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POLICY OPTION BRIEF

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MIGRATION

Increasing Efficiency and Effectiveness of Return Policy: Coerciveness or Migrants' Agency?

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ReSOMA identifies the most pressing topics and needs relating to the migration, asylum and integration debate. Building on the identification of pivotal issues and controversies in the ReSOMA Discussion Briefs, **ReSOMA Policy Option Briefs** provide an overview of available evidence and new analysis of policy alternatives. They take stock of existing literature of policy solutions on asylum, migration and integration, highlight the alternatives that can fill key policy gaps and map their support among various stakeholders. They have been written under the supervision of Sergio Carrera (CEPS/EUI) and Thomas Huddleston (MPG).

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Policy Option Brief

Increasing Efficiency of Return Policy: Role of Evidence and Policy Alternatives*

1. INTRODUCTION

The ReSOMA Discussion Brief on the EU Return Policy has outlined the rapid developments and key controversies in the area of EU return policy until July 2018 (Cortinovis 2018a). The initial brief has highlighted how since 2015 EU returns policies, operations, agencies have been reshaped and reinforced in the aftermath of the so-called, European humanitarian 'refugee crisis'. In addition, the policy brief situated the discussion on return in a broader context of developing a web of formal EU readmission agreements and, increasingly promoted, non-formal arrangements with third countries (Carrera 2016; Cortinovis 2018a; Cortinovis 2018b). European Commission and the Member States at the Council have prioritised swift returns of asylum seekers whose applications have been rejected and other irregular migrants as one of the most visible responses to Europe's humanitarian 'refugee crisis' in a short-medium term period.

This Policy Options brief further updates on developments in this policy area that took place between August 2018 – May 2019. This Policy Options brief aims to critically assess the role of evidence in the debate on the alternatives in the EU Return policy. This brief underlines how the 'politics' have been outweighing the role of 'evidence' and how the efficiency of the EU return operations has fed a blame-shifting game between the European Commission, the European Border and Coast Guard Agency (Frontex) and the EU Member States.

The long tale of blame-shifting

In June 2018 the Council "welcomed the legislative proposals" to increase the efficiency of returns and on 12 September 2018 Jean Claude Junker during the State of the Union Address has announced the "last elements needed for compromise on migration and border reform" (European Commission 2018b). Among these 'last elements' two proposals focused on increasing 'efficiency' or rather the rate, of expulsions: the proposed recast EU return directive and updated European Border and Coast Guard (Frontex) regulation. This is illustrative of the Commission acting in "a crisis mode" and "blame shifting" for ineffectiveness of returns between Member States and Commission, to the Frontex, third countries, and the most visibly to irregular migrants and asylum seekers whose applications have been rejected (Carrera 2016; Carrera and Den Hertog 2016; Carrera 2019).

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The Commission's Memorandum accompanying proposal to amend the directive has reiterated that "the shortcomings of Member States' return procedures and practices hamper the effectiveness of the EU return system" (European Commission 2018a: 2). Also, the Commission has highlighted that the Member States are not using up 'the flexibilities' readily provided within the Return Directive.

The Commission has responded to certain Ministries of Interior calls to allow for more coercive methods that would entail reducing the fundamental rights safeguards, in particular, in the border zones at the external EU Schengen border zones. However, the Commission's concessions on the side of procedural safeguards also entailed increasing 'Europeanisation' of these Member State actions.

Current Commission's proposal imposes extremely tight deadlines and more stringent requirements, not only to the persons issued the return decisions but also to the EU Member States, that will have a hard time to comply with this Directive, if it will be approved. For example, Member States have lost their discretion to grant the cheaper and less coercive options, such as non-issuing return decision, granting voluntary return for migrants that are deemed 'at risk of absconding' (Article 9), non-detention of children and families (Article 18), shorter than 3 months' detention periods, option to not-impose entry bans in certain cases (Article 13), limiting appeals on return decisions to speedy single judicial review (Article 16).

Besides, the Frontex also got more competences in the area of returns in two last recasts in 2016 and 2019. The recast Return Directive obliges the Member States to communicate all their decisions to a new central return management system (Article 14). This system will track what the Member States do (not) do. In short, the Commission attempted to gain more information and control over the return procedures.

It seems that such a move has been subsequently met with caution at the Council of the EU. During its attempts to find partial agreement on the recast directive, Member States suggested rewording some of the passages as an attempt to reclaim the lost 'margin of discretion' as to apply less coercive measures, for example to grant voluntary period for persons, even they are at risk of absconding, exempting children from detention, etc. (Council of the EU 2019a and 2019b).

The Commission's departure from Impact Assessment procedure

The key controversy aroused when the Commission has not backed its proposal to recast Return directive with any impact assessment. While this is not a unique situation in the past years, it raises some pertinent questions on Commission's compliance with its own "Better Regulation Guidelines" (2017d) and playing the role that it was assigned under Interinstitutional Agreement on Better Law-Making (European Parliament, Council of the European Union and European Commission 2016).

In its explanatory memorandum, the Commission argues that Impact Assessment "is deemed not necessary" in light of the "urgency in which legislative proposals need to be tabled" and refers to

prior technical consultations with Member States' Ministries of Interior and European Migration Network (EMN) (European Commission 2018:6). Such a move indicates that politics outweighed the evidence in policy-making, as Commission was not even attempting to resort for its legitimising function. This ReSOMA policy options brief provides a critical analysis of the role of politics and evidence in the EU policy-making, as the notion of 'evidence-based policy' making may often mask some of trade-offs and caveats. This brief argues that it is worth leaving such theoretical debate aside and coming back to the Commission's accountability under its given mandate under EU treaties and abovementioned agreements and guidelines.

In absence of Commission's Impact Assessment, the European Parliament has initiated its own "substitute impact assessment" which uses the very parameters of the Commission's Better Regulation Guidelines, namely subsidiarity, proportionality, coherence, relevance, efficiency and effectiveness (European Commission 2017d). This assessment concluded that: "there is no clear evidence supporting the Commission's claim, that its proposal would lead to more effective returns of irregular migrants" (Eisele et al. 2019).

Commissions' decision to strike out Impact Assessment and all the related public consultations on how such a proposal may translate into actual changes on the ground, in the end, has not proved to save time. The rushed and limited evidence-base provided by the Commission has made more difficult the political negotiations at the Parliament. These negotiations took place at a time when MEPs were going into 'elections mode' and when European party families made their pre-existing divisions on EU migration and asylum policies even more apparent. Negotiations happened in the on-going interinstitutional battle when so-called 'Asylum Package' remained blocked at the Council. Eventually, this proposal has not reached the needed political support in the European Parliament and therefore will be subject for the negotiations between the newly elected Parliament, Commission and Council (Legislative Observatory of the European Parliament 2019b).

Also, the only partial agreement has been reached at the Council of the EU (2019a and 2019b) on this file. While there was broad consensus on the need to revise the Return Directive, Council has proposed numerous amendments that are attempting to reverse some of the stringent requirements put on the Member States and take back the leverage. The most outstanding issue on which the Member States could not find the agreement remained 'the border procedure' (Article 22) and this leads back to the Asylum Package. At the Council, there was no consensus on the similar provisions in the proposal to recast Asylum Procedures Regulation (2016/0467). This ReSOMA policy options brief contributes to the ongoing debate and aims to highlight how alternative views from academia and civil society remained not considered or were side-lined in the absence of public consultations.

The assessment of policy alternatives

Civil society, academia as well as UN and Council of Europe bodies have challenged many of the proposed amendments to the Return Directive. Many of them have also proposed policy alternatives on how to go about the asylum seekers whose applications have been rejected and other irregular migrants who do not or no longer fulfils the criteria for residence within the EU.

The policy options brief goes a step further and explores the policy alternatives that are in line with the principle of subsidiarity and respect individual human rights. They are the following:

- Increased procedural guarantees and individual engagement in asylum procedures and returns
- Regularisation of non-removable third-country national
- Increased focus on voluntary returns, reintegration support and durable solutions

Alternatives to detention is another key solution in the process of return, however, it will be only briefly touched upon in this paper as it is a subject to a separate ReSOMA Discussion Brief.

The academia, civil society and practitioners have gathered some evidence that such policy alternatives could lead to more sustainable solutions for all parties involved, namely the rejected asylum seekers and irregular migrants, third countries of origin, or so-called 'safe third countries' and also for the EU Member States. The quick overview of these policy alternatives reveals, that indeed when migrants' agency, fundamental rights are put into the equation this leads to more sustainable results, less coercive and cheaper policies, for everyone involved. Such solutions make it easier for the European institutions and EU Member States' to comply with their commitments under EU law as well as under international humanitarian and human rights laws. It must be stressed that certain rights, such as non-refoulment, fair trial provisions, are not subject to derogations, even in the context of political pressures for more efficient returns or related border controls and migration management purposes.

Therefore, we further analyse solutions that could be developed in the spirit of Tampere, as 20 years ago EU Member States have agreed to develop common EU asylum and migration policies based on the principles of equal solidarity, responsibility-sharing, non-discrimination and fairness. The Global Compact on Migration and Global Compact on Refugees add a new global dimension for the EU policy making. Both compacts also highlight the agency of migrants, including in an irregular situation and asylum seekers, including when their asylum applications are rejected, and when they are issued return orders.

Also, the rule of law and democratic accountability requires the EU institutions' and Member States' governments to act within the given remits of their competences. EU oversight institutions, including Court of Justice of the EU, European Ombudsman, European Court of Auditors as well as European Parliament are vigilant as to what are the likely impacts of more coercive policies, in terms of Fundamental Rights of asylum seekers whose applications have been rejected and irregular

migrants and what is happening to them after they are returned. In addition, also Council of Europe court in Strasbourg as well as International Criminal Court (ICC) in n the blame-shifting game between The Hague have signalled that various (in)actions by the EU and its Member States will be scrutinised under their respective competences.

This policy options brief also draws on the discussions on this subject during a ReSOMA Task Force meeting, a ReSOMA Transnational Feedback meeting[1] and a closed door-event organised by the Danish Refugee Council (DRC).[2]

[1] "Global Migration and Asylum Conversation: Data, Research and Policy" took place on 29 of April 2019 in Brussels. The event was co-organised between CEPS on behalf of ReSOMA Network and London SOAS Migration Leadership Team.

[2] "DRC Roundtable asylum-return nexus in the EU hotspots", took place on 30 of April in Brussels. The event was organised by DRC. CEPS was taking part in it.

2. WHAT HAS THE PROPOSED RECAST RETURN DIRECTIVE INTENDED TO CHANGE?

This section highlights some of the coercive solutions that are more stringent towards migrants and towards EU member States as proposed by the European Commission (2018 a) in its Proposal to recast directive. The new directive proposes the following innovations:

- A new list of criteria defining the risk of absconding (Article 6);
- An article introducing an obligation to cooperate on irregular migrants and rejected asylum applicants (Article 7);
- A requirement for the EU Member States to immediately and automatically issue the return decisions (8) for those third-country nationals whose irregular stay has ended;
- Making it obligatory for the Member States not to grant period of voluntary departure for persons who are falling under criteria of risk of absconding or whose application was
- dismissed as 'fraudulent or manifestly unfounded', or if they 'pose a risk to public policy, public security or national security' (Article 9).
- The obligatory imposition of entry bans when voluntary departure has not been granted when persons have not complied with a voluntary departure period and also a possibility to impose entry bans on exiting third-country nationals (Article 13);
- A new article requiring the Member States to create a return management system and share it with the central return management system of Frontex (Article 14);
- Reducing procedural remedies and safeguards, namely allowing for the removal decisions pending the final decision on the appeal and also reducing the appeals to single judicial review (Article 16);
- Imposing on Member States obligatory detention of returnees and also the required minimum duration of 3 months (Article 18)
- Creation of a new border procedure to adopt certain return decisions in a fast-track and speedy manner as to expel irregular migrants and potential asylum seekers without granting a possibility to submit their asylum claims (Article 22).

All of these articles need to be seen as mutually reinforcing and leading towards more coercive behaviour against irregular migrants and potential or rejected asylum seekers

Limited procedural safeguards also need to be considered together with increasingly automated return decisions (Articles 8 and16). This article foresees that return decisions "shall be issued immediately after the adoption of a decision ending a legal stay of a third-country national in the same act" (Article 8 para. 6). Besides, all of such decisions would need to be communicated to the central return management system, that is also enabling sharing of personal data via return management procedures with agencies of third countries (Article 14).

An open list of criteria to determine the 'risk of absconding' (new Article 6) is also including an 'obligation to cooperate' (Article 7) that needs to be seen in over-

all, reduced possibilities to appeal return decisions. The Commission proposed to establish such 'risk of absconding' on a rebuttable presumption, meaning that the burden of proof shifts to the irregular migrant or asylum seekers whose applications have been rejected that they are not going to abscond, and therefore do not need to be detained and forcibly removed. While the open list of the risk of absconding may look as empowering Member States' and their enforcement agencies, this clause also imposed more stringent procedures on them. Increased grounds for the use of pre-removal detention (Article18, 5, 6) and also introducing a mandatory minimum duration for detention 3 months (Article 18) is very likely to overburden the Member States. They also cannot grant them voluntary departure and they have to automatically issue entry bans, what is likely to lead to the Member States' detention facilities being overused.

The proposal placed various restrictions on when the Member States shall not grant voluntary departure period. This is likely to lead to increased use of forced returns. The FRA (2019) has highlighted that such proposal reverses the principle of primacy of voluntary return over forced. New Article 9 is precluding voluntary returns when persons were determined at 'risk of absconding' (Article 6) or to not comply with an order to cooperate (7). Such measures are likely increasing the costs on the side of the Member States to expel people via forced return procedure, that otherwise would have been keen to return voluntarily. This also led the Council to propose that it should be not the Member States but irregular migrants paying for their forced returns. Meaning that persons would be given a 'fresh start' in a country of origin or third country with a hefty fine or debt. This reverses the logic of durable solutions for persons returned, where personal agency and assistance for the reintegration were deemed the key to ensure that return indeed leads to sustainable results for all parties involved (Caritas et al 2019).

Increased use of entry bans, including the option to impose them upon third-country nationals exiting the EU (Article 13). The provision on entry bans also imposes the maximum duration of entry bans up to 5 years and in certain cases makes it obligatory to issue such bans, if no voluntary period for departure has been granted (risk of absconding) or when the obligation to return was not complied with (Article 13 para 1). Council has attempted to increase such duration up to 10 years and also attempted to impose entry bans on persons who are benefiting from assisted voluntary return.

The introduction of a new border procedure (Article 22) risks creating a new default procedure for the returns with fundamental rights safeguards lowered to an extent that is very likely to lead to refoulment to countries where irregular migrants and potential asylum seekers would face torture, inhuman and degrading treatment (Eisele 2019). The border procedure is severely limiting procedural guarantees, including the suspensive effect of an appeal against a return order, it is also imposing extremely short timelines: 48 hours to lodge appeals against return decision (22, para. 5), and for temporary suspension of return decision (22, para 6) – if these timelines may lead to the Member States violating their

commitments under international law, such as non-refoulment.

The Commission's proposal to recast the directive was widely criticised by academics (Peers 2018; Molnar 2018; Muir and Molinari 2018; Fernandes and Galea 2018; Meijers Committee 2018; Carrera 2019) civil society (Caritas et. al. 2018; ECRE 2018; Amnesty International 2018), European Parliament (Sargentini 2019) and its Research Service (Eisele 2019; Diaz Crego 2019; EU's Fundamental Rights Agency (FRA 2019), European Economic and Social Committee (EESC 2019). Among submissions of academia and civil society, there were serious concerns raised that the focus on return rates has prevented the development of policy alternatives invested in durable solutions and a holistic approach to migration and asylum.

Various civil society organisations (ECRE 2015; PICUM 2017; DRC 2018; Caritas Europa et. al. 2018; ECRE 2018; Amnesty International 2018; Human Rights Watch 2018; International Detention Coalition 2018; DRC 2019) have consistently opposed the ever-increasing list of coercive measures proposed by the European Commission since 2015 (2015a; 2015b; 2015c; 2017a; 2017b; 2017c). These have increasingly challenged the principles underpinning the directive, such as the primacy of voluntary return, use of detention as a last resort and the best interests of the child. Civil society organisations' critique is based on the risk of violations of international and EU law, European Court of Human Rights (ECtHR) and the Court of Justice of the EU (CJEU) jurisprudence as well as evidence on what is happening to individuals when such measures are put in practice.

Several academics also have been for long critical on the coercive approach of the Directive since the very inception of the EU return directive (Acosta Arcazo 2009, Baldaccini 2009, Carrera and Merlino 2009). Academics (Meijers Committee 2018; Molnar 2018; Peers 2018; Muir and Molinari 2018; Carrera 2016); the EU's Fundamental Rights Agency (FRA 2019) and the European Parliamentary Research Service (EPRS) (Eisele et al. 2019; Diaz Crego 2019) have been bringing forward also case law of the European Court of Human Rights (ECtHR) as well as Court of Justice of the European Union(CJEU) that have been upholding individual rights and/or limiting Member States' discretionary powers in the area of return operations and reminding that measures infringing upon fundamental rights not only need to be legitimate (as prescribed by law) but also necessary and proportional to the aim pursued. Besides, the EU proposed measures also need to comply with the principle of subsidiarity and not to interfere unduly with national legal systems, for example requiring a substantial change of the application of the laws on the asylum procedure, purposes for detention, etc.

Also, regional and international human rights bodies have reacted to the Commissions' proposal. For example, the Parliamentary Assembly of Council of Europe has highlighted that many of the EU Member States are already denying the right to asylum by conducting pushbacks and pullbacks at the EU external borders. The swift 'border procedure' therefore needs to be analysed within this context.

3. WHAT IS THE ROLE FOR EVIDENCE IN THE EU POLICY-MAKING ON RETURNS?

The policy option brief critically assesses the fact that the European Commission has decided not to conduct the ex-ante impact assessment for the proposal to recast of the EU Return directive. The Commission has argued that it is due to the "urgency" of the need for such legislation, although the Commission's explanatory memorandum also details how "making returns more effective has been the priority for the Commission over the past years". The European Parliamentary Research Service also questions why such impact assessment has not been conducted earlier, recalling that the "Commission was already ready to revise the Return Directive in early 2017, as it is apparent from the Renewed action plan on return" (Eisele 2019). It raises questions about the weight and meaning of the evidence vis-à-vis politics. It also requires critical reflection on the 'evidence-based policy-making' that presupposes that 'independent and impartial evidence exists at all. Nevertheless, it brings back the issue of accountability of EU institutions acting within their defined roles, namely as set out in Treaties, and further detailed in the Inter-Institutional Agreement on Better Law-Making and Commissions' Better Regulation Guidelines, defining Commission's tasks in informing policy debate and engaging diverse stakeholders in the EU policy-making.

3.1. Why the Impact Assessment was deemed "not necessary"?

This Commissions' move to respond to political salience of the issue with measures that are not substantiated by diverse evidence is not unprecedented, nevertheless it stands at odds with Commissions own "Better Regulation Guidelines" (2017d) and Interinstitutional Agreement on Better Law-Making (European Parliament, Council of the European Union and European Commission 2016).

The Interinstitutional Agreement highlights the importance of impact assessments for achieving the overall goal of improving the quality of EU policy-making and that they are an obligatory step for making well-informed decisions. In this agreement there is an expectation that Commission will undertake Impact Assessments as a default procedure for "its legislative and non-legislative initiatives, delegated acts and implementing measures which are expected to have *significant economic, environmental or social impacts*" (Article 13, European Parliament, Council of the European Union and European Commission 2016, emphasis added).

Changes in return procedures are de facto lowering guarantees and safeguards by making the overall procedure more coercive will have a significant effects, first of all on returnees The proposed amendments as argues civil society (ECRE 2018; DRC 2018; Caritas et al. 2019; Amnesty International 2018), FRA (2019) and European Parliamentary Research Service (Eisele 2019) are very likely to lead

to an increased number of asylum seekers whose applications have been rejected and other migrants, who do not or no longer have their residency status – to be detained and returned with less procedural guarantees, including, via the newly proposed border procedure (Article 22). Therefore, 'significant effects' are likely to be felt by relevant national law enforcement and asylum agencies, judicial bodies. Local societies, for example, where detention facilities are going to be created or expanded may be affected, as well as countries of origin or 'safe third countries' where irregular migrants or asylum seekers whose applications have been rejected, will be expelled.

While it is entirely unclear how a more coercive approach will translate into increased 'effectiveness and efficiency' of return procedures, there seems to be following a trend in the interlinked areas of border controls and asylum. The Commission has not conducted impact assessments to accompany the proposal to recast the European Border and Coast Guard regulation, nor Asylum Procedures Regulation in 2016 and 2018.

Also, no evaluation reports, legally required under the Return Directive as required by Article 19, the last implementation report being conducted in 2014. Similarly, no evaluation reports have been submitted concerning several EU asylum directives. On the latter, the Commission explained that it "would have been confusing and distracting to the ongoing negotiations" to recast CEAS (European Commission 2019b). In this case, the letter drafted by Avramopoulous highlighted that explanatory memorandums to the asylum proposals should be regarded as sufficient evidence and hinted that Commission's political priorities should not be subject to a rigorous evaluation in light of contradictory and critical evidence.

As the Explanatory Memorandum itself highlights, how in the limited evidence on return rates was instrumentalised in the long-standing the blame-shifting game between Commission, Member States, and Frontex in the area of Return (Carrera 2016). It subsequently led to shifting institutional roles and disengaging other stakeholders that were not accepting such framing of the 'crisis-led' issue and side-lining the European Parliament (Meijers Committee 2018; Carrera 2019). For example, the report conducted by the LIBE committee has challenged some of the key assumptions behind the Return rates and highlighted the reasons behind the low return rates (Sargentini 2019).

3.2. How have interinstitutional roles shifted?

The Commission presented a proposal to recast Return directive, as well as to expand the Frontex mandate as its "A contribution from the European Commission to the Leaders' meeting in Salzburg on 19-20 September 2018 Council meeting in Salzburg". Therefore, the recast Return proposal needs to be read as the more political contribution to the work of the Council. As elaborated above the Commissions' proposal came without proper assessment and consultations. Besides, the Chairperson of EP LIBE Committee, Claude Moraes commented on this wording as side-lining the role of the European Parliament.

This situation has led the European Parliament to initiate a "substitute impact assessment" based on the parameters of the Commission's Better Regulation Guidelines (Eisele et al. 2019). The FRA has been asked not by the Commission, but by the European Parliament, whether the newly proposed elements in the Returns directive are in line with fundamental rights, as it is enshrined in the mandate of the agency. Subsequently, FRA (2019) has raised numerous legal concerns, regarding proportionality and necessity and in some cases, even legitimacy of amendments proposing to infringe upon the rights of persons, who are subject to return decisions. For example, the issue of including among the 'grounds of detention the - 'public policy and national security' - FRA has stressed that this is mixing criminal justice and migration management mandates. Nevertheless, latest Council negotiations have not clarified the situation, by replacing ground of 'public policy' with 'public order 'and 'public security'.

The EU decision-making process, according to the Interinstitutional Agreement, relies on Commission evidence in light of its role as 'Guardian of the Treaties'. It seems that this agreement has not anticipated a situation where the Commission itself becomes 'more political' and less interested in the diverse sources of evidence. Commission seems at least on paper to side with the 'Council' and serves primarily the interests of the EU Member States, while the European Parliament de facto takes up the role of 'Guardian of the Treaties' by providing the EU legal arguments when assessing proposals' compliance with the principles of subsidiarity, coherence, relevance, effectiveness and efficiency. Such actual institutional redesign brings back to the broader question of EU's migration and asylum policies being stuck in 'third pillar' logics and led by Member States priorities, rather by EU Treaties and 'ever closer union' principles. It also hides the blame-shifting game who is guilty of 'inefficiency of returns' and leads to intergovernmentalism through the backdoor (Carrera 2019).

3.3. Limited stakeholders' consultation: the fate of alternative views challenging the blame-shifting game

In the epicentre of the blame-shifting of responsibilities, the Commission's decision not to conduct an impact assessment further led to limiting the type of evidence that was taken into consideration when drafting the proposal to recast the Return directive. Public and open stakeholders' consultations are part of the process when conducting impact assessments. The Commission added in this memorandum that "[c]ivil society was also consulted" (European Commission 2018 a: 6), leaving it vague when and with whom such consultation took place, and even more importantly, how the results of such consultation have been taken on board.

In the section reflecting on "stakeholder consultations", besides, the European Migration Network studies, the Commission refers exclusively to political processes that happened among the Member States: European Council conclusions of October 2016; The Malta Declaration of Heads of State or Government of February 2017 and finally, the European Council conclusions of June 2018(European Commission 2018 a: 6). On this point, the think-tank Meijers Committee (2018) ex-

pressed that absence of evidence and rather political nature of the proposal "makes it difficult to verify the proposal's effectiveness, necessity and proportionality" of the proposal.

The Commission, while elaborating on the 'collection and use of expertise' has claimed to rely on rather technical evidence coming from the Schengen Evaluation and Monitoring Mechanism, the Return Expert Group of the European Migration Network (EMN REG), and Frontex. However, this expertise has been collected to revise the Return Handbook (2017c) and not the proposal to recast the directive.

On several occasions, the Commission refers to the EMN study on "effectiveness of return in the EU Member States" (EMN 2017). However, as pointed out by civil society, also this EMN study conducted in 2017 is more nuanced than the Commission's proposal. ECRE highlights that evidence provided by the EMN contradicted some of the amendments proposed such as on reducing voluntary departure periods, the minimum duration of detention, or entry bans at the exit (ECRE 2018).

Moreover, the Commission was not referring back to its implementation reports of the Return Directive in 2013 and 2014, nor evaluating the impact of recent revisions of soft law instruments, such as EU action plans on return (2015 b; 2017a), the Return Handbook (2015c and 2017 c) or the Commission's 2017 Recommendations (2017b) (Eisele 2019; ECRE 2018). In this regard, ECRE concluded that "overall evidence base for return policy is limited and sources of evidence non-transparent" (ECRE 2018a:6).

The civil society, academia as well as human rights bodies have made their concerns known after the European Commission announced its first action plan (European Commission 2015 b). Furthermore, the renewed action plan(2017a) and related Recommendations on increasing efficiency of returns (2017b) sparked a wave of discontent among civil society, not the least on how civil society was merely informed. 90 civil society organisations were concerned about the lowering of human rights safeguards in the proposals and the Commission falling short of good governance, as documents were "released without any prior consultation with civil society and local authorities, on the same day they gathered for the EU Migration Forum, the Commission's official annual forum to consult stakeholders" (PICUM 2017a). Subsequently, several civil society organisations published more detailed comments and recommendations (International Detention Coalition 2017; DRC 2017).

International and regional human rights bodies also have raised their concerns already in 2017. For example, the UN High Commissioner of Human Rights (2017) expressed concerns about the trend in employing more coercive measures in return policy? The Council of Europe, Commissioner of Human Rights (2017) also reacted to these proposals raising both efficiency and human rights concerns for detaining migrants, and in particular migrant children. The proposed use of detention of minors was also taken up by the European Ombudsman (2017a) who urged to interpret and clarify the Handbook of the Return procedures in line with the EU Fundamental Rights and in par-

ticular with the principle of the best interest of the child in the return procedures.

Academia has also made numerous contributions pointing to the fact that lowered fundamental rights safeguards are contrary to the EU legal framework, and that external factors precluding returns are outside of the Commission's or its Member States' influence (see for example Meijers Committee 2018; Carrera 2016; Acosta Arcazo 2009, Baldaccini 2009). Academics have warned that Commission and the Member States are set to fail as they raised unrealistic hopes to increase returns that are subject to cooperation of third countries, instead of addressing gaps and barriers in the area of legal migration and the Common European Asylum System (CEAS) (Carrera 2016). However, the abovementioned arguments do not seem to be reflected in the proposed Return recast directive, either.

Thus, by focusing 'on technical' expertise' and 'targeted revisions' to increase the return rate Commission seemed to narrow down who is eligible to present their evidence. While the Member States and their enforcement agencies are certainly among key stakeholders to be consulted, the concerns and evidence produced by civil society, academia, UN and regional bodies, as well as the EU's own Fundamental Rights Agency seemed to be effectively side-lined. For example, civil society has, by and large, reiterated very similar concerns to those raised in 2017 and also earlier (Amnesty International 2018; Caritas Europa et al 2018; ECRE 2018).

3.4. Fundamental Rights as a key criterion for Coherence, Effectiveness and Efficiency

In this section explores why open and transparent consultation is critical for efficiency and what does efficiency entails in the EU's legal framework. Commission's Better Regulation Guidelines prescribes to balance 'efficiency' among other criteria such as relevance, coherence, effectiveness, subsidiarity, necessity and proportionality. 'Efficiency and Effectiveness' as it is understood in the EU's Better Regulation Guidelines and Interinstitutional Agreement entails the respect, protection and promotion of fundamental rights. Thus, any measure that is unnecessary or disproportionally breaches fundamental rights cannot be regarded as 'coherent' nor 'efficient or effective'. Not only is such measure in breach of the EU's standards enshrined in the EU Treaties and the Charter for Fundamental Rights, but the people affected by such legislation could also challenge measures before national or European Courts and eventually it would need to be changed and/or dismissed.

The decision not to conduct the Impact Assessment and not even to request FRA's Opinion, also indicates that European Commission has proposed to recast the EU Return directive, without due investigation into potential fundamental rights impacts. The proposal is merely reiterating that the "proposal respects fundamental rights and observes the principles recognised by Articles 2 and 6 of the Treaty of the European Union and reflected in the Charter of the Fundamental Rights of the EU" (European Commission 2018 a: 6).

However, detailed explanation of the specific provisions of the proposal, contains a disclaimer downplaying the potential impact of proposed amendments, that "targeted changes do not amend the safeguards and rights of third-country nationals and respects their fundamental rights, in particular, the principle of non-refoulment" (European Commission 2018 a: 6). Such claims were quickly challenged by academics (Peers 2018; Muir and Molinari 2018) who argue that the proposed provisions contain various operational clauses that are increasingly coercive and removing fundamental rights safeguards. It also led FRA (2019) to stress the importance "to ensure that operational provisions of the Return Directive also continue to reflect these fundamental rights and principles and ensure their practical application by national authorities" (FRA 2019:19). The European Parliament (Eisele 2019), while assessing only selected Articles also stressed the cumulative effects of such amendments being likely to lead to more coercion and less voluntary returns. The further elaboration on mapping underlying assumptions also indicates, how 'fundamental rights' have been reframed as obstacles (see assumption 3 in chapter 4).

4. MAPPING THE DEBATE AT THE EU LEVEL AND THE ROLE OF UNDERLYING ASSUMPTIONS

A mapping exercise of the EU debate shows that several underlying assumptions are guiding the design of the current EU return policies, including the proposal to recast the Return directive. Therefore, this section critically assesses the underlying assumptions that were surfacing since the 2015 European Agenda on Migration and subsequent reforms of the EU's return policy and examines whether they are substantiated and diverse evidence-proof.

Assumption 1: Irregular migrants are aware of shortcomings in the EU return policy

The European Migration Agenda has proposed the increased enforcement of returns as a key disincentive to irregular migration and migrant smuggling, in light of the European humanitarian refugee crisis. It has made a very vague assumption that (European Commission 2015 a, emphasis added):

"One of the incentives for irregular migrants is *the knowledge* that the EU's return system – meant to return irregular migrants or those whose asylum applications are refused – works imperfectly."

While this assumption of a connection between knowledge of returns and irregular migration and migrant smuggling may sound convincing from the perspective of policy-makers, and maybe appealing to some of their electorates, from the research point of view there is no sound evidence to support it (Acosta Arcazo 2009; Baldaccini 2009; Carrera and Merlino 2009; Carrera 2016; Carrera 2019; Carrera et al. 2019). This is also supported by the empirical findings of the motivations to migrate, for example, Afrobarometer is indicating that not detailed knowledge on return policies but aspirations to find work, education and a better life are driving the migration to Europe as well as to other higher-income countries in Africa and elsewhere (Appiah-Nyamekye Sanny et al. 2019). Similarly, academic advisors to the Europol concluded that irregular migration is a result of geopolitical and socio-economic factors and that increased anti-smuggling measures might not be the best or the only response to the phenomenon (Taylor et al. 2017). Similarly, return operations might not be the best response in light of patchy and narrow legal migration channels. For example, among all persons issued EU Blue Cards in 2016, there were only 2.2% of persons having the nationality of sub-Saharan African countries (Carrera et al. 2019 b).

Civil society has argued that shaping a return policy with the aim of preventing irregular migration is not useful, as there is no actual link indicating that potential irregular migrants have such 'knowledge' in the first place, and secondly, it is the significant consideration when they are making decision to migrate into the EU and/ or are forced to do so (PICUM 2015; Caritas et al. 2018; DRC 2018).

Assumption 2: The gap between issued return decisions and actual returns means 'inefficiency'

Despite increased EU funding and operational measures taken in the area of returns, the results are modest, and not showcasing attempted 'success', in terms of numbers. Indeed, statistics showing that the gap between persons issued expulsion orders and actual returns has broadened is the main publicly declared justification to reduce rights and procedural guarantees of returnees. There is little critical analysis of why this gap occurred and what has it meant.

The continuous "unsatisfactory" speed of return procedures and the decreased return rate was also later repeated as one the key factors that led to these measures as well as to recast the directive (European Commission 2018 b):

"The rate of effective returns throughout the EU decreased from 45.8% in 2016 to merely 36.6% in 2017 and national practices continue to vary and do not sufficiently use the flexibility provided by the rules."

As it also could mean that persons who wanted to return or could be returned, already have done so. It also could mean that returns to certain countries of origin could not take place due to the worsening situation in the countries of origin or to third countries where it is not safe to return to. However, the Commission also does not clarify in any of its documents what kind of return rate should be seen as 'satisfactory'. At least in political speeches implying that "everyone" who do not or no longer have the valid residence permit, need to be returned. Such claim assumes that all asylum seekers whose applications have been rejected had the fair and quality procedure as well as effective remedy to appeal their rejections and/or return decisions.

The evidence coming from academia, civil society, international organisations, and human rights bodies has suggested that the number of issued return decisions is likely too high, as not all of them complied with the procedural safeguards. Civil society explains that perhaps persons who are not in position to return are still issued expulsion orders, and thus the gap in statistics was already a result of unfairness in the asylum procedure/ or speed of returns decisions, and not due the inefficiency of return procedures (PICUM 2017; Amnesty International 2018; ECRE 2018; Caritas et. al. 2018; DRC 2019). For example, faith-based organisations representing churches across Europe have raised very serious concerns regarding the fact "that the safeguards and guarantees embedded in the asylum procedures and the Geneva Convention are being eroded to increase the number of returns." (Caritas Europa et al. 2018)

However, the Commission (2019a) continues to argue that various legal, operational and financial measures need to be taken, including the recast of the EU Return Directive as:

"Addressing the low rate of return from the EU must remain a key objective. It is an indispensable link in the chain of migration management. Low return rates undermine the credibility of the system for the public and increase incentives for ir-

regular migration and secondary movements."

Thus, the question raised by academia is whether the speed with which return decisions are issued is in line with fundamental rights standards and that better monitoring is needed how such decisions are made (see, for example, Meijers Committee 2018; Eisele 2019). Civil society and Fundamental Rights agency suggests instead to explore safeguards so that return decisions would not be issued prematurely (FRA 2019; PICUM 2017; Amnesty International 2018; ECRE 2018; Caritas et. al. 2018). Civil society also called to oblige the Member States to withdraw return decisions when there is no prospect of durable solutions when persons return or are forcibly returned (Caritas et al. 2018). The durable solutions also need to be explored for non-removable in the countries of destination (see section 5).

Assumption 3: Fundamental rights as obstacles to 'effective returns'

The rights of asylum seekers other migrants, procedural guarantees and safeguards in the area of return as well as the sovereignty of third countries are labelled as obstacles for increasing the efficiency of the return decisions. For example, EPP think tank has claimed that (Novotny, 2019):

"This low rate [of returns] has been due to uncooperative countries of origin, the unduly lenient interpretations of migrants' rights, the costs involved, difficulties with establishing identity and the police effort required."

Quite interestingly 'lenient interpretation of migrant rights' and related costs on the side of national authorities and police efforts are predisposed as opposites. While, as civil society organisations continue to argue - regularisation, which one of the most lenient interpretations of migrants' rights could be the least police effort-intensive and cheapest. Moreover, regularisation could have a positive impact on overall return rates in the Member States, if for example people with no foreseeable possibility to be returned were granted temporary status and the return order withdrawn.

However, as it will be elaborated below, the very presumption that the CEAS is functioning properly, and that decisions refusing international protection are taken in compliance with EU law in respect of Fundamental Rights proves to be wrong in numerous cases.

Civil society and academia continue to argue that inadequate reception conditions, deficient asylum procedures and absence of safe and legal pathways for refugees and asylum seekers are among the reasons why so many people have no choice but to come and live irregularly, and therefore be subject to return policies.

Assumption 4: Asylum procedures within the EU are not deficient

The increased returns were 'packaged' as a way to ensure the rights of 'genuine' asylum seekers and refugees and to strengthen the states' sovereign competence to control borders and "to restore the trust in Schengen" (European Commission 2019).

For example, in 2017 Avramopulous has stressed that (European Commission 2017 f):

"Ensuring that irregular migrants are returned swiftly will not only take pressure off the asylum systems in Member States and ensure appropriate capacity to protect those who are genuinely in need of protection"

The Commission (2019), when proposing to recast the Return directive, again stressed that in line with 2017 proposals "Member States should take to improve their internal return procedures to ensure humane and swift return of those not in need of international protection". The balance between 'humane' and 'swift' from the perspective of various civil society organisations (ECRE 2015; PICUM 2017; DRC 2018; Caritas Europa et. al. 2018) has not been upheld and is leading towards less humane and swifter returns.

The UN High Commissioner for Human Rights' mission to the border zones of the EU has witnessed and criticised such increasingly restrictive trends:

"[EU and neighbouring] States appeared to prioritize an emergency and security-focused approach in their migration responses, reflected in restrictive laws and policies, such as the criminalization of irregular entry and/or stay, the increased use of detention practices or swift return procedures, all of which had far-reaching impacts on migrants' safety, health and ultimately, their dignity" (UN High Commissioner for Human Rights Office, 2017).

As mentioned above, many international and regional human rights bodies, academics and civil society organisations have already in 2017 criticised the Commission for developing policies that are likely to increase suffering, but without increasing 'efficiency' of returns. For example, the International Detention Coalition argues (2017):

Under pressure from the Member States to achieve quick results, the Commission has opted for short term policy measures which are not supported by evidence and are likely to be counterproductive and self-defeating.

Similarly, when assessing the Commissions' proposal to amend the Returns directive, the EU's Fundamental Rights Agency (FRA 2019b) has argued that fundamental rights are not obstacles, but "respect for fundamental rights is in the interest of the national authorities" and that "fundamental rights violations can lead to challenges that can undermine the effectiveness and credibility of the EU's return policy". All EU institutions, and not only the FRA, are in charge of ensuring that Fundamental Rights standards and EU legislative and other initiatives are not contravening or unnecessary and disproportionally infringing such rights (FRA 2019b).

The latest proposal to amend the EBCG regulation contained a clause allowing

the Frontex to conduct return operations from third countries to other third countries. Eventually, this clause has been stricken-out by the European Parliament. The European Parliament raised concerns that the EU would become responsible for what happens with people returned from these third countries. For example, if Frontex would return people from countries where the asylum procedure is deficient, Frontex may end up facilitating refoulment and could be held responsible for this.

5. TOWARDS INCREASING MIGRANTS' AGENCY: AN OVERVIEW OF UNEXPLORED POLICY ALTERNATIVES

The New York Declaration (UN General Assembly 2016) and subsequent Global Compacts' suggest better taking into account the agency of asylum seekers whose applications have been rejected and other irregular migrants and proposes options that are based on incentives rather than coercion. Thus both the Global Compact for Migration (GCM) as well as the Global Compact on Refugees (GCR) put forward some of the policy options that are underexplored in the currently proposed amendments to the EU Return directive.

The European Commission's proposal to amend the Return directive has been criticised by civil society as undermining commitments under the GCR and GCM as well as bypassing pending legislation at the EP (ReSOMA Transnational Feedback Meeting 2019). Therefore, in their written submissions civil society, academia as well as EU agencies have particularly criticised proposed Article 22 creating a new border procedure, which is referencing the pending legislation on asylum and also the foreseen commitments in the Global Compacts (ECRE 2018; Meijers Committee 2018; Eisele 2019; FRA 2019). Although the European Parliament's rapporteur has called to drop Article 22 Border procedure, Council has eventually changed some of the timeframe limits for the appeals ('at least of 48 hours' as opposed 'up to 48 hours'), but has not abandoned the idea to create a border procedure with significantly lowered procedural guarantees to expel third-country nationals whose asylum application has been rejected in a border procedure (Council of the EU 2019a and 2019b).

However, the evidence submitted by scholars, civil society and practitioners discussed below has shown that alternative approaches could lead to more sustainable and durable solutions for persons concerned, EU Member States and possibly also the countries of transit and origin.

In the area of returns, FRA (2019) highlighted that EU should recommit, operationalise and strengthen "the underlying principles governing EU return policy, including the principles of *non-refoulment*, the best interests of the child, the primacy of voluntary departure over forced returns, the right to family life, and the use of detention as a measure of last resort." FRA has criticised that the Commission's proposal while listing abovementioned principles in the recitals of the recast directive – aims to operationalise measures that by and large go into the opposite direction.

The Commissions' last available implementation report in 2014 has also stressed on the importance of these principles while applying the Return directive in practice (European Commission 2014, emphasis added):

"The implementation report, forming part of this Communication, shows that a number of shortcomings remain in several Member States, such as **aspects of detention conditions** in some Member States and an **absence of independent forced**

return monitoring systems. In addition, there is scope for improvement in many Member States, with **a more systematic use of alternatives to detention** and the **promotion of voluntary departure**."

The Commission proposal recasting the Return Directive shifted from principle of primacy of voluntary departure to increased use of forced returns, from the principle of detention as a measure of last resort to use of detention as default measure and replaced incentives to cooperate with the obligation to cooperate. The Return management system is also primarily aimed at monitoring return rates – whether member states are using the 'flexibilities provided by the EU law' to increase the efficiency of return to the detriment of fundamental rights compliance in forced returns. This shows that return rates were assigned overall higher priority than procedural and fundamental rights safeguards to prevent a breach of non-refoulment.

The various policy alternatives presented by academia, civil society and various international institutions have not been yet considered. This section of the policy options brief shifts attention to some of the alternatives of preferred legislative framing, that is likely to be proportional and cost-efficient, and also in line with EU fundamental values and international commitments.

5.1. Increased incentives to cooperate by increasing procedural safeguards and guarantees

This sub-section is critically assessing whether the coercive practices, such as an obligation to cooperate are examined, and subsequently, it is arguing that increasing procedural safeguards will increase incentives for individuals to cooperate and to make procedures cheaper and human rights compliant.

In the explanatory memorandum to recast the return directive, when justifying the limitation to a single level of jurisdiction to review return decisions issued to asylum seekers whose applications have been rejected, the European Commission (2018a) asserts that onward appeals for rejected asylum seekers are too time-consuming and constitute unnecessary multiple assessments of refoulment risks. Furthermore, the newly proposed obligation to cooperate (Article 7), illustrates the choice for a punitive approach instead of positive incentives to return. The EP's substitute assessment has highlighted that as non-cooperation is considered as one of the grounds of the risks of absconding (Article 6) it further leads to the increasingly arbitrary use of pre-removal detention that is likely to be very costly and will lead to overcrowding (Eisele 2019:14). Another European Parliamentary Research Service brief stresses that in absence of clear sanctions for non-compliance with the obligation to cooperate also is likely to lead to the Member States establishing their sanctioning regimes (Diaz Crego 2019:7).

The FRA (2019) has also highlighted that the proposed recast directive does not

take into account situations of stateless persons, who would also be obliged to 'cooperate in obtaining their documents' (Article 7) while the very fact of being stateless seems to constitute a risk of absconding (Article 6). Moreover, the obligation to cooperate covers aspects 'of requesting travel documents' from third countries, what already the Member States' can readily do without obliging and penalising third-country nationals.

The civil society argues that in many circumstances increased the use of coercion may lead to sacrificing the quality of return decision for the sake of speed and meeting political priorities to increase the return rates (ECRE 2018; Amnesty International 2018; Caritas et al.2018; DRC 2018; DRC 2019). For example, the International Detention Coalition (2017) has argued that:

"The punitive approach and end of process focus on forced returns is likely to decrease not increase cooperation and compliance with immigration decisions, as well as respect for human rights."s

The DRC similarly stresses that the obligation to cooperate in the return procedure further infringes upon the very principle of 'the free, informed and voluntary return' (DRC 2019). While at the moment many returns are falling into a grey area between voluntary and involuntary, such new possibility to sanction returnees may lead to simply re-labelling 'mandatory' and even 'forced returns' as voluntary. In light of these trends nine faith-based organisations have called for the clear separation between voluntary and forced return stressing that: "authorities must refrain from exercising coercion and pressure on potential beneficiaries of voluntary return programmes" (Caritas et al. 2018). Recent research also indicated that in Greek hot-spots voluntary returns were only left as an option for asylum seekers whose applications have been rejected insofar as they refrained from appealing their negative asylum decisions (Carrera et al. 2019). Nevertheless, this has not led to an increase in voluntary returns either.

Along the same lines of reasoning, the Commission proposed to amend Articles 16, on remedies and appeals, where the judicial review would be unduly limited to a single level of jurisdiction if asylum decision has been already appealed.

ECRE (2018) argues that by taking a more prescriptive approach than the CJEU case law, which found that two-level judicial appeal is no required under EU law but not prohibited either, "the Commission proposal arguably disregards the principle of procedural autonomy" and thus should be seen as infringing into the principle of subsidiarity. Moreover, Article 16. para. 3 also limited automatic suspensive effect of the appeal against return decision, meaning that persons, as a rule, would be sent out pending final decision on the legality of such measure with exception of asylum applicants where "breach of refoulment has not been already assessed" (European Commission 2018 a). The current proposal only provides for five days to submit appeals against return decisions following a final decision rejecting an asylum application, and the request for the temporary suspensive effect of the appeal needs to be decided upon within 48 hours. Such extremely short time limits are likely to decrease the quality of the appeals lodges

and the decisions taken on the appeals and the requests for suspensive effect. ECRE (2018) for example proposes to give reasonable time limits for the individuals concerned to launch appeals as it is the very essence of the right to an effective remedy.

Alternatives: Impartial and trusted pre-departure counselling

The pre-departure counselling as an alternative option is that it is less costly if it can convince TCNs to return voluntarily and be more cooperative within the return process. In light of the primacy of voluntary return, the role of counselling is crucial. For example, DRC (2019) argues that it entails having the physical space and time to engage with a counsellor, obtain separate legal advice should it be needed to explore appeal options, prepare for the return.

DRC (2019) further builds the argument on the lessons learnt by civil society in the hot-spot procedures. Namely, that persons not only need timely legal assistance and information about their rights but also psychosocial assistance and quality interpretation, in all stages of the procedure. DRC stresses that the very beginning of the process is the most important stage: when persons know their rights and have the possibility to explore their options, with someone they trust, they are more likely to choose the options that are less coercive to themselves and less costly to the countries of return, appeal against negative asylum decision, return decision or voluntary return.

Similarly, nine faith-based organisations were calling for "investing in appropriate counselling and support" on Assisted Voluntary Return and Reintegration (AVRR) and other options, need to start as soon as return decisions are issued (Caritas et al. 2018:4). Moreover, they stressed that the very nature of pre-departure counselling should promote increase 'voluntariness' and build trust:

"pre-departure counselling [on AVRR] should be carried out by impartial and trusted professional social services staff, without prejudice of the outcome, using a humane and individualised approach, taking into account the fact that return is a difficult decision, often entailing shame and depression." (Caritas et al. 2018:5).

Early-engagement and counselling are also the necessary elements of effectiveness and voluntariness. They were also recommended by the Council of Europe study (2017:96):

"[I]ndividuals should have a clear understanding of the asylum or migration process at the beginning stages of the procedure, but also the reasons of why a particular alternative to detention scheme has been chosen, the reasons why any restrictions or negative consequences for non-compliance have been deemed necessary, or any other relevant information as circumstances change throughout the process. Such knowledge was found to be a key factor in strengthening the efficiency of alternative to detention systems and to better prepare individuals for voluntary return should their asylum or migration claim fail, leading to improved voluntary return rates."

Similar conclusions were reached in the EPIM's interim evaluation report of three pilot projects within the European ATD Network (Ohtani 2018:15):

"Quality case management can increase individuals' ability to work towards case resolution. Even with various levels of vulnerability and wide diversity of people's circumstances, qualitative evaluation suggests that holistic and individualised case management can have a positive impact on individuals' ability to engage with immigration procedures, including cases of great complexity and with previous experience of detention, when certain conditions are met."

The report has also highlighted that only in half of the analysed cases (4 out of 8) "these decisions were made in a fully informed and truly voluntary manner, with the migrants having a clear idea and plan for their lives ahead" (Ohtani 2018:22).

Pre-departure counselling should include, not only legal information but also the medical and psycho-social support. It is also necessary to assess the individuals' fitness to fly as well as possible causes of vulnerability, including physical and mental health issues, which could affect the legitimacy of the return decision, or require specific safeguards to be implemented during the return process, for example assistance and ensuring that health condition will not worsen in the country of return.

Alternatives: Granting sufficient time for reflection and appeals

The reasonable time limits to appeal is an issue of procedural fairness and efficiency and quality of the appeal. Meaning, that more time the person is given to appeal the better quality of the appeal submission and more complete evidence brought before the Court to take the decision. It would make return procedure more efficient in the end and member states would not risk violating their international obligations.

During the reflection appeals period, medical and psycho-social support is also needed. For example, during this period organisation may also learn that persons are victims of crime, such as victims of trafficking that may lead to opening criminal investigations, or that they are minors (ECRE 2018). Therefore, sufficient time is needed to reflect on a voluntary return or other available options, such as starting appeals against the return decision and also for bringing new important information about the applicants.

5.2. Increased voluntary returns and reintegration support

The Commission in its proposal to recast the return directive has amended Article 9 on voluntary return to make its application more stringent among the EU Member States. According to the proposed Article 9 para. 4, Member States are precluded to grant a period for voluntary departure, to individuals presenting a risk of absconding, when their application for legal stay was dismissed as 'manifestly unfounded' or where the person poses a "risk to public policy, public security or national security".

The FRA (2019) has evaluated such proposal as challenging the primacy of voluntary departure versus forced returns. Civil society organisations in all their submissions have stressed the importance to highlight the primacy of voluntary departure and in particular of assisted voluntary returns (PICUM 2015; ECRE 2018; Amnesty

International 2018; Caritas et al.2018; DRC 2018.)

For example, Amnesty International (2018) has recommended:

"EU law should increase opportunities for people subject to return procedures to depart voluntarily, thereby avoiding the risk of arbitrary and costly detention, instead of limiting them. Facilitating voluntary departures would provide for a more dignified and sustainable, and altogether less costly, return policy."

As discussed above, also the process leading to the voluntary departure should not be coercive, namely criticising Article 7 introducing obligation towards third-country nationals to cooperate with the authorities. Similarly, many civil society organisations have criticised the entry bans at the exit, as this is precisely persons self-organised 'voluntary' return (see the section below).

Alternatives: Keeping 'voluntary' character of the Assisted Voluntary Return and Reintegration

Civil society further has provided evidence that persons in return procedures are more likely to cooperate when they are well informed, given the time to reflect and know their options. Thus civil society organisation advocate for the EU and the Member States' to shift their attention from increasing the return rates at any costs, to duly considering the well-being and possibilities for the reintegration of returnees (DRC, 2019; Caritas et al. 2018; ECRE 2018). They suggest building on the agency on the irregular migrants and asylum seekers whose applications have been rejected to find durable solutions for them. For example, nine faith-based organisations underlined that:

"[I]t is fundamental to keep the voluntary nature of the 'voluntary' return programmes and render the reintegration process efficient. Assisted Voluntary Return and Reintegration (AVRR) programmes should put the well-being of migrants at the centre to empower the person to start a new phase of life in the country of the return." (Caritas et al. 2018:4)

For this, the independence of civil society organisations' mandate needs to be protected as they are seen as a trusted interlocutor to potential returnees. Civil society or services expected to provide counselling, therefore, should not be used for migration management functions. Civil society organisations also warn against such function to be undertaken by Frontex or other law enforcement agencies as they have a different mandate and are politically accountable for return rates (Caritas et al. 2018:4). Civil society organisations also urged to leave the separate European voluntary returns fund that could fund such civil society operations. Also, some Member States claim that voluntary return assistance as 'a pull factor', although civil society evidence is rebutting such allegations, the Commission also has moved to harmonise voluntary return assistance (Statewatch 2016).

5.3. Reducing the use of entry bans and in particular on the occasion of border controls at exit

Critical evidence against the entry bans on the exit

The European Commission proposed a key novelty – possibility for the Member States to impose the entry bans upon exiting irregularly staying third-country nationals when no prior return decision has been issued (Article 13, para. 2 European Commission 2018 a). Civil society organisations (Amnesty International 2018; ECRE 2018;), academia (Carrera 2019; Peers 2018; Meijers Committee 2018), the European Parliament's rapporteur (Sargentini 2019) and the EP Research Service (Eisele 2019; Diaz Crego 2019) as well as FRA (2019) have argued against this measure, as it is likely to rather prevent people from leaving the EU voluntarily and it looks also at odds with Commission's goal to increase the 'efficiency' of returns. Research conducted by academics (Fernandes and Galea 2019) and national authorities also indicate additional administrative burden (Leerkes et al. 2014, EMN Slovene 2014). Finally, additional may clause as well as contradicts the direction indicated by the European Commission (2014) that was aiming at harmonisation of entry bans rather than their expansion.

The logic of such an entry ban on the surface seems to be to prevent re-entry. However, ECRE (2018:13) has aptly elaborated that such measure is contrary to the overall logic of the use of the entry ban in the Return directive "which is to sanction a person's non-compliance with an obligation to return" as it is laid out in the first paragraph of Article 13. ECRE (2018:13) was concerned that such provision would be used as "a tool to retroactively penalise irregular residence". Moreover, it was added that "individual assessment" in such cases where no prior decision was made by relevant authorities is likely to be "challenging and may result in standard decisions with potentially grave circumstances for the individuals concerned" (ECRE 2018:13). Similarly, FRA (2018: 10) warned against the implied swift decision as being in contradiction with the procedural safeguards foreseen in the Returns Directive itself, and "the right to good administration, including the right to be heard, which is a general principle of EU law". Amnesty International also commented that "it is difficult to see when it [entry ban on the exit] would be justified or proportional" (Amnesty International 2018). EPRS research also highlighted that such procedure on the exit is likely to delay the voluntary departure of third-country nationals (Eisele 2019: 11).

Economic analysis has shown only partial direct costs for the Member States for associated with entering such new type of entry ban into the system and related EU coordination and monitoring costs (Fernandes and Galea 2019: 139). However, judging from the EMN Slovenia (2014) report analysing the procedure to issue entry bans, it seems that "direct costs" should also take into account that 'individual assessments' would also require to consider certain factors, such as the length of the entry ban, when the responsible authority "has to take into account the nature and gravity of the circumstances that led to the residence". Also, the Meijers Committee (2018) referred to

the evidence in research requested by the Dutch government (Leerkes et al. 2014), that in general, an "obligation always to issue entry bans leads to complaints about unnecessary administrative burdening". Moreover, such costs would increase if persons concerned will ask for the withdrawal of entry bans or would challenge their grounds or proportionality of the length in light of procedural safeguards foreseen in the directive (FRA 2018: 11).

Broader analysis of societal and economic impacts has shown that because imposing entry bans at the exit might actually discourage irregular migrants from organising their departure, "as a result, the costs associated with the shadow economy, organised crime and human trafficking identified in status quo assessment would be unlikely to abate" (Fernandes and Galea 2019: 145). However, it seems that by limiting the "right to leave the country of irregular residence" such measures could lead to exacerbate vulnerability and increase the likelihood of abuse (Vosyliute and Joki 2018; UNODC 2013). Also, authorities would not have much time needed to ascertain that irregular migrants exiting, are not victims of trafficking, exploitation, as it would result in their double penalisation which would be in contradiction with the Return directive itself as well as with Victims' Rights directive.

Finally, imposing entry bans at border controls at exiting EU territory, and in general the use of entry bans could actually lead towards increased demand for forged documents, or facilitating their exit or entry with help of migrant smugglers as criminal networks are described as being fluid and responsive towards new type of circumstances and business opportunities, including created by the EU's legislation (Taylor et al. 2017). For example, migrant smuggling market is likely responding to the increased usage of entry bans with a better quality of forged documents, to bypass border controls without showing the real documents.

Potential impacts of entry ban as an increased measure

Article 13 should be seen in the light of overall recast, and in particular in conjunction of Articles 9 and 6 which reduced the minimum duration for voluntary departure as well as prohibitions to grant voluntary departure. Peers (2018) has warned that "narrowing down the cases where the voluntary departure is possible to have a knock-on effect that more entry bans are issued." And the insufficient time for voluntary departure seems to be among concerns for almost half of the EU Member States (EMN 2017: 72). For instance, the Slovak Republic highlighted that due to short voluntary departure periods, "the delayed voluntary departure of third-country nationals creates an overlap with the entry ban authorisation system, as an alert is automatically created in the SIS (Schengen Information System) immediately after the return decision is issued." (EMN 2017: 72).

Subsequently, new Article 6 para: 1(p) 'non-compliance with entry' bans is qualified as one of the deciding factors to determine the risk of absconding (Article 6, para 2) and further increases the prospects of detention (Article 18, para:1 (a)). Therefore, the direct and indirect costs, societal and economic impacts, as well as impacts on criminality may be far-

reaching, and without "any clear impact or effect on efficiency on returns" (Eisele 2019).

ECRE (2018:13) highlighted "far-reaching negative consequences for persons seeking asylum". Namely, that such EU wide measure "does not take into account possible changes in the countries of origin that might entail a risk of prosecution and force individuals to leave again after they have been returned." And such risks are far from theoretical as nine faith-based organisations[3] representing "Churches through Europe" are witnessing an increasing push towards "increase returns of asylum seekers whose applications have been rejected and irregular migrants to conflict and fragile countries, such as Afghanistan, Iraq or Sudan" (Caritas Europa et al. 2018: 8). Similar concerns have been raised by DRC (2018). Furthermore, ECRE (2018:13) has highlighted that the right to asylum in the EU is not effective across the EU and thus "asylum seekers are likely to be unfairly denied protection in some Member States".

Similarly, PICUM (2017:7) argues that "lengthy re-entry bans on migrants who have been subject to removals […] contributes to a logic of criminalisation of migration." PICUM (2017) was in particular concerned about the rights of the lawful return and the proportionality of this measure as it may violate the right to family life and other rights.

[3] Caritas Europa, CCME – Churches' Commission for Migrants in Europe, COMECE – Commission of the Bishops' Conferences of the European Union, Don Bosco International, Eurodiaconia, JRS-Europe – Jesuit Refugee Service Europe, ICMC – International Catholic Migration Commission, Protestant Church in Germany (EKD), QCEA – Quaker Council for European Affairs.

The FRA (2018) has also cautioned against the use of speedy and automatic entry bans, in particular without return decision. As "a speedy issuing of entry bans at the border is also likely to reduce the practical opportunity to object to possible mistakes based on incorrect data contained in national or EU databases which may be used as a basis to justify the issuance of an entry ban. (FRA 2018: 37).

Alternatives

As an alternative approach was proposed in the study conducted by the Meijers Committee (2018). This study relied on the evidence collected in the empiric research requested by the Dutch government (Leerkes et al. 2014), it argued that "the mere threat of a possible *future* entry ban may be more effective in stimulating third-country nationals to leave on their account, than an *automatically* issued entry ban." In this report, it was also argued that any 'automatic' measures may lead to burdening the administrative offices and therefore making it difficult to apply individual assessment on necessity and proportionality.

For the similar reasons FRA (2018) that suggested limiting the use of entry bans only based on the final return decision, in the circumstances when it is necessary and proportional to the situation of the individual. ECRE (2018) was even more cautious and recommended to leave the possibility for member states to use entry bans, but not to impose it automatically as sanction for non-compliance with a voluntary departure period as it might violate the right to seek asylum and other rights given that situation in some countries of origin are not stable.

Amnesty International (2018) more generally suggested to shift the focus from entry bans and to alternatives that are promoting the primacy of voluntary returns. As it was noted that such alternatives do contribute to human rights protection and prevent individuals from falling into the hands of organised criminal groups who easily adapt to the changing situation (Taylor et al. 2017).

5.4. Automatic obligation to regularise the status of non-removable persons

Critical evidence to de-link Nexus between returns and asylum procedure

While the Commission in its proposed Article 8 makes it obligatory for the Member States to issue the return decisions in connection with the termination of the legal stay, it also proposes to issue the return decision "immediately after the adoption of a decision ending a legal stay" including decisions not to grant refugee or subsidiary protection status (Article 8, para: 6). The recast proposal also limited applicability of paragraph on "procedural safeguards available" to this provision.

The proposed Article 8 also needs to be read in line with proposed Article 16 on remedies, that attempted to limit remedies to a single level of jurisdiction and giving only 5 days to file the appeals against return decisions following a negative asylum decision. In this regard, ECRE (2018: 10) raises concerns that person presumed to be in the category of risk of absconding would be issued a decision ending legal stay, return decision, a removal order and an entry ban at the same time with little possibilities to challenge them.

From the explanatory memorandum, it becomes clear that the attempt is to issue return decisions, before the rejections to grant international protection become final. While such proposal can be seen as in line with Gnandi judgement (CJEU Case C-181/16), the CJEU has highlighted that suspensive effect and remedies should remain available for international protection applicants (ECRE 2018:10). ECRE (2018:10) has argued that "there may be little efficiency gains [for national administrations]".

Similarly, Moraru (2019) notices a shift in a 'post-refugee crisis CJEU case law' as the Court in Gnandi judgement has reversed the previous pre-crisis principle separating asylum seekers and irregular migrants subject to returns decisions. For example, according to the CJEU ruling in Arslan case (C-534/11), return decisions have suspended and cannot be enforced before asylum appeals are finished and quite contrary Gnandi case (C-181/16) suggests that return orders can be issued immediately after the first rejection of asylum application before it becomes final. This, as ECRE (2018) notices have added to "conceptual confusion and legal uncertainty" as to who people are – asylum applicants or irregular migrants before the decision to grant asylum becomes final. This also leads to increasing divisions among national Constitutional courts, as some of them continued to follow Arslan precedent, in light of states international obligations under Humanitarian and Human rights law (Moraru 2019).

Such divisions and lack of clarity, in practical terms, is likely to lead in statistical double counting as persons still in the asy-

lum procedure, would be counted as persons with return decisions and thus are negatively affecting the impression of the 'efficiency of return rates'.

For example, FRA (2019:9) insisted on issuing return decisions once decision to end the legal stay is final and also to introduce "clear safeguards to protect the right to asylum, the principle of non-refoulment as well as "the right to an effective remedy" and also "the respect to private and family life". The FRA (2019) assessment also notices that under the proposed Article 14 establishing return management procedures, authorities risk starting exchanging personal data on asylum applicants too early, before such decisions become final and thus to compromise the safety of asylum applicants.

Faith-based organisations called for the very clear separations between international protection and return policies, as this led to "the categorisation of asylum seekers in function of their likelihood to remain in the hosting country", longer periods of detention or isolation, wider use of safe country concepts and accelerated procedures" (Caritas et al. 2018: 5).

DRC (2019) provides evidence from the hot spots in Greece and Italy that such proposals should be seen in the context of already deficient asylum procedures: namely fast-track and nationality-based approaches, insufficient vulnerability assessments, lack of legal aid, counselling, lack of procedural safeguards, short deadlines and limited effectiveness of appeals. DRC (2019:12) raises a particular situation in Italy, where persons are being returned directly from hot-spots without the possibility for an individual assessment by a judicial authority of an individual's status as it was proposed with Salvini Decree introducing Border Procedures.

The EESC (2019) proposed that "Article 8 should be expanded to include the possibility of third-country nationals being given a reasonable opportunity to comply with the obligation to leave the country on their own or to seek alternative ways to regularise their situation." And this is the situation for people who do not have prospects to be returned due to the principles of non-refoulment and also stateless persons, or where the links with the country of origin are weak or inexistent (ECRE 2018; Caritas et al. 2018; DRC 2018).

Similarly, PICUM (2017) argued that "unremovable migrants should not be detained and should be granted leave to remain". In light of proposed possibilities to increase detention, for example, pending documents from the third country, many non-removable persons would likely end up spending years in detention centres. Also, CJEU in El Dridi judgment (C-61/11, PPU) has precluded the imposition of a prison term on an illegally staying third-country national who does not comply with an order to leave the national territory.

Besides detention as a punitive measure for irregular migration, it seems that expulsions were also used as a punitive measure for non-nationals committing petty crimes. For example, during the UK's Windrush scandal many persons deported for petty crimes after more than 30 years of living in the country. The proportionality, in this case, is questionable, as of such expulsion measures can be more

severe to an individual than serving the foreseen sentence in the UK's prisons (Freeman-Powell 2019).

Alternatives

The civil society and academia have highlighted the lack of balance in Article 8 – while the Member States are obliged to issue the return decisions automatically, the decisions to grant to stay remain are not. Article 8 of the Return Directive contains an optional clause for the Member States to grant a right to stay for "compassionate, humanitarian and other reasons". This possibility provided in the Return directive deserves a closer look, as it is also in line with the Global Compact on Migration – Objective 5 foreseeing to enhance availability and flexibility of legal pathways. Namely, "to develop or build on existing national practices for admission and stay of appropriate duration based on compassionate, humanitarian or other consideration for migrants […] return to their country of origin is not possible." (GCM, Article 21 (g)).

EESC (2019:1.14) has also called for mentioning some promising practices that aim "to prevent illegally-staying foreign nationals from falling into a chronically irregular situation. Such best practices include granting residence permits on exceptional grounds of strong social, work or family ties (arraigo) in Spain or the Duldung provision in Germany." However, academia has criticised the Duldung provision for being subject for constant renewal each 3 to 6 months and raising issues of precarity, limiting mobility rights, and also limiting the rights of children as they also carry Duldung status (Van Baar 2017).

PICUM (2017:29) has proposed to better explore "durable solutions for migrants who cannot be returned" and that "unreturnable migrants should be granted access to a regular residence status and access to social services, including housing, healthcare and education." Among such solutions, the cheapest and the most human rights compliant would be the regularisation process. While there are controversies that regularisation of undocumented migrants who have been living in a country for a prolonged period of times, may create 'a pull factor', there is no sound evidence supporting this hypothesis. On the other hand, there is sound evidence proving that the inclusion of undocumented migrant would benefit society. Previous ReSOMA Discussion Brief on undocumented indicated the negative individual, societal and economic impacts are present and well-evidenced by civil society, trade unions and employers, and academia (Vosyliute and Joki 2018).

5.5. Other alternatives

Various actors have advocated for the increased use of alternatives to detention, including in the return procedures. For example, the International Coalition on Detention (2017) has rebutted the proposals that detention can increase the return rate. The civil society has developed and mapped various alternatives to detention used in the several EU Member States (ECRE 2018; IDC 2017; Council of Europe 2017). Detention was regarded as a measure of last resort in the Commission's implementation assessment in 2014. This is not discussed in this brief since it is subject of a separate ReSOMA brief

on Alternatives to Detention.

Also, broader reforms are needed. The European Parliament has been consistently calling for a holistic approach on migration since 2014 and in particular after the emergence of the crisis in the Central Mediterranean (European Parliament, 2016). PICUM (2017) also highlighted that: "Current emphasis on border control in Europe significantly overshadows the need to address other causes of irregularity, such as inadequate visa and residence policies, administrative failures and difficulties in understanding the complex procedures of residence work permits. This was further evidenced in the academic research highlighting the very gaps and barriers in the area of legal migration (Carrera et al. 2018).

References

Acosta, D. (2009), "The Good, the Bad and the Ugly in EU Migration Law: Is the European Parliament Becoming Bad and Ugly? (The Adoption of Directive 2008/115: The Returns Directive)", European Journal of Migration and Law, Vol. 11 (1), pp. 19-39.

Appiah-Nyamekye Sanny, J., C. Logan and E. Gyimah-Boadi (2019) A la recherche d'opportunités: En Afrique, les jeunes et les instruits sont plus susceptibles de penser à émigrer, Dépêches no. 288, Afrobaromètre: Accra, Ghana, 26 March. http://afrobarometer.org/fr/publications/ad288-la-recherche-dopportunites-en-afrique-les-jeunes-et-les-instruits-sont-plus.

Baldaccini, A. (2009). "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), pp. 1-17. https://doi.org/10.1163/157181609X410566.

Brillantes, J., R. Winter, F. González Morales, A. Callamard, L. Vargas-Silva, M. Sahli Fadel (2017), Joint statement of UN and regional experts on migration in light of stocktaking meeting in Puerto Vallarta towards a human rights-based Global Compact for Safe, Orderly and Regular Migration, Organisation of American States, December 6, 2017 (http://www.oas.org/en/iachr/media_center/PReleases/2017/203.asp).

Caritas Europa, CCME – Churches' Commission for Migrants in Europe, COMECE – Commission of the Bishops' Conferences of the European Union, Don Bosco International, Eurodiaconia, JRS-Europe – Jesuit Refugee Service Europe, ICMC – International Catholic Migration Commission, Protestant Church in Germany (EKD), QCEA – Quaker Council for European Affairs (2018) Recommendations for humane return policies in Europe, 30 of May. (http://www.comece.eu/dl/MkOsJKJKKkMlJqx4KJK/2018-05-30_position_paper_return_FINAL.pdf)

Carrera, S. & L. Den Hertog (2016) "A European Border and Coast Guard: What's in a Name?" CEPS Paper in Liberty and Security in Europe. 8 March.

Carrera, S. (2016). *Implementation of EU Readmission Agreements: Identity Determination Dilemmas and the Blurring of Rights*. Springer Briefs in Law. Online: https://www.springer.com/gp/book/9783319425047 .

Carrera, S. (2019). *An Appraisal of the European Commission of Crisis: Has the Juncker Commission delivered a new start for EU Justice and Home Affairs?* CEPS Paperbacks, 21 January 2019. https://www.ceps.eu/publications/appraisal-european-commission-crisis.

Carrera, S., & Merlino, M. (2009). Undocumented immigrants and rights in the EU addressing the gap between social science research and policy-making in the Stockholm Programme. CEPS Liberty and Security in Europe, December 2009.

Carrera, S., Allsopp, J., & Vosyliūtė, L. (2018a). Policing the mobility society: the effects of EU anti-migrant smuggling policies on humanitarianism. *International Journal of Migration and Border Studies*, *4*(3), 236-276.

Carrera, S., Stefan, M., Chun Luk, N. and Vosyliūtė, L., (2018c). The Future of the Schengen Area: latest developments and challenges in the Schengen governance framework since 2016. Study for the EP LIBE Committee, https://www.ceps.eu/ceps-publications/future-schengen-area-latest-developments-and-challenges-schengen-governance-framework/.

Carrera, S., V. Mitsilegas, J. Allsopp, & L. Vosyliute (2019a) "Policing Humanitarianism: EU Policies Against Human Smuggling and their Impact on Civil Society", Hart Publishing, forthcoming in 2018. (https://www.bloomsburyprofessional.com/uk/policing-humanitarianism-9781509923014/).

Carrera, S., Vosyliūtė, L., Vankova, Z., Laurentsyeva, N., Fernandes, M., Dennison, J., & Guerin, J. (2019b). The Cost of Non-Europe in the Area of Legal Migration. CEPS Papers in Liberty and Security in Europe No. 2019-01, March 2019. https://www.ceps.eu/ceps-publications/cost-non-europe-area-legal-migration/.

Cortinovis, R. (2018 a). *EU Return Policy*. ReSOMA Discussion Brief. Online: http://www.resoma.eu/publications/discussion-brief-eu-return-policy.

Cortinovis, R. (2018 b). *Safe Third Country Rules*. ReSOMA Discussion Brief. Online: http://www.resoma.eu/publications/discussion-brief-role-and-limits-safe-third-country-concept-eu-asylum-policy.

Cortinovis, R. (2018c). Responsibility sharing in EU asylum policy. ReSOMA Discussion Brief. Online: http://www.resoma.eu/publications/discussion-brief-responsibility-sharing-eu-asylum-policy.

Cortinovis, R. and C. Conte (2018). *Migration-related Conditionality in EU External Funding*. ReSOMA Discussion Brief. Online: http://www.resoma.eu/

Council of Europe (2005) Twenty guidelines on forced return. (https://www.coe.int/t/dg3/migration/archives/Source/MalagaRegConf/20_Guidelines_Forced_Return_en.pdf).

Council of Europe (2011), Council of Europe Standards and Guidelines in the Field of Human Rights Protection of Irregular Migrants, Strasbourg. (http://fra.europa.eu/fraWebsite/frc2011/docs/CoE-standards-hr-protection-irreg-migrants.pdf).

Council of Europe (2017) "Human Rights and Migration: Legal and practical aspects of effective alternatives to detention in the context of migration", Analysis of the Steering Committee for Human Rights (CDDH). Adopted on 7 December 2017.

https://rm.coe.int/legal-and-practical-aspects-of-effective-alternatives-to-detention-in-/16808f699f.

Council of Europe, Commissioner for Human Rights (2017). "Europe's Duty to Avoid Detaining Migrants". 9 March, Strasbourg. https://www.coe.int/en/web/commissioner/view/-/asset_publisher/ugj3i6qSEkhZ/content/europe-s-duty-to-avoid-detaining-migrants.

Council of the European Union (2019a) 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 - Partial general approach, No. 9620/19, Brussels, 23 May, https://data.consilium.europa.eu/doc/document/ST-9620-2019-INIT/en/pdf.

Council of the European Union (2019b) Migration Policy: Council Agrees Partial Negotiating Position on Return Directive - Consilium. Press Release 7 June. (https://www.consilium.europa.eu/en/press/press-releases/2019/06/07/migration-policy-council-agrees-partial-negotiating-position-on-return-directive/.

Diaz Crego, M. (2019) Recasting the Return Directive, Briefing EU Legislation in Progress, EuropeanParliamentary Research Service (EPRS), April. http://www.europarl.europa.eu/thinktank/en/document.html?reference=EPRS_BRI(2019)637901.

DRC (2018) "DRC RETURN POLICY: Positions and guiding principles for DRC's engagement in return of refugees, IDPs and rejected asylum seekers" October, https://reliefweb.int/sites/reliefweb.int/files/resources/drc-return-policy_oct-2018.pdf.

ECRE (2018) ECRE Comments on the Commission Proposal for a Recast Return directive COM (2018) 634, November.

EESC (2018) 'Common Standards and Procedures in Member States for Returning Illegally Staying Third-Country Nationals (Recast)'. European Economic and Social Committee, SOC/608, Rapporteur: José Antonio MORENO DÍAZ, Co-rapporteur: Vladimíra DRBALOVÁ, 18 December. https://www.eesc.europa.eu/en/our-work/opinions-information-reports/opinions/common-standards-and-procedures-member-states-returning-illegally-staying-third-country-nationals-recast.

EMN (2014) The use of detention and alternatives to detention in the context of immigration policies, Synthesis Report for the EMN Focussed Study 2014, November. http://emn.ie/files/p_20141104045146 2014_emn_synthesis_detention_alternatives_to_detention_nov14.pdf.

EMN (2017) The effectiveness of return in EU Member States 2017: Synthesis Report for the EMN Focussed Study, February. http://emn.ie/files/p_20180226050024 2017_emn_synthesis_return_23.02.2018.pdf.

EMN Slovene (2014) EMN FOCUSED STUDY 2014: Good Practices in the return and reintegration of irregular migrants: Member States' entry bans policy & use of readmission agreements between Member States and third countries Slovene national contribution, June. https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/networks/european_migration_network/reports/docs/emn-studies/25a-slovenia_entry_bans_and_readmissionstudy_august2014_en.pdf.

European Commission (2014). The EU Return Policy. COM(2014) 199 final.

European Commission (2015a). A European Agenda on Migration. COM(2015) 240 final.

European Commission (2015b). An EU action plan on return. COM(2015) 453 final.

European Commission (2015c). Commission Recommendation C(2015) 6250 of 1 October 2015 establishing a common 'Return Handbook' to be used by Member States' competent authorities when carrying out return related tasks.

European Commission (2016) "Back to Schengen: Commission proposes Roadmap for restoring fully functioning Schengen system", Press release, Brussels, 4 March 2016. (http://europa.eu/rapid/press-release_IP-16-585_en.htm).

European Commission (2017a). A more effective return policy in the European Union – A renewed action plan. COM(2017) 200 final.

European Commission (2017b). Commission Recommendation of 7 March 2017 on making returns more effective when implementing the Directive 2008/115/EC of the European Parliament and of the Council. C(2017) 1600 final.

European Commission (2017c) Commission Recommendation (EU) 2017/2338 of 16 November 2017 establishing a common 'Return Handbook' to be used by Member States' competent authorities when carrying out return-related tasks, C/2017/6505, OJ L 339, 19.12.2017, p. 83–159.

European Commission (2017d) "Better Regulation Guidelines", Commission Staff Working Document, SWD (2017) 350, Brussels, 7 July.

European Commission (2017f) "European Agenda on Migration: Commission Presents New Measures for an Efficient and Credible EU Return Policy." Press Release, 2 March. http://europa.eu/rapid/press-release_IP-17-350_en.htm.

European Commission (2018a) 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) Brussels, COM(2018) 634 final/ 2018/0329 (COD) 12 September.

European Commission (2018b) "State of the Union 2018 – Commission proposes last elements needed for compromise on migration and border reform", Press release, Strasbourg, 12 September 2018. (http://europa.eu/rapid/press-release_IP-18-5712_en.htm).

European Commission (2018c) "State of the Union 2018: Stronger EU rules on return – Questions and Answers", Fact Sheet, Strasbourg, 12 September 2018. (http://europa.eu/rapid/press-release_MEMO-18-5713_en.htm).

European Commission (2018d) "State of the Union 2018: A fully equipped European Border and Coast Guard – Questions and Answers", Fact Sheet Strasbourg, 12 September 2018. (http://europa.eu/rapid/press-release_MEMO-18-5715_en.htm)

European Commission (2019a) "Progress report on the Implementation of the European Agenda on Migration", COM(2019) 126 final, Brussels, 6 March.

European Commission (2019b) Response of the Commissioner for Migration and Home Affairs, Dimitris Avramopoulous to the letter sent by the Chair of the European Parliament's Committee on Civil Liberties, Justice and Home Affairs (LIBE) on 3 December 2018, Ares(2019)358450, 22 January.

European Commission and European External Action Service (2016) Joint Commission-EEAS non-paper on enhancing cooperation on migration, mobility and readmission with Afghanistan, Brussels, 3 March 2016. http://statewatch.org/news/2016/mar/eu-council-afghanistan-6738-16.pdf.

European Ombudsman (2014). Proposals to improve the monitoring of Frontex Joint Return Operations. Case: OI/9/2014/MHZ. Online: https://www.ombudsman.europa.eu/en/cases/summary.faces/en/59743/html.bookmark

European Ombudsman (2017a) Case of the Protection of Children in Migration and in Returns SI/5/2017/MHZ, Case opened on 4 July. (https://www.ombudsman.europa.eu/en/correspondence/en/81082).

European Ombudsman (2017b) "Ombudsman: EU must continue to assess human rights impact of EU-Turkey deal", Press Release No. 1/2017, 19 January 2017 on Case 506/2016/MHZ, Decision of 18 January 2017. https://www.ombudsman.europa.eu/en/press-release/en/75136.

European Parliament (2015) Resolution of 10 September 2015 on migration and refugees in Europe (2015/2833(RSP)). http://www.europarl.europa.eu/doceo/document/TA-8-2015-0317_EN.html?redirect.

European Parliament (2016) 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)).

European Parliament (2016) Resolution of 12 April 2016 on the situation in the Mediterranean and the need for a holistic EU approach to migration (2015/2095(INI)). http://www.europarl.europa.eu/doceo/document/TA-8-2016-0102_EN.html?redirect.

European Parliament (2019a) "European Border and Coast Guard: 10 000-strong standing corps by 2027", Press Release. 17 of April, Strasbourg. (http://www.europarl.europa.eu/news/en/press-room/20190410IPR37530/european-border-and-coast-guard-10-000-strong-standing-corps-by-2027)

European Parliament, Council of the European Union and European Commission (2016) Interinstitutional Agreement on Better Law-Making, OJ L 123, 12.5.2016, p. 1–14.

European Union Agency for Fundamental Rights (FRA) (2014) Victims of crime in the EU: the extent and nature of support for victims, European Union Agency for Fundamental Rights, 2014.

Fekete, L., F. Webber and A. Edmond-Pettitt (2017), Humanitarianism: the unacceptable face of solidarity, Institute of Race Relations, London (http://s3-eu-west-2.amazonaws.com/wpmedia.outlandish.com/irr/2017/11/10092853/Humanitarianism_the_unacceptable_face_of_solidarity.pdf).

Fekete, L., F. Webber and A. Edmond-Pettitt (2019), When witnesses won't be silenced: citizens' solidarity and criminalisation, Institute of Race Relations, London.

Fotiadis, A., H. Smith and P. Kingsley (2016). 'Syrian Refugee Wins Appeal against Forced Return to Turkey'. The Guardian, 20 May, Istanbul www.theguardian.com, https://www.theguardian.com/world/2016/may/20/syrian-refugee-wins-appeal-against-forced-return-to-turkey.

FRA - European Union Agency for Fundamental Rights (2019 b) 'Respecting Rights for More Effective Return Policies'. European Union Agency for Fundamental Rights, 16 January, https://fra.europa.eu/en/news/2019/respecting-rights-more-effective-return-policies.

FRA - European Union Agency for Fundamental Rights, (2019 a) The recast Return Directive and its fundamental rights implications: Opinion of the European Union Agency for Fundamental Rights, FRA Opinion – 1/2019, Vienna, 10 January. https://fra.europa.eu/sites/default/files/fra_uploads/fra-2019-opinion-recast-return-directive-01-2019_en.pdf.

Freeman-Powell, S. (2019) "Windrush Row over Criminal Deportation Flight". 6 February 2019, BBC. https://www.bbc.com/news/uk-47123841.

Frontex (2018). Return. Online: https://frontex.europa.eu/operations/return/

Guild, E. (2010) "Criminalisation of Migration in Europe: Human Rights Implications" Council of Europe Commissioner for Human Rights, Strasbourg.

Guild, E., Carrera, S., Vosyliūtė, L., Groenendijk, K., Brouwer, E., Bigo, D., Jeandesboz, J. and Martin-Mazé, M. (2016). An Analysis of the Schengen Area in the Wake of Recent Developments. Study for the EP LIBE Committee, https://www.ceps.eu/ceps-publications/analysis-schengen-area-wake-recent-developments/.

Human Rights Watch (2018) 'World Report 2018: Rights Trends in European Union'. Human Rights Watch, 5 Jan. 2018, https://www.hrw.org/world-report/2018/country-chapters/european-union.

International Detention Coalition (2017a). 'Misguided and Harmful: New European Commission Policy on Returns'. 14 March 2017, https://idcoalition.org/news/misguided-and-harmful-new-european-commission-policy-on-returns/. Accessed 21 May 2019.

International Detention Coalition (2017b). There are alternatives. Revised edition. https://idcoalition.org/publication/there-are-alternatives-revised-edition/ .

Kingsley, P. (2016) "Greece May Have Deported Asylum Seekers by Mistake, Says UN". The Guardian, 5 April. www.theguardian.com, https://www.theguardian.com/world/2016/apr/05/greece-deport-migrants-turkey-united-nations-european-union.

Laver, N (2019) Common Assault, Actual Bodily Harm and Grievous Bodily Harm, Inbrief, https://www.inbrief.co.uk/offences/assault-gbh-abh/.

Leerkes, A., Boersema, E. and Chotkowski, M. (2014) "The fate of the entry ban: A study into the implementation practice and perceived effects of the Return Directive in the Netherlands", WODC - Scientific Research and Documentation Center of the Dutch Ministry of Justice and Security, The Hague, February. https://www.wodc.nl/onderzoeksdatabase/2414-uitvoeringspraktijk-en-werking-van-hetinreisverbod.aspx.

Legislative Observatory of the European Parliament (2019a) 2018/0330A(COD) - European Border and Coast Guard , (https://oeil.secure.europarl.europa.eu/oeil/popups/ficheprocedure.do?reference=2018/0330A(COD)&l=en).

Legislative Observatory of the European Parliament (2019b) 2018/0329(COD) - Returning illegally staying third-country nationals. Recast (https://oeil.secure.europarl.europa.eu/oeil/popups/ficheprocedure.do?reference=2018/0329(COD)&l=en).

Meijers Committee (2018) 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. https://www.eerstekamer.nl/eu/documenteu/cm1816_notitie_van_de_commissie/f=/vku0ok9buyq8.pdf.

Moraru, M. (2019) 'Lawyer's Voice - The Return Directive and Irregularity: The Gnandi Case (C-181/16) and the Recast Return Directive. Published by PICUM, 4 July 2019. https://picum.org/redrawing-the-boundaries-of-the-return-directive-and-irregularity-the-gnandi-case-c-181-16-and-the-proposed-recast-return-directive/.

Ohtani, E. (2018) Alternatives to detention from theory to practice: Evaluation of three engagement-based alternative to immigration detention pilot projects in Bulgaria, Cyprus and Poland, EPIM. https://www.epim.info/wp-content/uploads/2018/10/ATD-Evaluation-Report_FINAL.pdf.

OSCE ODIHR (2014) Guiding Principles on Human Rights in the Return of Trafficked Persons, OSCE ODIHR, Warsaw. https://www.osce.org/odihr/124268?download=true.

Peers S. (2018), Lock 'em up: the proposal to amend the EU's Returns Directive, EU Law Analysis, 12 September 2018. http://eulawanalysis.blogspot.com/2018/09/lock-em-up-proposal-to-amend-eus.html.

PICUM (2015). *PICUM Position Paper on the Return Directive*. Online: https://picum.org/Documents/Publi/2015/ReturnDirective_EN.pdf

PICUM (2017a) "*New EU Commission Plans on Returns and Detention Will Create More Harm and Suffering" PICUM*, 3 March 2017. (https://picum.org/new-eu-commission-plans-returns-detention-will-create-harm-suffering/).

PICUM (2017b) "Undocumented migrant workers: Guidelines for developing an effective complaints mechanism in cases of labour exploitation or abuse" Brussels.

PICUM (2018) 'Momentum Builds towards Ending Detention of Children' PICUM, 23 November. https://picum.org/momentum-builds-towards-ending-detention-of-children/.

PICUM (2019) "CHILD IMMIGRATION DETENTION IN THE EU",

Prison Reform Trust and Hibiscus Initiative (2017) Still No Way Out Foreign national women and trafficked women in the criminal justice system Summary report. http://www.prisonreformtrust.org.uk/Portals/0/Documents/Still%20No%20Way%20Out%20summary%20report.pdf

Rasmussen, S. E. (2016) "EU's Secret Ultimatum to Afghanistan: Accept 80,000 Deportees or Lose Aid". The Guardian, 28 September. https://www.theguardian.com/global-

development/2016/sep/28/eu-secret-ultimatum-afghanistan-accept-80000-deportees-lose-aid-brussels-summit-migration-sensitive.

Sargentini, J. (2018) 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 – C8-0407/2018 – 2018/0329(COD)) Committee on Civil Liberties, Justice and Home Affairs. (http://www.europarl.europa.eu/doceo/document/LIBE-PR-632950_EN.pdf?redirect).

Slagter, J. (2019) 'An "Informal" Turn in the European Union's Migrant Returns Policy towards Sub-Saharan Africa'. Migration Policy Institute, 3 January. https://www.migrationpolicy.org/article/eu-migrant-returns-policy-towards-sub-saharan-africa.

Statewatch (2016) "EU council: Assisted voluntary returns non-binding standards", www.statewatch.org/news/2016/may/eu-council-assisted-voluntary-returns-non-binding-standards-8829-16.pdf.

Taylor, M., X. Raufer, M. Den Boer, A. Sinn, M. Levi, L. Paoli and E. Savona (SOCTA Academic Advisory Group) (2017), Comments by Academic Advisors, Europol (https://www.europol.europa.eu/sites/default/files/documents/comment_by_academic_advisors.pdf).

UN General Assembly (2016) The New York Declaration for Refugees and Migrants, 19 September.

UN Human Rights Office (2017) "In search of dignity: Report on the human rights of migrants at Europe's borders", United Nations, Geneva.

Van Baar, H. (2017). Boundary practices of citizenship: Europe's Roma at the nexus of securitization and citizenship. In Within and beyond citizenship (pp. 155-170). Routledge.

Westerby, R. (2019) "Follow the Money – II: Assessing the use of EU Asylum, Migration and Integration Fund (AMIF) funding at the national level 2014-2018", UNHCR & ECRE. https://www.ecre.org/wp-content/uploads/2019/01/Follow-the-Money-II_AMIF_UNHCR_ECRE.pdf

ReSOMA

RESEARCH SOCIAL PLATFORM ON MIGRATION AND ASYLUM

ReSOMA - Research Social Platform on Migration and Asylum is a project funded under the Horizon 2020 Programme that aims at creating a platform for regular collaboration and exchange between Europe's well-developed networks of migration researchers, stakeholders and practitioners to foster evidence-based policymaking. Being a Coordination and Support Action (CSA), ReSOMA is meant to communicate directly with policy makers by providing ready-to-use evidence on policy, policy perceptions and policy options on migration, asylum and integration gathered among researchers, stakeholders and practitioners.

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