator runs the risk of incentivising ‘return at all costs’, without taking stock of the full human, foreign relations and other costs.

**Recommendation 14: Any quantitative assessment of the performance of EU return and readmission policy should be accompanied by a qualitative assessment.**

Even if the validity of a solely quantitative assessment in the form of the effective return rate was used to determine policy success or failure, there are concerns about the adequacy of the underlying data. Reliance on the statistics provided (or not, as the case may be) by Member States in the context of return has been the sustained subject of methodological caution for scholars,<sup>445</sup> and acknowledged by the European Migration Network (“EMN”)<sup>446</sup> and the European Commission itself.<sup>447</sup>

The bases for caution have emanated from not all Member States providing data on return, varying approaches by Member States to data processing and collection and the inclusion of voluntary returns by some Member States within the figures. The European Council on Refugees and Exiles (ECRE) has also highlighted the peculiar statistical occurrence of return rates exceeding 100% in the Western Balkan countries in 2017 due to a backlog,<sup>448</sup> which raises questions about the reliability of

<sup>442</sup> [Kohls, M. \(2014\)](#), *Effectiveness of Re-Entry Bans and Readmission Agreements – Study by the German National Contact Point for the European Migration Network*, Working Paper 58, Federal Office for Migration and Refugees, Nuremberg, p.28.

<sup>443</sup> Council of Europe Parliamentary Assembly (2010), op. cit., paras 77 - 78, [Council of Europe Parliamentary Assembly \(2010b\)](#), *Readmission agreements: a mechanism for returning irregular migrants*, Resolution 1741 (2010) Final version, 22 June 2010, Strasbourg, para 6.15, Cassarino (2010), op. cit., EP Study, p.49; Billet (2010), op. cit., p.77.

<sup>444</sup> Carrera (2016), op. cit., p.58.

<sup>445</sup> Cassarino (2010), EP Report, op. cit., p.47-48; Billet (2010), op. cit., p.78; Singleton (2016), op. cit., Carrera (2016), op. cit., pp.37-41.

<sup>446</sup> “However, these findings need to be put into perspective as fewer than half of the (Member) States provided statistics and thus no general conclusions can be drawn on the basis of these, in particular as there are also many (Member) States that experience practical challenges for the implementation of EURAs with specific third countries”. The study also noted that some Member States use EURAs to carry out voluntary returns. [European Migration Network \(2014\)](#), *Synthesis report for the EMN Focussed Study 2014 – Good practices in the return and reintegration of irregular migrants: Member States’ entry bans policy and use of readmission agreements between Member States and third countries*, European Commission, Brussels, p.22.

<sup>447</sup> “Average return rates among Member States vary significantly. This variation does not necessarily reflect the effectiveness of return systems, but may also be due to different approaches in collecting and processing data. Apart from internal factors, the migration mix can have a significant influence given the diverse levels of cooperation also on return and readmission between third countries of origin”, [European Commission \(2019b\)](#), *Communication from the Commission to the European Parliament, the European Council and the Council – Progress report on the Implementation of the European Agenda on Migration*, COM(2019) 481 final, 16 October, p.15, fn.35; European Commission (2011), EURA evaluation, op. cit., pp.3-4.

<sup>448</sup> European Council on Refugees and Exiles ([ECRE \(2019\)](#)), *Return Policy: Desperately seeking evidence and balance*, Policy Note 19, ECRE, Brussels, p.2,

annual data on account of the lag between the Member State ordering a person to leave their territory and a person's eventual removal from it.

A development since 2014 has been the establishment of two data sets on return collected by Eurostat. The first, "third-country nationals who have left the territory to a third country by destination country and citizenship" enables disaggregation by country of citizenship, transit country or other third country.<sup>449</sup> It is not expressly clear that "other third country" means a country other than either transit or citizenship.

The second, "third-country nationals who have left the territory to a third country by type of agreement procedure and citizenship" enables four fields of disaggregation: (1) "returned under a EURA"; (2) "returned under other readmission agreement"; (3) "returned without existing a [sic] readmission agreement"; (4) "unknown".<sup>450</sup>

Again, it is not expressly clear whether "returned under other readmission agreement" includes bilateral and/or informal readmission agreements (such as the EU-Afghanistan Joint Way Forward) or whether "returned without existing a [sic] readmission agreement" includes informal bilateral Member State arrangements on return and readmission. Without those further distinctions, it is not possible to undertake a comparison of the EURAs or the EU informal readmission agreements with Member State bilateral agreements and to come to a conclusion about any EU added value. Even so, not all Member States have provided data to both data sets. Accordingly, it is not possible to come to any EU-wide conclusions.

Notwithstanding the emergence of these datasets on return, data pertinent to the returned person is still needed to understand the impacts on returned persons and to ensure compliance with fundamental rights. The Council of Europe's PACE Committee in 2010 called for the collection of statistics and information on the nature of returns such as their length, whether they were preceded by detention, the fate of the person following their return, and whether the returned person attempted to re-enter the territory.<sup>451</sup> This could also include the number of returned persons who received a negative asylum decision (on the merits) or a negative administrative asylum decision (such as under the Safe Third Country provisions).

Additional information on the number of readmission requests made, refused and accepted, whether any travel documentation was issued could also give a better insight into factors pertinent to the individual.<sup>452</sup> A Resolution by PACE also noted that, "it is essential to negotiate and apply readmission agreements which take fully into account the human rights of the irregular migrants concerned. Furthermore, it is crucial, in order to better understand these instruments, to collect data on their effects and implementation."<sup>453</sup> In response to the Council of Europe's call, a 2010 European Parliament study on return and readmission recommended the identification of "robust and measurable indicators allowing the fate of readmitted persons to be evaluated".<sup>454</sup> The need for post-return monitoring is underscored.

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<sup>449</sup> Eurostat, *Third-country nationals who have left the territory to a third country by destination country and citizenship*, [https://ec.europa.eu/eurostat/web/products-datasets/-/miqr\\_eirt\\_des](https://ec.europa.eu/eurostat/web/products-datasets/-/miqr_eirt_des)

<sup>450</sup> Eurostat, *Third-country nationals who have left the territory to a third country by type of agreement procedure and citizenship*, [https://ec.europa.eu/eurostat/web/products-datasets/-/miqr\\_eirt\\_aqr](https://ec.europa.eu/eurostat/web/products-datasets/-/miqr_eirt_aqr)

<sup>451</sup> Council of Europe Parliamentary Assembly (2010), op. cit., para 77.

<sup>452</sup> Carrera (2016), op. cit., pp.40-41.

<sup>453</sup> Council of Europe Parliamentary Assembly (2010b), op. cit., para 6.

<sup>454</sup> Cassarino (2010), EP Study, op. cit., pp.49-50.

**Recommendation 15: Avenues should be explored to identify measurable indicators pertinent to the readmitted individual to enable an evaluation of the circumstances of their return and fate.**

In terms of the EU's broader external migration objectives, of which return and readmission are key components, assessment of the effectiveness has proven difficult. A scholarly analysis of the EU Mobility Partnerships, for example, highlighted conceptual and methodological challenges that make it difficult to assess stated (but broadly cast) policy objectives against intended outcomes (indeed, where these can be measured).<sup>455</sup>

The ECA has also highlighted the difficulties in evaluating the impact of EU external migration funding. In its 2018 special report on the EUTF for Africa, the ECA observed that the objectives of the trust fund "were too broad to efficiently steer action and measure impact".<sup>456</sup> In terms of governance, the strategic priorities and guidelines given to the trust fund managers by the Trust Fund Board were described as "very broad and unspecific".<sup>457</sup> The ECA also observed that the European Commission did not undertake a comprehensive needs or means analysis,<sup>458</sup> the selection of projects was not "fully consistent and clear" and, as regards implementation, had a "limited impact speeding up the process compared to traditional development aid".<sup>459</sup> The ECA noted that the monitoring system was not yet operational.<sup>460</sup>

Similar observations regarding the shortcomings in operational objectives, monitoring, information gathering and needs analysis were also included in the ECA's special report on the ENPI and TPMA funds. In that special report the ECA observed the lack of coherence between the objectives of the other instruments relating to EU external migration expenditure.<sup>461</sup> Pointedly, the ECA observed that, "the total amount of expenditure charged to the EU budget could not be established in the course of the audit".<sup>462</sup>

The ECA also observed the limited effectiveness in returns and readmissions because "the policy on readmissions is wrongly perceived by partner countries to be a component of the EU's security policy", the lack of preparation by Member States for their return and that migrants were unaware they could access assistance for their readmission.<sup>463</sup>

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<sup>455</sup> Reslow, N. (2017), "Not everything that counts can be counted': Assessing 'success' of EU external migration policy", *International Migration*, Vol. 55, No. 6, pp.156-169.

<sup>456</sup> ECA (2018), op. cit., p.12.

<sup>457</sup> Ibid, para 18.

<sup>458</sup> Ibid, pp.14-16.

<sup>459</sup> Ibid, para 42.

<sup>460</sup> Ibid, p.26.

<sup>461</sup> ECA (2016), op. cit., para 30.

<sup>462</sup> Ibid, page 7 and para 53.

<sup>463</sup> Ibid, para 86.

## 9. Conclusion and recommendations

This study explored the external dimension of the Return Directive, with a particular focus on the formal and informal EU agreements that operationalise readmission, as well as the role of Frontex and the associated agreements.

The study highlighted the development of EU return and readmission policy and showed how it has developed from a normative-based approach to its current approach which is driven by the need for flexibility and the prioritisation of operationality. This has paralleled the emergence of conditionality towards third countries and the enhanced role of Frontex both in return operations and in and with third countries.

Amongst the fundamental rights considerations pertinent to persons subject to return and readmission are *non-refoulement* (including indirect *refoulement*), the right to an effective remedy, the prohibition on collective expulsion, the right to liberty and data protection.

The study has revealed the inadequacies of the both formal and informal agreements to ensure fundamental rights safeguards in third countries for persons subject to return and readmission, notwithstanding that, at times, these agreements make express reference to international human rights conventions. In the case of persons returned under safe third country provisions, there is an absence of corresponding obligations from the third country towards the returned person.

Although readmission agreements have been described as operational in focus, it is arguable that they cannot be viewed in isolation from EU secondary legislation and jurisprudence on international protection and return. Indeed, data regarding the fate of returned persons is conspicuous by its absence – in terms of indicators, data and post return monitoring.

In terms of accountability, the emergence of informal agreements has had a concomitant effect on Parliamentary and judicial accountability. The role of Frontex in multiple-actor contexts presents particular obstacles to judicial accountability that underscores the need for ECHR and EU public liability law to develop in such a way as to enable attribution of responsibility and liability in all cases.

Readmission and return have become a key priority in EU external affairs that has entrenched the use of conditionality to secure readmission agreements or migration outcomes but which has also blurred the lines between international development and humanitarian aid principles. A consequence of the conclusion of readmission agreements with third countries has been a “domino effect” of readmission agreements with other third countries. Such a consequence arguably contributes to responsibility shifting – rather than sharing – of forced migrant populations, contrary to the intention of the Global Compact on Refugees.

An emphasis on the return rate as the primary indicator of policy success should be approached with caution. This is not only because of the methodological shortcomings for doing so and concerns about the reliability of the underlying data, but also because a qualitative assessment of the return and readmission policy is necessary to form an accurate view about return and readmission policy in practice (including the consequences for persons returned). The express focus on the return rate, combined with an emphasis on the operational over the normative, discounts the importance of fundamental rights obligations and an adherence to the rule of law.

A mapping of the formal agreements and informal arrangements has revealed the fundamental rights implications these agreements can have on persons subject to return and readmission.

On the basis of these findings, the study makes the following policy recommendations:

## Safeguarding of Fundamental Rights

- **Recommendation 1:** Avenues should be explored to obtain commitments from third countries of return that ensure readmitted persons have access to the substantive rights contained in the international human rights treaties identified in EURAs, including access to the asylum procedure if returned under the Safe Third Country concept provisions.
- **Recommendation 2:** Further research should be undertaken to determine the extent to which time limits contained in EURAs that are linked to a maximum period of detention in requesting states are used in practice and their impact, if any, on the legality a person's detention.
- **Recommendation 3:** The European Commission should undertake fundamental rights impact assessments before concluding a EURA with a third country.
- **Recommendation 4:** Frontex Working Arrangements should contain express references to fundamental rights guarantees that reflect Frontex's obligation to guarantee fundamental rights under the EBCG Regulation.
- **Recommendation 5:** To suspend or terminate an action under a Status Agreement in the case of a breach of fundamental rights should be obligation.
- **Recommendation 6:** Status Agreements should include a prohibition on the onward transfer of personal data consistent with the obligation under the EBCG Regulation.

## Accountability

- **Recommendation 7:** The European Commission should undertake a comprehensive and objective evaluation of EURAs and their implementation.
- **Recommendation 8:** Post-return monitoring of persons returned to third countries should be undertaken to ensure the fate of returned persons and the challenges they face.
- **Recommendation 9:** Obstacles to accessing complete Operational Plans by those directly affected should be removed.
- **Recommendation 10:** The European Parliament should be informed about cooperation instruments, 'delegated' working arrangements and documents of a similar character which emanate from, or consolidate, Frontex Working Arrangements.
- **Recommendation 11:** The liability of Frontex statutory staff exercising executive powers in a third country should be expressly contemplated in Frontex Status Agreements.
- **Recommendation 12:** Avenues should be explored, and reform undertaken, to ensure attribution of responsibility under ECHR and EU public liability law in multiple actor contexts.

## Implications on EU External Affairs

- **Recommendation 13:** International development and humanitarian aid principles should be subject to greater demarcation from EU funding for migration-related outcomes.

## Effectiveness

- **Recommendation 14:** Any quantitative assessment of the performance of EU return and readmission policy should be accompanied by a qualitative assessment.
- **Recommendation 15:** Avenues should be explored to identify measurable indicators pertinent to the readmitted individual to enable an evaluation of the circumstances of their return and fate.

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## Annexes

### Annex I. European Union Readmission Agreements ('EURAs') - key

1. Agreement (signature; (entry into force))
2. Accelerated Procedures/Frontier Zones
3. Non-Affection Clause
4. Ability to resort to other formal or informal arrangements
5. *Prima facie* evidence of nationality "unless proven otherwise"
6. Spouses holding another nationality and minor unmarried children of national, regardless of nationality
7. Third country nationals and stateless persons
8. Third country nationals and stateless persons "having stayed on or transited through, the territory of" the third country.
9. Conditions for readmission of third country nationals and stateless persons through presentation of *prima facie* evidence "unless proven otherwise"
10. Data protection clause
11. Suspension clause
12. Costs to be borne by requesting state "without prejudice to the right of competent authorities to recover the costs associated with the readmission from the person to be readmitted or third parties..."
13. Party to Refugee Convention and 1967 Protocol

Agreement Signature (entry into force)	Accelerated Procedures/ Frontier Zones	Non -affection clause	Resort to other informal or formal arrangements	Prima facie evidence of nationality	Spouses and children	TCNs and stateless persons	TCNs and stateless "having stayed on or transited" third country	Prima facie evidence of conditions for readmission (TCN & stateless)	Data protection clause	Suspension clause	Costs borne by requesting state	Party to Refugee Convention and 1967 Protocol
Hong Kong 27.11.2002 (01.03.2004)	No	Yes, but no explicit texts mentioned "...without prejudice to rights, obligations and responsibilities arising from International Law applicable to the Community, the Member States and Hong Kong SAR": Article 16(1)	No	Yes, deemed nationality (by MS) or PR (by Hong Kong) "unless they can prove otherwise" Article 8(2)	No	Yes, Articles 1(d) & (e), 3	No	Yes, conditions deemed to be established "unless they can prove otherwise" Article 9(2)	Article 14 -DPD & principles	No	Article 14	No
Macao 13.10.2003 (01.06.2004)	No	Yes, but no explicit texts mentioned "...without prejudice to rights, obligations and responsibilities arising from International Law applicable to the Community, the Member States and the Macao SAR": Article 16(1)	Yes, Article 16(2)	Presumption of nationality (by MS) or PR (by Macao) "to be established unless they can prove otherwise", Article 8(2)	No	Yes, Articles 1(d) & 3, Joint Declaration on Stateless Persons	No	Yes, conditions deemed to be established "unless they can prove otherwise" Article 9(2)	Article 15 - DPD & principles	No	Article 14	Extended to Macao via China

Agreement Signature (entry into force)	Accelerated Procedures/ Frontier Zones	Non -affection clause	Resort to other informal or formal arrangements	Prima facie evidence of nationality	Spouses and children	TCNs and stateless persons	TCNs and stateless "having stayed on or transited" third country	Prima facie evidence of conditions for readmission (TCN & stateless)	Data protection clause	Suspension clause	Costs borne by requesting state	Party to Refugee Convention and 1967 Protocol
Sri Lanka 04.06.2004 (01.05.2005)	No	Yes, but no explicit texts mentioned "...without prejudice to the rights, obligations and responsibilities of the Community, the Member States and Sri Lanka arising from International Law and, in particular, from any applicable International Convention or agreement to which they are Parties", Article 16(1)	Yes, Article 16(2)	No	No	Yes, Articles 1(d) & (e), 3. Note Joint Declaration not considering airside transit as "having entered another country in between".	No	Yes, conditions deemed to be established "unless they can prove otherwise" Article 9(2)	Article 15 - DPD & principles	No	Article 14	No

Agreement Signature (entry into force)	Accelerated Procedures/ Frontier Zones	Non -affection clause	Resort to other informal or formal arrangements	Prima facie evidence of nationality	Spouses and children	TCNs and stateless persons	TCNs and stateless "having stayed on or transited" third country	Prima facie evidence of conditions for readmission (TCN & stateless)	Data protection clause	Suspension clause	Costs borne by requesting state	Party to Refugee Convention and 1967 Protocol
Albania 14.04.2005 (01.05.2006)	No	Yes, but express mention of instruments "in particular", ECHR, Refugee Convention and Protocol, international instruments on extradition	Yes, Article 17(2)	Nationality deemed to be established "unless they can prove otherwise" Article 8(2)	No	Yes, Articles 1(d) & (e), 3 - but note Joint Declaration - obligation for readmission only if visa "has been used for entering the territory of Albania"	Yes, Article 3(1)(b)	Yes, conditions deemed to be established "unless they can prove otherwise" Article 9(2)	Article 16 - DPD & principles	No	Article 15	Yes, accession.

Agreement Signature (entry into force)	Accelerated Procedures/ Frontier Zones	Non -affection clause	Resort to other informal or formal arrangements	Prima facie evidence of nationality	Spouses and children	TCNs and stateless persons	TCNs and stateless "having stayed on or transited" third country	Prima facie evidence of conditions for readmission (TCN & stateless)	Data protection clause	Suspension clause	Costs borne by requesting state	Party to Refugee Convention and 1967 Protocol
Russia 25.05.2006 (01.06.2007)	Yes, Articles 6(3), 10(3) (reply within 2 working days from confirmed receipt of readmission application; 10(5) transferred within 2 working days	Yes, but express mention of instruments "in particular" Refugee Convention and Protocol, ECHR, CAT, international treaties on extradition and transit, "multilateral international treaties containing rules on the readmission of foreign nationals, such as the Convention on International Civil Aviation of 7 December 1944", Article 18(1)	Yes, Article 18(3)	Yes, Article 9(2) - nationality deemed "unless they can prove otherwise" for Annex 3 A evidence	No	Yes, Articles 1(e) & (f), 3. Note Joint Declaration that airside transit "shall not be considered as entry"	No	Yes, Article 10(2) conditions deemed to be established "unless they can prove otherwise" for Annex 5 A evidence	Article 17, DPD & principles	No	Article 16	Yes, accession.

Agreement Signature (entry into force)	Accelerated Procedures/ Frontier Zones	Non -affection clause	Resort to other informal or formal arrangements	Prima facie evidence of nationality	Spouses and children	TCNs and stateless persons	TCNs and stateless "having stayed on or transited" third country	Prima facie evidence of conditions for readmission (TCN & stateless)	Data protection clause	Suspension clause	Costs borne by requesting state	Party to Refugee Convention and 1967 Protocol
Ukraine 18.06.2007 (01.06.2008)	Yes, Articles 5(3) readmission application within 2 days following apprehension in a border region (30km see Article 1(l)) of a person who has illegally crossed State border within 48 hours, 8(3) reply from requested State within 2 working days	Yes, but no express mention of international treaties in clause itself but refers back to preamble: UDHR, ECHR, Refugee Convention and Protocol, ICCPR and "international instruments on extradition": Article 14(1) & Recital 5	Yes, Article 14(2)	Yes, Article 6(1)(b), nationality deemed established by the requested State based on documents in Annex 2 "unless it can prove otherwise on the basis of an investigation with participation of the competent authorities of the requesting State"	No	Yes, Articles 1(d) & (e), 3	No	No, Article 7, but opportunity for requested State to conduct investigation based on presentation of any documents listed in Annex 3b	Article 13, DPD & principles	No	Article 12, but note provision for transport and maintenance costs to be borne by requesting state relating to returning those readmitted in error.	Yes, accession.

Agreement Signature (entry into force)	Accelerated Procedures/ Frontier Zones	Non -affection clause	Resort to other informal or formal arrangements	Prima facie evidence of nationality	Spouses and children	TCNs and stateless persons	TCNs and stateless "having stayed on or transited" third country	Prima facie evidence of conditions for readmission (TCN & stateless)	Data protection clause	Suspension clause	Costs borne by requesting state	Party to Refugee Convention and 1967 Protocol
FYROM EoL 18.09.2007 (01.01.2008)	Yes, Article 6(3) if apprehended in border region (up to 30km see Article 1(m)) application for readmission may be made within 2 days of apprehension; Article 10(2) reply within 2 working days of receipt of request; Article 10(3) transfer "without delay" or latest within three months.	Yes, "in particular" Refugee Convention and Protocol, "the international conventions determining the State responsible for examining applications for asylum lodged", ECHR, CAT, "international conventions and agreements on extradition and transit", "multilateral international conventions and agreements on the readmission of foreign nationals", Article 17(1).	Yes, Article 17(2)	Yes, Article 8(2), presumption of nationality based on documents in Annex 2 "unless they can prove otherwise".	Yes, Article 2(2)	Yes, Articles 1(f) & (g), 3. Note Joint Declaration noting Parties "will endeavour" to return third country nationals to his or her country of origin.	Yes, Article 3(1)(b)	Yes, Article 9(2), presumption of conditions established based on documents listed in Annex 4 "unless they can prove otherwise".	Article 16 - DPD & principles .	Partly, for TCN & Stateless only on account of reasons of "security, protection of public order or public health": Article 22(4)	Article 15	Yes, succession

Agreement Signature (entry into force)	Accelerated Procedures/ Frontier Zones	Non -affection clause	Resort to other informal or formal arrangements	Prima facie evidence of nationality	Spouses and children	TCNs and stateless persons	TCNs and stateless "having stayed on or transited" third country	Prima facie evidence of conditions for readmission (TCN & stateless)	Data protection clause	Suspension clause	Costs borne by requesting state	Party to Refugee Convention and 1967 Protocol
Bosnia & Herzegovina 18.09.2007 (01.01.2008)	No	Yes, "in particular" Refugee Convention and Protocol, "the international conventions determining the State responsible for examining applications for asylum lodged", ECHR, CAT, "international conventions and agreements on extradition and transit", "multilateral international conventions and agreements on the readmission of foreign nationals", Article 17(1)	Yes, Article 17(2)	Yes, Article 8(2), nationality deemed to be established based on documents listed in Annex 2 "unless they can prove otherwise".	Yes, Article 2(2)	Yes, Articles 1(e) & (f), 3. Note Joint Declaration noting that Parties "will endeavour" to return third country nationals to his or her country of origin.	Yes, Article 3(1)(b)	Yes, Article 9(2), presumption of conditions deemed established based on evidence listed in Annex 4 "unless they can prove otherwise".	Article 16 - DPD & principles	Partly - Article 22(4) for TCN & Stateless only on account of reasons of "security, protection of public order or public health".	Article 15	Yes, succession

Agreement Signature (entry into force)	Accelerated Procedures/ Frontier Zones	Non -affection clause	Resort to other informal or formal arrangements	Prima facie evidence of nationality	Spouses and children	TCNs and stateless persons	TCNs and stateless "having stayed on or transited" third country	Prima facie evidence of conditions for readmission (TCN & stateless)	Data protection clause	Suspension clause	Costs borne by requesting state	Party to Refugee Convention and 1967 Protocol
Montenegro 18.09.2007 (01.01.2008)	No	Yes, "in particular" Refugee Convention and Protocol, "the international conventions determining the State responsible for examining applications for asylum lodged", ECHR, CAT, "international conventions and agreements on extradition and transit", "multilateral international conventions and agreements on the readmission of foreign nationals", Article 17(1)	Yes, Article 17(2)	Yes, Article 8(2), nationality deemed to be established based on documents listed in Annex 2 "unless they can prove otherwise".	Yes, Article 2(2).	Yes, Articles 1(e) & (f), 3. Note Joint Declaration noting that Parties "will endeavour" to return third country nationals to his or her country of origin.	Yes, Article 3(1)(b)	Yes, Article 9(2), presumption of conditions deemed established based on evidence listed in Annex 4 "unless they can prove otherwise".	Article 16 - DPD & principles	Partly - Article 22(4) for TCN & Stateless only on account of reasons of "security, protection of public order or public health".	Article 15	Yes, succession

Agreement Signature (entry into force)	Accelerated Procedures/ Frontier Zones	Non -affection clause	Resort to other informal or formal arrangements	Prima facie evidence of nationality	Spouses and children	TCNs and stateless persons	TCNs and stateless "having stayed on or transited" third country	Prima facie evidence of conditions for readmission (TCN & stateless)	Data protection clause	Suspension clause	Costs borne by requesting state	Party to Refugee Convention and 1967 Protocol
Serbia 18.09.2007 (01.01.2008)	Yes, Article 6(3) if apprehended in border region (up to 30km see Article 1(l)) application for readmission may be made within 2 days of apprehension; Article 10(2) reply within 2 working days of receipt of request; Article 10(3) transfer within three months.	Yes, "in particular" Refugee Convention and Protocol, "the international conventions determining the State responsible for examining applications for asylum lodged", ECHR, CAT, "international conventions and agreements on extradition and transit", "multilateral international conventions and agreements on the readmission of foreign nationals", Article 17(1)	Yes, Article 17(2)	Yes, Article 8(2), nationality deemed to be established based on documents listed in Annex 2 "unless they can prove otherwise".	Yes, Article 2(2)	Yes, Articles 1(e) & (f), 3. Note Joint Declaration noting that Parties "will endeavour" to return third country nationals to his or her country of origin.	Yes, Article 3(1)(b)	Yes, Article 9(2), presumption of conditions deemed established based on evidence listed in Annex 4 "unless they can prove otherwise".	Yes, Article 16 - DPD & principles .	Partly - Article 22(4) - for TCN & Stateless only on account of reasons of "security, protection of public order or public health".	Article 15	Yes, succession

Agreement Signature (entry into force)	Accelerated Procedures/ Frontier Zones	Non -affection clause	Resort to other informal or formal arrangements	Prima facie evidence of nationality	Spouses and children	TCNs and stateless persons	TCNs and stateless "having stayed on or transited" third country	Prima facie evidence of conditions for readmission (TCN & stateless)	Data protection clause	Suspension clause	Costs borne by requesting state	Party to Refugee Convention and 1967 Protocol
Moldova 10.10.2007 (01.01.2008)	Yes, Article 6(3) if apprehended in border region (up to 30km see Article 1(m)) application for readmission may be made within 2 days of apprehension; Article 10(2) reply within 2 working days of receipt of request; Article 10(5) transfer within three months.	Yes, "in particular" Refugee Convention and Protocol, "the international conventions determining the State responsible for examining applications for asylum lodged", ECHR, CAT, "international conventions and agreements on extradition and transit", "multilateral international conventions and agreements on the readmission of foreign nationals", Article 17(1)	Yes, Article 17(2)	Yes, Article 8(2), nationality deemed to be established based on documents listed in Annex 2 "unless they can prove otherwise".	Yes, Article 2(2)	Yes, Articles 1(e) & (f), 3. Note Joint Declaration on "entering directly" and exclusion of "airside transit" from being considered as "entry".	Yes, Article 3(1)(b)	Yes, Article 9(2) grounds deemed to be established based on evidence listed in Annex 4, "unless they can prove otherwise".	Yes, Article 16 - DPD & principles	No	Article 15	Yes, accession but note a number of reservations

Agreement Signature (entry into force)	Accelerated Procedures/ Frontier Zones	Non -affection clause	Resort to other informal or formal arrangements	Prima facie evidence of nationality	Spouses and children	TCNs and stateless persons	TCNs and stateless "having stayed on or transited" third country	Prima facie evidence of conditions for readmission (TCN & stateless)	Data protection clause	Suspension clause	Costs borne by requesting state	Party to Refugee Convention and 1967 Protocol
Pakistan 26.10.2009 (01.12.2010)	No	Article 15(1), titled "Consistency with other legal obligations" - No mention of specific treaties. Article 15(3) provides "This Agreement shall be without prejudice to the remedies and rights available to the person concerned under the laws of the host country including international law".	Yes, Article 15(2) but differently phrased to other agreements.	No, Article 6(3), documents listed in Annex II, if presented, compel the Requested State to "initiate the process for establishing the nationality of the person concerned".	No	Articles 1(d) & (e), 3. Note Joint Declarations noting that Parties "will endeavour" to return third country nationals to his or her country of origin and exclusion of "airside transit" from consideration of "having entered another country in between".	No	No, Article 2. If presented with documents listed in Annex IV, Requested State "will deem them appropriate to initiate investigation".	Yes, Article 14 - DPD & principles.	No	Article 13 but note special provision for costs to be borne by State taking back those readmitted in error.	No

Agreement Signature (entry into force)	Accelerated Procedures/ Frontier Zones	Non -affection clause	Resort to other informal or formal arrangements	Prima facie evidence of nationality	Spouses and children	TCNs and stateless persons	TCNs and stateless "having stayed on or transited" third country	Prima facie evidence of conditions for readmission (TCN & stateless)	Data protection clause	Suspension clause	Costs borne by requesting state	Party to Refugee Convention and 1967 Protocol
Georgia 22.11.2010 (01.03.2011)	Yes, Article 6(3) if apprehended in the border region (5km, Article 1(m)) after illegally crossing the border, readmission request may be submitted within 2 days of apprehension. Reply within 2 working days (Article 10(2)(a)). Transfer within 3 months (Article 10(4))	Yes, "in particular" Refugee Convention and Protocol, "the international conventions determining the State responsible for examining applications for asylum lodged", ECHR, CAT, "international conventions and agreements on extradition and transit", "multilateral international conventions and agreements on the readmission of foreign nationals, such as the Convention on International Civil Aviation of 7 December 1944", Article 17(1)	Yes, Article 17(2)	Yes, Article 8(2), nationality deemed to be established if furnished with documents listed in Annex 2 "unless they can prove otherwise".	Yes, Article 2(a) and (b)	Yes, Articles 1(e) & (f), 3. Note Joint Declaration that airside transit "shall not be considered as entry"	Article 3(1)(b)	Yes, Article 9(2), conditions deemed to be established by evidence listed in Annex 4, "unless they can prove otherwise".	Article 16 - DPD & principles	No	Article 15	Yes, accession.

<p>Armenia 13.04.2013 (01.01.2014)</p>	<p>Yes, Article 7(3) if apprehended in the border region (15km from territories of seaports including custom zones and international airports, Article 1(m)) after illegally crossing the border, readmission request may be submitted within 2 working days of apprehension. Reply within 2 working days (Article 11(2)). Transfer within 3 months (Article 11(4))</p>	<p>Note Article 2 "Fundamental Principles" - respect for human rights and for obligations and responsibilities "in particular", UDHR, ECHR, ICCPR, CAT, Refugee Convention and Protocol. "The Requested State shall in particular ensure, in compliance with its obligations under the international instruments listed above, the protection of the rights of persons readmitted to its territory". Article 18 titled "Relation to other international obligations" (para 1) "without prejudice to...in particular...international conventions determining the State responsible for examining applications for asylum lodged, international conventions on extradition and transit, multilateral international conventions and agreements on the readmission of foreign nationals".</p>	<p>Yes, Article 18(2)</p>	<p>Yes, Article 9(2) - nationality deemed "unless they can prove otherwise" for evidence furnished through documents listed in Annex 2.</p>	<p>Yes, Article 3(2)</p>	<p>Yes, Articles 1(e) &amp; (f), 4</p>	<p>Yes, Article 4(1)(b)</p>	<p>Yes, Article 9(2), conditions deemed to be established by evidence listed in Annex 4, "unless they can prove otherwise".</p>	<p>Article 17 - DPD &amp; principles</p>	<p>Yes, Article 23 - not limited to particular grounds</p>	<p>Article 16</p>	<p>Yes, accession</p>
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<p>Azerbaijan 28.02.2014 (01.09.2014)</p>	<p>Yes, Article 7(3) if apprehended 15km from and including the territories of seaports and international airports, including custom zones of Requesting State after illegally crossing the border, readmission request may be submitted within 2 working days of apprehension. Reply within 2 working days (Article 11(2)). Transfer within 3 months (Article 11(4))</p>	<p>Note Article 2 "Fundamental Principles" - respect for human rights and for obligations and responsibilities "in particular", UDHR, ECHR, ICCPR, CAT, Refugee Convention and Protocol. "The Requested State shall in particular ensure, in compliance with its obligations under the international instruments listed above, the protection of the rights of persons readmitted to its territory". Article 18 titled "Relation to other international obligations" (para 1) "without prejudice to...in particular...international conventions determining the State responsible for examining applications for asylum lodged, international conventions on extradition and transit, multilateral international conventions and agreements on the readmission of foreign nationals such as the Convention on International Civil Aviation".</p>	<p>Yes, Article 18(2)</p>	<p>Yes, Article 9(2) - nationality deemed "unless they can prove otherwise" for evidence furnished through documents listed in Annex 2.</p>	<p>Yes, Article 3(2)</p>	<p>Articles 1(f) &amp; (g), 4. Note Joint Declaration that parties "will endeavour" to return third country nationals "to his or her country of origin".</p>	<p>Yes, Article 4(1)(c)</p>	<p>Yes, Article 10(2), conditions deemed to be established by evidence listed in Annex 4, "unless they can prove otherwise".</p>	<p>Article 17 - DPD &amp; principles</p>	<p>Yes, Article 23 - not limited to particular grounds</p>	<p>Article 16</p>	<p>Yes, accession</p>
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<p>Turkey 16.12.2013 (01.10.2014)</p>	<p>Yes, Article 7(4), if apprehended in border region after having entered illegally, a readmission application may be submitted within three working days following apprehension. "Border region" is "an area within its territory extending inwards up to 20km from the external border of the Requesting State, whether or not the border is shared between the Requesting State and the Requested State as well as the sea ports including custom zones and international airports of the Requesting State" Article 1(p). Reply period is 5 working days after receipt of application Article 11(2).</p>	<p>Yes, extensive setting out of international treaties and EU secondary legislation: Refugee Convention + protocol, ECHR, "the international conventions determining the State responsible for examining the applications for asylum lodged", CAT, "European Convention of 13 December 1955 on Establishment", "international conventions on extradition and transit", Association Agreement between EEC &amp; Turkey, RD, RCD, PD, LTR, FRD - Article 18(1)-(6). Note particular rights in EU secondary legislation also identified.</p>	<p>Yes, Article 18(7)</p>	<p>Yes, Article 9(2), nationality deemed to be established "unless following an investigation and within the time limits laid down in Article 11, the Requested State demonstrates otherwise".</p>	<p>Yes, Article 3(2)</p>	<p>Yes, Articles 1(e) &amp; (f), 4. Note "every effort to return a [TCN] to the country of origin, Article 7(1). Note Joint Declaration on making concurrent readmission request with country of origin as well as requested country and requested country to be notified if requesting country unable to determine country of origin. Note 3-year transition period - during transition period, only TCN and stateless from countries with which Turkey has concluded a readmission agreement - Article 24(3)</p>	<p>Yes, Article 4(1)(c)</p>	<p>Yes, Article 10(2), on presentation of <i>prima facie</i> evidence listed in Annex 4, conditions deemed established, "unless following an investigation and within the time limits laid down in Article 11, the Requested State demonstrates otherwise."</p>	<p>Yes, Article 17 - DPD &amp; principles</p>	<p>No</p>	<p>Article 16, but note "without prejudice to Article 23" [EU making available financial resources with respect to technical assistance] and without prejudice to recovering costs from persons referred to in Article 3(2) and 5(2) [minor unmarried children</p>	<p>Yes, ratification of Convention but with geographic limitations; accession to 1967 Protocol.</p>
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	Transfer within three months Article 11(3).										of national s and spouses of national s holding another national ity]	
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<p>Cape Verde 18.04.2013 (01.12.2014)</p>	<p>Yes, if apprehended in border region (30km from the territories of the seaports, including customs zones, and the international airports of the Member States and of Cape Verde Article 1(m)), then application may be submitted within 2 working days of apprehension - Article 6(5). Reply to be within 2 working days from date of receipt of request - Article 10(2). Transfer within 3 months - Article 10(4).</p>	<p>Yes, titled "Without prejudice clause", "in particular", Refugee Convention &amp; Protocol, ECHR, "the international conventions on determining the State responsible for examining applications for asylum", CAT, "international conventions on extradition and transit", "multilateral international conventions and agreements on the readmission of foreign nationals", Article 17(1)</p>	<p>Yes, Article 17(2)</p>	<p>Yes, nationality deemed to be established through presentation of documents listed in Annex 2 "unless they can prove otherwise", Article 8(2).</p>	<p>Yes, Article 2(2)</p>	<p>Yes, Articles 1(e) &amp; (f), 3. Note Joint Declaration of endeavours to return TCN and stateless to territories or country of origin.</p>	<p>No</p>	<p>Yes, Article 8(2) if furnished with documents listed in Annex 4, conditions deemed to be established "unless they can prove otherwise".</p>	<p>Article 16 - DPD &amp; principles</p>	<p>No</p>	<p>Article 15</p>	<p>Protocol only, accession</p>
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## Annex II. Frontex-related Agreements - notes

- a. Frontex Working Arrangement with Former Yugoslav Republic of Macedonia (exchange of letters) – for entry into force, see [Frontex Press Release](#).
- b. Working Arrangements, Memorandum of Understanding, Memorandum, Terms of Reference are with competent authorities of the States Identified (with the exception of MARRI which is a regional initiative consisting of Albania, North Macedonia, Bosnia and Herzegovina, Serbia, Montenegro and Kosovo).
- c. Status Agreements are concluded with States.

State concerned, Date, Nature of agreement	Cooperation on Return	Nature of Cooperation on Return	Legal Basis	Human Rights Clause	Statement on international treaty/relationship to other international agreements
<a href="#">Russian Federation</a> 14.09.2006 <a href="#">Terms of Reference</a>	Not foreseen	Not specified	Not specified	No	Part 6, "The present Terms of Reference shall not be considered an international treaty. Practical implementation of its contents shall not be regarded as the fulfilment of international obligations by the European Union and Russian Federation."
<a href="#">Ukraine</a> 11.06.2007 <a href="#">Working Arrangement</a>	Not foreseen	Not specified	Not specified	No	Part 6, "The present working arrangement shall not be considered as an international treaty. Practical implementation of its contents shall not be regarded as fulfilment of international obligations by the European Union and Ukraine."

State concerned, Date, Nature of agreement	Cooperation on Return	Nature of Cooperation on Return	Legal Basis	Human Rights Clause	Statement on international treaty/relationship to other international agreements
<a href="#">Moldova</a> <a href="#">12.08.2008</a> <a href="#">Working Arrangement</a>	Not foreseen	Not specified	Not specified	No	Part 6, "The present Working Arrangement shall not be considered as an international treaty. Practical implementation of its contents shall not be regarded as fulfilment of international obligations by the European Community, its institutions and its Member States and Moldova."
<a href="#">Georgia</a> <a href="#">04.12.2008</a> <a href="#">Working Arrangement</a>	Not foreseen	Not specified	Not specified	No	Part 7, "The present Working Arrangement shall not be considered as an international treaty. Practical implementation of its contents shall not be regarded as fulfilment of international obligations by the European Union and Georgia."

State concerned, Date, Nature of agreement	Cooperation on Return	Nature of Cooperation on Return	Legal Basis	Human Rights Clause	Statement on international treaty/relationship to other international agreements
<a href="#">Former Yugoslav Republic of Macedonia, 19.02.2009 (by exchange of letters) Working Arrangement</a>	Yes	Part 4, "...may explore possibilities to develop cooperation in the field of joint return operations as well as promote the active participation of the Sector for Border Affairs and Migration in Frontex coordinated joint return operations on a case by case basis as decided by the Executive Director of Frontex and upon agreement of the organising EU Member States."	Article 14, Regulation 2007/2004 and MB decision of 22 February 2007	No	Part 7, "The present Working Arrangement shall not be considered as an international treaty. Practical implementation of its contents shall not be regarded as fulfilment of international obligations by the European Community and its institutions."
<a href="#">Serbia 17.02.2009 Working Arrangement</a>	Yes	Part 4, "...may explore possibilities to develop cooperation in the field of joint return operations as well as to promote the active participation of the Border Police of Serbia in Frontex coordinated joint return operations on a case-by-case basis as decided by the Executive Director of Frontex and upon agreement of the organising EU Member States."	Article 14, Regulation 2007/2004 and MB decision of 12 June 2008	No	Part 7, "The present Working Arrangement shall not be considered as an international treaty. Practical implementation of its contents shall not be regarded as fulfilment of international obligations by the European Community and its institutions."

State concerned, Date, Nature of agreement	Cooperation on Return	Nature of Cooperation on Return	Legal Basis	Human Rights Clause	Statement on international treaty/relationship to other international agreements
<a href="#">Albania</a> <a href="#">19.02.2009</a> <a href="#">Working Arrangement</a>	Yes	Part 4, "...may explore possibilities to develop cooperation in the field of joint return operations as well as to promote the active participation of the Border and Migration Department of Mol of Albania."	Article 14, Regulation 2007/2004 and MB Decision of 12 June 2008	No	Part 7, "The present Working Arrangement shall not be considered as an international treaty. Practical implementation of its contents shall not be regarded as fulfilment of international obligations by the European Community and its institutions."
<a href="#">Bosnia and Herzegovina</a> <a href="#">03.04.2009</a> <a href="#">Working Arrangement</a>	Yes	Part 4, "...may explore possibilities to develop cooperation in the field of joint return operations as well as to promote the active participation of the Border Police of the Ministry of Security in Frontex coordinated joint return operations on a case-by-case basis as decided by the Executive Director of Frontex and upon agreement of the organising EU Member States"	Article 14, Regulation 2007/2004 and MB Decision of 12 June 2008	No	Part 7, "The present Working Arrangement shall not be considered as an international treaty. Practical implementation of its contents shall not be regarded as fulfilment of international obligations by the European Community and its institutions."

State concerned, Date, Nature of agreement	Cooperation on Return	Nature of Cooperation on Return	Legal Basis	Human Rights Clause	Statement on international treaty/relationship to other international agreements
<a href="#">United States of America</a> <a href="#">28.04.2009</a> <a href="#">Working Arrangement</a>	Yes	Part 4F "Participation in joint operations (including, but not limited to, removals or returns, airport operations, and maritime operations), where appropriate and permitted by applicable laws and regulations;"	Article 14, Regulation 2007/2004	No, but Part 6 "All activities under this Working Arrangement are to be carried out in accordance with applicable laws, regulations, and policies."	Part 6, "The present Working Arrangement does not create binding obligations under international law. It is not intended to create or confer any right, privilege, or benefit on any person or party, private or public. [...] The provisions of this Working Arrangement should not prevent either Frontex or DHS from cooperating or granting assistance in accordance with the provisions of applicable international treaties and agreements, arrangements, laws, regulations, and policies."

State concerned, Date, Nature of agreement	Cooperation on Return	Nature of Cooperation on Return	Legal Basis	Human Rights Clause	Statement on international treaty/relationship to other international agreements
<a href="#">Montenegro</a> <a href="#">18.06.2009</a> <a href="#">Working Arrangement</a>	Yes	Part 4, "may explore possibilities to develop cooperation in the field of joint return operations as well as to promote the active participation of the Directorate for State Border and Border Affairs of the Police Directorate of Montenegro in Frontex coordinated joint return operations on a case-by-case basis as decided by the Executive Director of Frontex and upon agreement of the organising EU Member States."	Article 14, Regulation 2007/2004 and MB decision of 12 June 2008	No	Part 7, "The present Working Arrangement shall not be considered as an international treaty. Practical implementation of its contents shall not be regarded as fulfilment of international obligations by the European Community and its institutions."
<a href="#">Belarus</a> <a href="#">21.10.2009</a> <a href="#">Working Arrangement</a>	Not foreseen	Not specified	Not specified	No	Part 7, "The present Working Arrangement shall not be considered as an international treaty. Practical implementation of its contents shall not be regarded as fulfilment of international obligations by the European Union and Belarus."

State concerned, Date, Nature of agreement	Cooperation on Return	Nature of Cooperation on Return	Legal Basis	Human Rights Clause	Statement on international treaty/relationship to other international agreements
<a href="#">Canada</a> <a href="#">21.10.2009</a> <a href="#">Working Arrangement</a>	Yes	Part 4(vi), "Participation in joint operations (including but not limited to, removals or returns, airport operations, and maritime operations), where appropriate and permitted by the relevant legal framework applicable to each Participant;"	Article 14, Regulation 2007/2004	No	Part 6(a), "This Working Arrangement does not create binding obligations under international law. It is not intended to create or confer any right, privilege, or benefit on any person or party, private or public."
<a href="#">Commonwealth of Independent States</a> <a href="#">16.12.2010</a> <a href="#">Memorandum</a>	Not foreseen	Not specified	Article 13, Regulation 2007/2004 and MB decision of 25 May 2007	No	No
<a href="#">Cape Verde</a> <a href="#">14.01.2011</a> <a href="#">Working Arrangement</a>	Yes	Part 4.9 "Frontex and the National Police of Cape Verde will explore possibilities to develop cooperation in the field of joint return operations. Active participation of the National Police of Cape Verde in Frontex coordinated joint return operations should take place on a case-by-case basis decided by the Executive Director of Frontex and upon agreement of the organising EU Member States."	Article 14, Regulation 2007/2004 and MB Decision of 25 May 2007	No	Part 7, "The present Working Arrangement shall not be considered as an international treaty. Practical implementation of its contents shall not be regarded as fulfilment of international obligations by the European Union and its Institutions and Cape Verde."

State concerned, Date, Nature of agreement	Cooperation on Return	Nature of Cooperation on Return	Legal Basis	Human Rights Clause	Statement on international treaty/relationship to other international agreements
<a href="#">Nigeria</a> <a href="#">19.01.2012</a> <a href="#">Working Arrangement</a>	Yes	Part 4.9 "...continue to develop cooperation in the field of Frontex coordinated joint return operations as well as promote the active participation of the Nigerian authorities in Frontex coordinated joint return operations on a case-by-case basis by the Executive Director of Frontex and upon agreement of the organising EU Member States."	Article 14, Regulation 2007/2004 and MB Decision of 26 May 2007	Part 1, Basic Principles, "1.2 In the implementation of the intended cooperation, Frontex and the competent authorities of the Federal Republic of Nigeria afford full respect for human rights."	Part 6, "The present Working Arrangement shall not be considered as an international treaty. Practical implementation of its contents shall not be regarded as fulfilment of international obligations by European Union and its Institutions and the Federal Republic of Nigeria."
<a href="#">Armenia</a> <a href="#">22.02.2012</a> <a href="#">Working Arrangement</a>	Not foreseen	Not specified	Not specified	Part 1, Basic Principles "(ii) In the implementation of the intended cooperation, Frontex and the NSC afford full respect for human rights."	Part 6, "The present Working Arrangement shall not be considered as an international treaty. Practical implementation of its contents shall not be regarded as fulfilment of international obligations by the European Union, and its institutions and Armenia."

State concerned, Date, Nature of agreement	Cooperation on Return	Nature of Cooperation on Return	Legal Basis	Human Rights Clause	Statement on international treaty/relationship to other international agreements
<a href="#">Turkey</a> <a href="#">28.05.2012</a> <a href="#">Memorandum of Understanding</a>	Yes	Part 10, "Frontex and the competent Turkish authorities may explore possibilities to develop cooperation in the field of Frontex coordinated joint return activities in accordance with their respective legislation as well as promote the active facilitation and participation of the competent Turkish authorities in such activities;"	Not specified	Part 15, "In the implementation of the intended cooperation, Frontex and the competent Turkish authorities shall, in their respective capacities, afford full respect for human rights;"	Part 16, "The present MoU is concluded with a view to enhancing and developing cooperation between Frontex and the competent Turkish authorities and shall not be considered as a document having legal effect under international law and the practical implementation of its contents shall not be regarded as fulfilment of international obligations by the European Union and its institutions and Turkey;"
<a href="#">Azerbaijan</a> <a href="#">16.04.2013</a> <a href="#">Working Arrangement</a>	Not foreseen	Not specified	Not specified	Part 1, Basic Principles "(ii) In the implementation of the intended cooperation, Frontex and the SBS afford full respect for human rights, related international laws and principles."	Part 6, "The present working arrangement shall not be considered as an international treaty. Practical implementation of its contents shall not be regarded as fulfilment of international obligations by the European Union and its institutions and Azerbaijan."

State concerned, Date, Nature of agreement	Cooperation on Return	Nature of Cooperation on Return	Legal Basis	Human Rights Clause	Statement on international treaty/relationship to other international agreements
<a href="#">Kosovo</a> <a href="#">25.05.2016</a> <a href="#">Working Arrangement</a>	Yes	Part 3(x) "...may explore possibilities to develop cooperation in the field of Frontex coordinated (joint) return activities in accordance with their respective legislation as well as promote the active facilitation and participation of the competent authorities of Kosovo in such activities."	Article 14, Regulation 2007/2004 and MB decision of 10 September 2015	Part 1, Basic Principles "(iii) In the implementation of the intended cooperation, Frontex and the Ministry of Internal Affairs afford full respect for human rights, enshrined in international laws and principles, in particular they shall ensure that the rights of persons in need of international protection and other vulnerable groups are respected during all activities."	Part 6, "The present Working Arrangement shall not be considered as an international treaty. The practical implementation of its contents shall not be regarded as the fulfilment of international obligations by the European Union and its institutions or by Kosovo."

State concerned, Date, Nature of agreement	Cooperation on Return	Nature of Cooperation on Return	Legal Basis	Human Rights Clause	Statement on international treaty/relationship to other international agreements
<a href="#">Migration, Asylum, Refugees, Regional Initiative (MARRI) Regional Centre. Date not specified; Working Arrangement</a>	Not foreseen	Not specified	Not specified	No	No
<a href="#">Former Yugoslav Republic of Macedonia (now North Macedonia) 18.07.2018 Status Agreement (initialled)</a>	Yes	Article 1(2) "provision of operational support" carried out in accordance with EURA; Article 2(1) defines "action" to include return operation.	Not identified in document	Article 9, Fundamental Rights	Non-affection clause, Article 13 "This Agreement shall not affect the rights and obligations of the Parties arising from other international agreements by which both Parties are bound"
<a href="#">Albania 05.10.2018 Status Agreement</a>	Yes	Article 1(1) "...all aspects that are necessary for carrying out actions by the Agency that may take place in the territory of the Republic of Albania whereby team members of the Agency have executive powers." Article 2(1) defines "action" to include return operation.	Not identified in document	Article 8, Fundamental Rights	No non-affection clause
<a href="#">Bosnia &amp; Herzegovina 05.02.2019 Status Agreement (initialled)</a>	Yes	Article 2(1) defines "action" to include return operation;	Not identified in document	Article 8, Fundamental Rights	No non-affection clause

State concerned, Date, Nature of agreement	Cooperation on Return	Nature of Cooperation on Return	Legal Basis	Human Rights Clause	Statement on international treaty/relationship to other international agreements
<a href="#">Serbia</a> <a href="#">19.11.19</a> <a href="#">Status Agreement</a>	Yes	Article 1(1) "...all aspects of cooperation between the Republic of Serbia and the Agency necessary for carrying out actions by the Agency that may take place on the territory of the Republic of Serbia whereby team members of the Agency may have executive powers". Article 2(a) defines "action" to include return operation.	Not identified in document	Article 9, Fundamental Rights; Article 12, Relation to other international obligations	Non-affection clause, Article 12 "This Agreement shall be without prejudice to the obligations assumed by the Republic of Serbia or the European Union on the basis of international treaties and agreements in accordance with generally accepted principles of international law and shall be without prejudice to their application."
<a href="#">Montenegro</a> <a href="#">07.10.2019</a> <a href="#">Status Agreement</a>	Yes	Article 1(1) "...all aspects that are necessary for carrying out actions by the Agency that may take place on the territory of Montenegro whereby members of a team of the Agency have executive powers". Article 2(1) defines "action" to include return operation.	Not identified in document	Article 9, Fundamental Rights;	No non-affection clause

### Annex III. Informal agreements

Country, Date, Description of Informal Cooperation	Readmission Commitments	Human Rights	Frontex	Monitoring	Suspension	Documents accepted for travel	Policy Umbrella	MS participating?	TCNs foreseen
<a href="#">Moldova</a> <a href="#">05.06.2008</a> <a href="#">Mobility Partnership</a>	Para 9 "To enhance Signatories' efforts to fight illegal migration and trafficking in human beings, to strengthen border management capacities and cross-border cooperation; to strengthen the security of travel documents, identity documents and residence permits, and to fully cooperate on return and readmission;"	Recitals, "...while respecting human rights and the relevant international instruments for the protection of refugees and taking into account the situation of individual migrants and the socio- economic development of the Signatories."	Para 13, "The Community agencies, in particular Frontex, will be involved, as appropriate, in the implementation of the partnership."	Not systematic. Para 14, meet "in order to reconsider the priorities and further develop the partnership if need be."	Not foreseen	Not expressly, but cooperation foreseen in Paras 9-11 and in projects.	GAMM (Eastern Partnership )	BG, CY, CZ, F, DE, HE, HU, I, LT, PL, PT, RO, SK, SI, SE (+EC) (Annex included)	

Country, Date, Description of Informal Cooperation	Readmission Commitments	Human Rights	Frontex	Monitoring	Suspension	Documents accepted for travel	Policy Umbrella	MS participating?	TCNs foreseen
<a href="#">Georgia</a> <a href="#">30.11.2009</a> <a href="#">Mobility Partnership</a>	<p>Paras 11-16 generally. Para 11 "To enhance Signatories' efforts to fight further illegal migration and trafficking in human beings, to strengthen the implementation of the integrated border management, including through further improvement of border management capacities and cross-border cooperation; to strengthen the security of travel documents, identity documents and residence permits, and to fully cooperate on return and readmission;" Para 13 "To broaden further the application of readmission procedures through concluding and implementing the Readmission Agreement with the EC, to intensify the cooperation with the EU Member States through concluding agreements on border cooperation, and implementing joint specific programmes on these issues;"</p>	<p>Recitals, "...while respecting human rights and the relevant international instruments for the protection of refugees and taking into account the situation of individual migrants and the socio- economic development of the Signatories."</p>	<p>Yes, paras 16 &amp; 18 ("will")</p>	<p>Not systematic. Para 20, meet once a year "in order to reconsider the priorities and further develop the partnership if need be."</p>	<p>Not foreseen</p>	<p>Not expressly, but cooperation foreseen in Paras 11 and 15.</p>	<p>GAMM</p>	<p>BE, BG, CZ, DK, DE, EE, HE, F, I, LV, LT, NL, PL, RO, SE, UK (+EC) (no separate Annex)</p>	

Country, Date, Description of Informal Cooperation	Readmission Commitments	Human Rights	Frontex	Monitoring	Suspension	Documents accepted for travel	Policy Umbrella	MS participating?	TCNs foreseen
<a href="#">Armenia</a> <a href="#">27.10.2011</a> <a href="#">Mobility Partnership</a>	Paras 10-14 generally. Para 12 "To broaden further the application of readmission procedures, notably through the conclusion and effective implementation of the EU-Armenia Readmission Agreement, to intensify the cooperation with the EU Member States through concluding agreements on border cooperation, and implementing joint specific programmes on these issues;"	Recitals, "...while respecting human rights and the relevant international instruments for the protection of refugees and taking into account the situation of individual migrants and the socioeconomic development of the Signatories."	Yes, paras 14 & 18 ("may be involved")	Not systematic. Para 20, meet once a year "in the framework of the existing structure for dialogue and cooperation, in order to reconsider the priorities and further develop the partnership if need be.	Not foreseen	Not expressly, but cooperation foreseen in paras 10 and 13, and in projects.	GAMM	BE, BG, DE, NL, PL, RO (+EU) proposal "to support measures aiming at sharing the practical aspects of return policies, including exchanging best practices on readmission processes" (Annex to Joint Declaration, para III(a))	

<p><a href="#">Morocco</a> <a href="#">07.06.2013</a> <a href="#">Mobility</a> <a href="#">Partnership</a></p>	<p>Para 12 "To continue cooperation on readmission to the mutual benefit of both parties and in compliance with the existing reciprocal obligations between Morocco and the EU Member States." Para 13 "To resume negotiations between the EU and Morocco in order to conclude a balanced readmission agreement, with provisions relating to third-country nationals as well as accompanying measures and reconciling the need for operational efficiency with the requirement to observe the fundamental rights of migrants. The promotion of active and efficient cooperation with all regional partners will be essential in order to support efforts in this area."</p>	<p>Recitals, "RECALLING that respect for fundamental rights underpins the EU's and Morocco's migration policies, including in relations with third countries;" Objectives (body of text)," to promote an effective return and readmission policy while respecting fundamental rights, the relevant legislation and ensuring the dignity of the people concerned." Para 13, "reconciling the need for operational efficiency with the requirement to observe the fundamental rights of migrants". Para 20, "With respect for migrants' dignity and fundamental rights, to support the development of initiatives facilitating the voluntary return and socio-economic reintegration of illegal migrants, both for Moroccan nationals residing in the EU and for third-country nationals residing in Morocco."</p>	<p>Yes, Para 40 ("will"); P.21, conclusion of Working Arrangement foreseen in projects.</p>	<p>Para 35, "To improve and implement the policies and the legal framework governing migration, encouraging on the one hand the appropriate treatment of the various categories of migrants, and on the other hand the involvement of civil society in drawing up and monitoring those policies.". Para 42, to meet twice a year to monitor partnership and "where necessary, reconsider its priorities".</p>	<p>Not foreseen</p>	<p>Not expressly, but cooperation foreseen in para 16 and in projects (P.19)</p>	<p>GAMM</p>	<p>BE, F, DE, I, NL, ES, SE, UK (+EU). Note EU &amp; NL as project partners in relation to objectives 12 &amp; 13 (readmission and EURA); PT on objective 15 (capacity building on return and readmission); NL on objective 20 (supporting reintegration of readmitted Moroccans) - see Annex</p>	<p>Yes</p>
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<p><a href="#">Azerbaijan</a>  <a href="#">05.12.2013</a>  <a href="#">Mobility</a>  <a href="#">Partnership</a></p>	<p>Paras 7-11 generally. Para 9 "To enhance operational cooperation on return, including through the conclusion and effective implementation of the EU-Azerbaijan Readmission Agreement and implementing joint programmes on these issues;"</p>	<p>In purpose paragraph, "by promoting an effective return and readmission policy, in accordance with fundamental rights as well as international law, including refugee protection and human rights obligations;", "maximising the development impact of migration and mobility, while respecting human rights and international norms regarding persons in need of protection, and taking account of the perspective of individual migrants as well as the socio-economic situation of the Signatories."</p>	<p>Yes, para 1, and Working Arrangement identified. Paras 11 and 18, "may be involved"</p>	<p>Para 20, to meet twice a year "in order to follow the implementation of the partnership, reconsider the priorities and further develop the partnership if need be."          Para 23, "Whenever appropriate, the Signatories will conduct an evaluation of the current partnership."</p>	<p>Not foreseen</p>	<p>Not expressly, but cooperation foreseen in para 7.</p>		<p>BG, CZ, F, LT, NL, PL, SI, SK (+EU)          "Promoting of best practices on management of return and readmission" (Annex to Joint Declaration, para III, point 2)</p>	
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Country, Date, Description of Informal Cooperation	Readmission Commitments	Human Rights	Frontex	Monitoring	Suspension	Documents accepted for travel	Policy Umbrella	MS participating?	TCNs foreseen
<a href="#">Tunisia</a> <a href="#">03.03.2014</a> <a href="#">Mobility Partnership</a>	<p>Para 9 "Développer la coopération dans le domaine de la réadmission en mettant en œuvre les obligations existant entre la Tunisie et les États membres de l'UE, notamment en ce qui concerne l'identification et la délivrance des documents de voyage des personnes à réadmettre et conclure un accord de réadmission UE-Tunisie conforme aux standards de l'UE dans ce domaine La négociation de cet accord sera initiée et conclue en parallèle avec la négociation de l'accord de facilitation des visas."</p>	<p>Recitals, "...tout en respectant les droits de l'homme et les instruments internationaux relatifs à la protection des réfugiés". Refugee capacity building foreseen in paras 24 - 27.</p>	Not mentioned	<p>Para 37, "Les signataires procéderont régulièrement à l'évaluation de ce partenariat et des initiatives prises pour sa mise en œuvre....Une fois accomplie cette tâche, il se réunira deux fois par an au niveau approprié décidé d'un commun accord."</p>	Not foreseen	Not expressly, but foreseen in paras 9 and 11	GAMM	DE, BE, DK, ES, I, F, PL, PT, UK, SE (+EU) (no separate annex)	

<p><a href="#">Jordan</a>  <a href="#">09.10.2014</a>  <a href="#">Mobility</a>  <a href="#">Partnership</a></p>	<p>Para 9 "To negotiate a readmission agreement between the EU and Jordan with provisions relating to third country nationals based on clear and transparent criteria to be laid down in the agreement and taking into account the specific situation of Jordan." Para 33 "The signatory parties take the view that the elements contained in the various components of this partnership will be implemented using a balanced overall approach and constitute a package, particularly the visa and readmission facilitation agreements, which shall be concluded simultaneously."</p>	<p>Recitals "RECALLING that respect for fundamental human rights underpins the EU's and Jordan's migration and mobility policies, including in relations with third countries;" Objectives, to promote an effective return and readmission policy while respecting fundamental rights, the relevant legislation and ensuring the dignity of the people concerned." Para 10, "...assist in accordance with Jordanian national legislation migrants in crisis situations while ensuring respect and protection of fundamental human rights of all migrants." Para 19, "... to ensure respect of the fundamental human rights of all migrants."</p>	<p>Yes, para 34 ("will be involved")</p>	<p>Para 36, meet twice a year to monitor implementation of the partnership.</p>	<p>Not foreseen</p>	<p>Not expressly, but cooperation foreseen para 15.</p>	<p>GAMM</p>	<p>DK, DE, HE, F, I, CY, HU, PL, PT, RO, SE (no separate Annex)</p>	<p>Yes</p>
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Country, Date, Description of Informal Cooperation	Readmission Commitments	Human Rights	Frontex	Monitoring	Suspension	Documents accepted for travel	Policy Umbrella	MS participating?	TCNs foreseen
<a href="#">Nigeria</a> <a href="#">12.03.2015</a> <a href="#">Common Agenda on Migration and Mobility</a>	Not publicly available						GAMM		

<p><a href="#">Ethiopia</a>  <a href="#">11.11.2015</a>  <a href="#">Common Agenda on Migration and Mobility</a></p>	<p>"5...taking into account the provisions of Article 13 of the Cotonou Agreement, exploring possibilities for engaging in close coordination and cooperation on the return of irregular migrants in a safe and secure environment, including by developing programs of voluntary return and adequate reintegration assistance to and from Ethiopia; increasing the speed and efficiency of procedures for returning and receiving irregular migrants, especially with regard to the identification of own nationals and the issuance of travel documents required for return, while safeguarding respect for human rights, with all due respect to the countries' international and domestic legal obligations on the respect of human rights."</p>	<p>Recitals, "...while respecting international human rights and international norms regarding persons in need of international protection as applicable to the Signatories"; "STRESSING the importance of strengthening and promoting international protection, including the implementation of international and regional instruments for the protection of refugees, asylum seekers, in line with the principle of <i>non-refoulement</i>..."</p>	<p>Yes, para 8 ("may")</p>	<p>Not foreseen</p>	<p>Not foreseen</p>	<p>Not expressly but cooperation foreseen in para 5.</p>	<p>GAMM</p>		
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Country, Date, Description of Informal Cooperation	Readmission Commitments	Human Rights	Frontex	Monitoring	Suspension	Documents accepted for travel	Policy Umbrella	MS participating?	TCNs foreseen
<a href="#">Turkey</a> <a href="#">18.03.2016</a> <a href="#">EU-Turkey Statement</a>	"rapid return of all migrants not in need of international protection crossing from Turkey into Greece and to take back all irregular migrants intercepted in Turkish waters" and additional action points (1) and (2) relating to return of "all new irregular migrants crossing from Turkey into Greek islands as from 20 March 2016" and 1-for-1 deal in relation to resettlement of a Syrian from Turkey for each Syrian returned to Turkey from the Greek islands.	Not foreseen other than assertion that measures do not amount to collective expulsion.	Not mentioned	Monthly basis	Not foreseen	Not foreseen		All	Yes

Country, Date, Description of Informal Cooperation	Readmission Commitments	Human Rights	Frontex	Monitoring	Suspension	Documents accepted for travel	Policy Umbrella	MS participating?	TCNs foreseen
<a href="#">India</a> <a href="#">29.03.2016</a> <a href="#">Common Agenda on Migration and Mobility</a>	"...address such issues as: [...] 4(ix) cooperating on facilitation of the return of irregular migrants, including on the establishment of nationality by the competent authority, and timely issuance of travel documents required for return, while seeking to make the process swifter and more efficient; 4(x) exploring possibilities for a Readmission Agreement.	Para 1, Priority areas "promoting international protection, in line with the respective obligations of the Signatories". Para 6 "...promoting international protection"	Not directly mentioned but note para 4 (vi), "strengthening interagency cooperation, coordination and exchange of information"; and para 7 where agency cooperation is contemplated ("may")	Para 8, annual EU-India High Level Dialogue on Migration and Mobility	Not foreseen	Not expressly but see para 9 on readmission cooperation.	GAMM		

Country, Date, Description of Informal Cooperation	Readmission Commitments	Human Rights	Frontex	Monitoring	Suspension	Documents accepted for travel	Policy Umbrella	MS participating?	TCNs foreseen
<a href="#">Ghana</a> <a href="#">16.04.2016</a> <a href="#">Joint Declaration on Ghana-EU Cooperation on Migration</a>	<p>"11. Both parties agreed that an effective return policy is an integral part of migration management and will deter further irregular migration. The National Migration Policy for Ghana identifies return, readmission and reintegration of emigrant Ghanaians and recognizes the challenges in this area. [Para break] In this context and in line with the Valetta Declaration and Action Plan, both parties agreed on the need to significantly increase in the short-term the speed and efficiency of procedures for returning and receiving irregular migrants and the timely issuance of travel documents required for return. The parties agreed to deepen the discussions at the technical level. Ghanaian authorities committed to organize pilot identification missions in EU Member States [not later than June 2016]."</p>	<p>Not expressly, reference back to Cotonou Agreement in para 2.</p>	<p>Not mentioned</p>	<p>Not systematic                      "The next Ghana-EU Political Dialogue is scheduled for May/June 2016 the parties will take stock of progress achieved in these areas."</p>	<p>Not foreseen</p>	<p>Not expressly, but cooperation foreseen in last para (see readmission)                      "The parties agreed to deepen the discussions at the technical level. Ghanaian authorities committed to organize pilot identification missions in EU Member States not later than June 2016."</p>	<p>Cotonou Agreement; Valetta Declaration and Action Plan (November 2015)</p>		

<p><a href="#">Cote d'Ivoire</a>  <a href="#">16.04.2016</a>  <a href="#">Joint</a>  <a href="#">Communiqué on</a>  <a href="#">the High Level</a>  <a href="#">Dialogue on</a>  <a href="#">Migration</a></p>	<p>Para 4 "Readmission and reintegration: the European Union and Côte d'Ivoire agree that the implementation of an effective policy for the systematic return of irregular migrants is a key aspect of managing migration and the best way of discouraging people from putting their lives in danger.</p> <p>The European Union notes that, on the basis of its figures, very few Ivorian nationals subject to deportation decisions have actually been deported, with a return rate of around 14%. In the framework of its relations with the Member States of the European Union, Côte d'Ivoire undertakes, for its part, to verify these figures and to increase its cooperation, particularly by improving procedures for the identification of illegal residents, including through the identification missions which it already conducts in Europe and that it will step up, and through the issue of consular laissez-passers. For its part, the European Union confirms its readiness to support the return of irregular Ivorian migrants by introducing aid for training and reintegration."</p>	<p>Not mentioned</p>	<p>Not mentioned</p>	<p>Not systematic</p>	<p>Not foreseen</p>	<p>See comments on Readmission Commitments</p>	<p>Valletta Summit (November 2015)</p>		
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Country, Date, Description of Informal Cooperation	Readmission Commitments	Human Rights	Frontex	Monitoring	Suspension	Documents accepted for travel	Policy Umbrella	MS participating?	TCNs foreseen
<a href="#">Niger</a> <a href="#">03.05.2016</a> <a href="#">Joint Migration Declaration</a> <a href="#">(source: jeanpierrecassari.no.com)</a>	Unable to locate source document								
<a href="#">Afghanistan</a> <a href="#">03.10.2016</a> <a href="#">Joint Way Forward on migration issues between Afghanistan and the EU</a>	Part I, para 2 "In line with its obligations under international law, Afghanistan reaffirms its commitment to readmit its citizens who entered into the EU or are staying on the EU territory irregularly, after due consideration of each individual case by Member States."	Reference in recitals to Refugee Convention and Protocol, ICCPR, EUCFR, "respecting the safety, dignity and human rights of irregular migrants subject to a return and readmission procedure".	Yes, joint flights coordinated by Frontex Part II paras 3 and 4.	Part VI, Joint Working Group "to meet regularly to facilitate application of this declaration"	Agreement initially for 2 years, with possibility to discontinue 30 days prior to end of two year period, otherwise agreement continues for further two years. No suspension clause.	Yes, Part II paras 1 and 2; See also Part VIII on Exchange of Documents (includes evidence of nationality)			

<p><a href="#">Belarus</a>  <a href="#">13.10.2016</a>  <a href="#">Mobility</a>  <a href="#">Partnership</a></p>	<p>"12...to fully cooperate on return and readmission, including by providing EU-financed assistance; 17. To enhance operational cooperation on return, including through the conclusion and effective implementation of the EU-Republic of Belarus Readmission Agreement, with provisions relating to third country nationals based on clear and transparent criteria to be laid down in the agreement, and implementing joint programmes on these issues."</p>	<p>Recitals, general reference "RECALLING that respect for human rights underpins the EU's and the Republic of Belarus' migration and mobility policies, including in relations with third countries"; Objectives paragraph: "including by promoting an effective return and readmission policy, in accordance with full respect of human rights and international law, including in the area of international protection;" and "maximising the development impact of migration and mobility, in order to exploit the potential of migration and its positive effects on the development of the Republic of Belarus and the participating EU Member States, while respecting human rights and international norms regarding persons in need of protection, and taking account of the perspective of individual migrants as well as the socio-economic situation of the Signatories."; Para 23 "To promote the</p>	<p>Yes, cooperation foreshadowed in recitals; Paras 36 and 19, Frontex involvement foreshadowed in partnership ("may") and "in conjunction with working arrangement in place with the State Borders Committee".</p>	<p>Para 39, meet once a year.</p>	<p>Not foreseen</p>	<p>Not expressly, but cooperation foreseen in paras 12, 18 and 20.</p>	<p>GAMM</p>	<p>BG, LV, LT, HU, PL, RO, FI (no separate Annex)</p>	<p>Yes</p>
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		integration of legal migrants, so as to enhance their capacity to contribute to the development of their host countries, and to ensure respect of the fundamental human rights of all migrants."							
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Country, Date, Description of Informal Cooperation	Readmission Commitments	Human Rights	Frontex	Monitoring	Suspension	Documents accepted for travel	Policy Umbrella	MS participating?	TCNs foreseen
<a href="#">Mali</a> <a href="#">06.12.2016</a> <a href="#">Standard Operating Procedures</a> (Not publicly available. Source: <a href="#">Statewatch</a> )	<a href="#">Agreed, but not signed and implemented following Mali's retraction. See letter from European Commission to EP.</a> <a href="#">Source: Statewatch</a>	Not mentioned	Para 3(i) Yes, may be part of a joint invitation to Mali to conduct "identification missions" in requesting country or countries. Costs borne by requesting country, countries or Frontex.	Para 7, meet once a year	Para 7, either party may "stop applying" the operating procedures on 6 months' notice,	Yes, and comprehensive modalities set out for determining nationality, paras 1-5			

<p><a href="#">Mali</a>  <a href="#">11.12.2016</a>  <a href="#">Communiqué</a>  <a href="#">commun Mali-EU</a>  <a href="#">À la suite du</a>  <a href="#">Dialogue de Haut</a>  <a href="#">Niveau sur la</a>  <a href="#">Migration</a>  <a href="#">(document not</a>  <a href="#">publicly</a>  <a href="#">available. Source:</a>  <a href="#">Statewatch)</a></p>	<p>"l'accompagnement des retours d'Europe des personnes en situation irrégulière, sur la base des procédures standard, conclu entre les deux parties tout en respectant leurs obligations mutuelles."</p>	<p>"Les deux parties ont également mis un accent particulier sur le respect des droits de l'homme des personnes concernées."</p>	<p>Not expressly, but could fall within foreshadowed cooperation, "la gestion des frontières et un meilleur contrôle du territoire"</p>	<p>Not expressly, "Les deux parties ont convenu de mettre en place une structure appropriée de concertation locale, sous l'égide du gouvernement du Mali et avec la pleine participation de la partie européenne, pour permettre de coordonner les différentes actions et programmes dans le cadre de la coopération sur les questions migratoires, et pour en assurer la cohérence avec les orientations stratégiques nationales."</p>	<p>Not foreseen</p>	<p>Not expressly, but cooperation foreseen," le renforcement des systèmes cohérents et robustes de registres d'état civil, ainsi que la délivrance des cartes d'identité et passeports sécurisés et l'utilisation des passeports biométriques;</p>			
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Country, Date, Description of Informal Cooperation	Readmission Commitments	Human Rights	Frontex	Monitoring	Suspension	Documents accepted for travel	Policy Umbrella	MS participating?	TCNs foreseen
Ghana 07.2017 Good Practices for the efficient operation of the return procedure	<a href="#">Proposed to Ghana but not yet concluded. Unable to locate source document. See letter from European Commission to EP. Source: Statewatch</a>								
<a href="#">Guinea</a> 24.07.2017 <a href="#">EU-Guinea good practices for the efficient operation of the return procedure (document not publicly available)</a>	<a href="#">Document not publicly available</a>								

Country, Date, Description of Informal Cooperation	Readmission Commitments	Human Rights	Frontex	Monitoring	Suspension	Documents accepted for travel	Policy Umbrella	MS participating?	TCNs foreseen
<a href="#">Bangladesh</a> <a href="#">20.09.2017</a> <a href="#">Standard Operating Procedures for the identification and return of persons without an authorisation to stay (unable to locate source document):</a> <a href="#">Source</a> <a href="#">jeanpierrecassari.no.com</a>	<a href="#">Unable to locate source document. Agreement effective from 25.09.2017 - See letter from European Commission to EP.</a>								

Country, Date, Description of Informal Cooperation	Readmission Commitments	Human Rights	Frontex	Monitoring	Suspension	Documents accepted for travel	Policy Umbrella	MS participating?	TCNs foreseen
<a href="#">Ethiopia</a> <a href="#">05.02.2018</a> <a href="#">Admission Procedures for the return of Ethiopians from European Union Member States (draft text) (text not publicly available)</a>	<a href="#">Relates to Ethiopian nationals who are "illegally present in the EU Member States". No reciprocity (text source: Statewatch). Note: Council approval of admission procedures for return of Ethiopians on p.12 of Council Document 5710/18)</a>	In section prior to body of text, "This Procedure will be applied to voluntary and non-voluntary returns in full compliance with the human rights of Ethiopian nationals provided under relevant international instruments."	Not mentioned	Not mentioned	Only request to modify, with the mutual consent of EU and Government of Ethiopia Section 6(3) and (4)	Yes, and comprehensive modalities set out for determining nationality, Sections 2-4			

Country, Date, Description of Informal Cooperation	Readmission Commitments	Human Rights	Frontex	Monitoring	Suspension	Documents accepted for travel	Policy Umbrella	MS participating?	TCNs foreseen
<a href="#">The Gambia 08.05.2018 Good practices between the Government of The Gambia and the European Union for the efficient operation of the identification and return procedures of persons without authorisation to stay (text not publicly available)</a>	<a href="#">Text not publicly available. Note: moratorium on returns from EU issued by The Gambian Government in March 2019 (source: Altrogge, J., and Zanker, F. (2019)).</a>								



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In November 2019, the European Parliament's Committee on Civil Liberties, Justice and Home Affairs (LIBE) launched an implementation report on *Directive 2008/115/EC on common standards and procedures in Member States for returning illegally staying third-country nationals (the 'Return Directive')*. The Return Directive aims at ensuring that the return of non-EU nationals without legal grounds to stay in the EU is carried out effectively, through fair and transparent procedures that fully respect the fundamental rights and dignity of the people concerned. Tineke Strik (Greens/EFA, the Netherlands) was appointed as rapporteur.

Implementation reports by European Parliament committees are routinely accompanied by European Implementation Assessments, drawn up by the Ex-Post Evaluation Unit of the European Parliament's Directorate-General for Parliamentary Research Services (EPRS).

This EPRS European Implementation Assessment finds several protection gaps and shortcomings regarding the four key measures of the Return Directive – return decision, enforcement of the return decision, entry ban, and detention – which may lead to fundamental rights violations for irregular migrants. Moreover, EU return and readmission policy has increasingly resorted to informal cooperation in the external policy dimension. There have been, and continue to be, rule of law, fundamental rights, budgetary and external affairs implications flowing from the pursuit, conclusion and implementation of EU readmission agreements and agreements having equivalent effect with third countries.

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