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# COMMUNICATION FROM THE COMMISSION TO THE COUNCIL AND THE EUROPEAN PARLIAMENT

## on EU Return Policy

## COMMUNICATION ON EU RETURN POLICY

### Part I - Introduction

The EU has been working since 1999 on developing a comprehensive approach on migration, which covers the harmonisation of admission conditions, the rights of legally staying third-country nationals[1] and the development of legal measures and practical cooperation to prevent irregular migration flows.

This Communication focuses on EU policy on the return of irregular migrants, which — together with efficient border management, effective sanctions against employers of irregularly staying third-country nationals, and the fight against smuggling and trafficking of human beings — is an important tool for facing the challenge of irregular migration, while fully ensuring respect for the fundamental rights and dignity of the individuals concerned, in line with the EU Charter of Fundamental Rights, the European Convention on Human Rights and all other relevant international human rights conventions. The return of third-country nationals without legal grounds to stay in the EU or a need to be granted protection is essential to the credibility of EU legal migration and asylum policy.

This Communication reports on the changes to EU return policy over recent years, analyses its impact, and presents some ideas for future developments. It responds to the Commission's obligation to submit a report to the European Parliament and the Council on the implementation of the Return Directive, the main piece of EU *acquis* on return[2] (see the detailed part IV of this Communication), as well as to the political commitment made by the Commission when the amended FRONTEX Regulation was adopted in 2011 to report on the monitoring of return operations coordinated by FRONTEX (see section II.4.2).

Return policy is closely interlinked with readmission and reintegration policy, and both are an integral part of the *Global Approach to Migration and Mobility (GAMM),*[3] which is the overarching framework for external asylum and migration policy. Through the GAMM, the EU is working to strengthen its political dialogue and operational cooperation with non-EU countries on migration issues, including return and readmission, in a spirit of partnership and based on shared interests. While EU readmission policy is not addressed in detail here,[4] the external dimension of return policy is a key aspect in ensuring its effectiveness and in addressing issues such as voluntary departure and reintegration of returnees in countries of origin, as well as identification and documentation of returnees.

[1] "*Third-country national*" means any person who is not an EU citizen and who is not a person enjoying the right of free movement under Union law.
[2] Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, OJ L 348/98 of 24.12.2008.
[3] Communication on the Global Approach to Migration and Mobility — COM(2011) 743.
[4] For more detail on this aspect, see the Communication on the Evaluation of EU Readmission Agreements (EURAs), COM(2011) 76 of 23.2.2011.

## Part II - EU return policy to date

### *1. Facts and figures*

The number of apprehensions of irregular migrants in the EU has fallen every year since 2008, with a cumulative decline between 2008 and 2012 of almost 30%. The figure has now gone down from about 610 000 apprehensions in 2008 to around 440 000. The precise reason for this decrease is difficult to gauge, but a number of factors such as improved controls at the external borders, the economic crisis in Europe and an improved economic situation in some significant source countries have contributed to this change. In spite of this decline, irregular migration will undoubtedly continue to present challenges to the EU, given the complexity and multi-faceted nature of this issue. Irregular migration is, by definition, likely to be subject to unpredictable quantitative (numbers of migrants), geographic (non-EU countries concerned and Member States affected) and qualitative (motivation for migration) fluctuations. With regard to the return of those without the right to stay in the EU, statistics demonstrate that there is a considerable gap between the persons issued with a return decision (approximately 484 000 persons in 2012, 491 000 in 2011 and 540 000 in 2010) and those who, as a consequence, have left the EU (approximately 178 000 in 2012, 167 000 in 2011 and 199 000 in 2010).[5] Provisional 2013 data confirms this trend, with a slight downward trend in apprehensions as compared to 2012 as well as a continued existence of a large gap between return decisions issued and effected returns.

There are multiple reasons for this gap, including in particular lack of cooperation from the non-EU country of origin or transit (e.g. problems in obtaining the necessary documentation from non-EU consular authorities) and lack of cooperation from the individual concerned (i.e. he/she conceals his/her identity or absconds).

### *2. The EU legal framework on return*

In recent years, considerable progress has been made towards putting in place a consistent legal framework for return measures in Member States across the Union, notably with the adoption of the **Return Directive**. The Directive's aim is to ensure that the return of third-country nationals without legal grounds to stay in the EU is carried out effectively, through fair and transparent procedures that fully respect the fundamental rights and dignity of the people concerned. A series of ECJ rulings have clarified a number of key aspects of the Directive (e.g. detention), with a significant impact on Member States' implementation of the Directive itself. A detailed assessment of the impact of the Return Directive on Member States'[6] return policies and practices and an overview of the ECJ jurisprudence is given in part IV of this Communication.

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[5] Eurostat data: S*tatistics* may however give a distorted picture as there is currently no obligation for MS to collect data on voluntary returns and these are also not properly recorded on a voluntary basis. This statistical gap can only be closed once a systematic recording of voluntary departures will be in place. The EU Entry-Exit system currently under negotiation has the potential of significantly facilitating such data collection.

[6] The term "*Member States*" used in the Return Directive context refers to 30 States: the 28 EU Member States minus UK and Ireland, plus CH, NO, Icl and Lie. *Explanation*: The Return Directive is a hybrid instrument and on the one hand is part of the *Schengen* acquis. It applies thus to Switzerland, Norway, Iceland and Liechtenstein. The UK and Ireland are not bound by that part of the Schengen acquis in accordance with Protocol 19. On the other hand, the Return Directive is a development of the acquis covered by Title V of Part Three of the Treaty, into which UK and Ireland could opt into in accordance with Protocol 21. However, these MS have not exercised such an opt-in.

Other **'flanking' legal instruments** adopted at EU level also play an important role in the area of return. The Visa Information System (VIS) Regulation (EC) No 767/2008 is expected to become a significant tool for identification and documentation of returnees. One of its objectives, according to Article 2(e), is '*to assist in the identification of any person who may not, or may no longer, fulfil the conditions for entry to, stay or residence on the territory of the Member States*.' Articles 19(1) and 20(1) allow access by migration authorities to certain VIS data for verification and identification purposes. Article 31(2)[7] allows this data to be transferred to or shared with a non-EU country to prove the identity of third-country nationals for the purpose of return. According to a recent European Migration Network (EMN) ad-hoc enquiry,[8] some Member States have already started to use VIS data for return and readmission purposes and this seemed to have a positive impact both in terms of length of return procedures and rates of return. VIS is also explicitly mentioned as one of the possible means of evidence of nationality under some of the most recent EU Readmission Agreements (EURAs).

The Schengen Information System (SIS) has proved to be a helpful tool for giving full effect to the European aspect of entry bans issued under the Return Directive. These Schengen-wide entry bans are primarily preventive. During the period 2008-2013 an average of approximately 700 000 Schengen-wide entry bans were stored in the system. However, even using these tools more efficiently will not solve all the issues around identification and re-documentation for irregular migrants who have come into the European Union without a visa, or who have simply entered without documents and claim a false or real identity that cannot be verified. For those cases — which take up significant migration authority time and are a major challenge to return management — new, innovative solutions must be found, based on increased cooperation with non-EU countries and in full respect of fundamental rights.

### *3. Financial support at EU level*

The **Return Fund** (2008-2013) provided for a financial support mechanism, which allowed considerable EU funds to be channelled to Member States to help address their challenges in the area of return management. The total allocation for all Member States in the period 2008-2013 amounted to €674 million. Since the start of the programming period in 2008, annual programmes in the Member States have developed significantly. They include a wider range of measures which put increasing emphasis on voluntary return programmes and compliance with common standards of the Return Directive, including humane and dignified detention conditions and promotion of sustainable return and reintegration.[9] **NGOs played an important role** in carrying out actions and projects to assist returnees. NGOs enjoy access to migrant diaspora community, have experience in working with irregular migrants and are perceived as moderators not representing the State. They were frequently able to de-escalate, to establish trust and better cooperation between authorities and returnees and to improve the situation of irregular migrants in general. The upcoming Asylum, Migration and Integration

[7] Article 31(2) of the VIS Regulation provides a derogation from the general principle that data processed in the VIS shall not be transferred or made available to a third country or to an international organisation: certain types of data may be transferred or made available to a third country if necessary in individual cases for the purpose of proving the identity of third-country nationals, including for the purpose of return, and only where specific conditions are met in order to ensure compliance with the requirements of EU data protection.

[8] Available at the EMN websites´ ad-hoc query section: http://ec.europa.eu/dgs/home-affairs/what-we-do/networks/european_migration_network/index_en.htm

[9] A detailed assessment of the first years of experiences with the Return Fund is given in the spring 2014 Commission 'Report on the results achieved and on qualitative and quantitative aspects of implementation of the European Return Fund for the period 2008-2010'.

Fund (AMIF) will build on experience gained over the last six years and will continue to offer financial support for efforts to meet the objectives of EU return policy, supporting - inter alia - alternative measures to detention, provision of social assistance, counseling and legal aid, specific assistance for vulnerable persons, independent and effective forced return monitoring, improvement of reception infrastructure, services and conditions as well as training of staff.

Under the EU external cooperation instruments, the EU has also supported capacity building for non-EU countries for several aspects of return management, including the integration of returnees. Since 2005, the Commission has financed over 40 projects under EU development cooperation instruments which included a strong focus on capacity building for return and reintegration for an amount of more than EUR 70 million.

## *4. Practical and operational cooperation*

### *4.1. Programmes promoting voluntary departure*

Key elements of sustainable return include voluntary return advice, tailor-made return packages, efficient reintegration assistance and information about the possibilities for legal migration. Relevant governmental and non-governmental actors, in particular the International Organization for Migration (IOM), have played an important role in facilitating voluntary departure by carrying out **Assisted Voluntary Return (AVR) programmes** providing comprehensive return assistance, including activities aimed at ensuring sustainable reintegration in countries of origin. IOM is currently operating over 70 AVR projects in 26 EU Member States. Over the last six years, approximately 148 000 migrants have been assisted to return voluntarily. When running the programmes, IOM emphasised the importance of cooperating with countries of origin and maintaining a link to on-going efforts by the EU and Member States in addressing return and relevant migration matters through partnerships. The ratio between voluntary departure and forced return (according to FRONTEX 2013 annual risk analysis data[10]) in the EU in 2012 was about 44:56. Further promotion of voluntary departure will continue to be one of the main policy objectives of the EU's return policy.

### *4.2. Joint return operations coordinated by FRONTEX*

As part of operational cooperation measures between Member States, States increasingly used joint flights for removal. In this context, the FRONTEX agency played an important role as a vehicle for promoting joint return operations. Between 2006 and December 2013, FRONTEX coordinated 209 Joint Return Operations (JROs) returning 10 855 people.[11] Since 2007, FRONTEX has provided standardised training for return officers focusing on safeguarding returnees' fundamental rights and dignity during forced return operations.[12] Since Article 8(6) of the Return Directive on forced return monitoring became binding in 2010, half of all JROs have been the subject of monitoring by independent monitors who were physically present from the start of the operation until arrival at the airport of destination. To date, these monitors have not reported any violation of returnees' fundamental rights.

[10] Published at: http://frontex.europa.eu/publications ('FRAN').
[11] Since 2010, the Commission 'Annual Report on Immigration and Asylum' provides for regular reporting on FRONTEX coordinated JROs.
[12] 225 escort leaders have been trained between 2007 and 2013.

Table 1: Monitoring of FRONTEX coordinated JROs:

| | Number of JROs + overall number of returnees | Number of JROs with monitors present on board | Percentage of JROs with monitors present | Percentage of returnees in monitored JROs | Nationality of monitors *(NB: in some JROs 2 or 3 monitors were present)* |
|---|---|---|---|---|---|
| 2011 | 39 JROs with 2 059 returnees | 23 JROs with 1 147 returnees | 59% | 56% | AT: 15; NL: 7; UK: 4; LV: 3; BE: 2; DK: 1; FR: 1; LU: 1 |
| 2012 | 38 JROs with 2 110 returnees | 23 JROs with 1 059 returnees | 60% | 50% | AT: 21; NL: 3; LV: 2; LU: 1; NO: 1 |
| 2013 | 39 JROs with 2 152 returnees | 20 JROs with 937 returnees | 51% | 44% | AT: 10; DE: 3; NL: 3; IE: 1; UK: 1; CH: 1; BE:2; ES:1; IS: 1; |

A FRONTEX Code of Conduct (CoC) for JROs was adopted on 7 October 2013, focusing on effective forced return monitoring procedures and respect of returnees' fundamental rights and dignity during return operations. The CoC foresees that the monitor (an independent outside observer who frequently represents an NGO or another independent monitoring body entrusted by a Member State with forced return monitoring tasks under Article 8(6) of the Directive) will be given all necessary information in advance of the operation and will be involved in the return process from the pre-return phase (internal briefings) until the post-return phase (debriefing). He/she will have access to all information and physical access to any place he wishes. The observations/reports of the monitor will be included in the reporting on the JRO. Even though this is not expressly required under current legislation, the Commission considers that given the visibility and sensitivity of such operations an independent monitor should be present in *each* JRO. Therefore the revision of the CoC shall be considered as a matter of priority.

An EU-financed project run by the International Centre for Migration Policy Development (ICMPD)[13] currently seeks to further harmonise the different approaches to monitoring taken by Member States. It seeks to develop objective, transparent criteria and common rules for monitoring, and to provide a pool of independent monitors to Member States which may also be used in JROs.

In 2012, the position of independent FRONTEX Fundamental Rights Officer (FRO) was created and on 17 December 2012 the first FRO was appointed. The FRO's role is to monitor, assess and make recommendations on the protection and guarantees of fundamental rights in all FRONTEX activities and operations including those related to JROs. The FRO should have access to all information on issues that impact on fundamental rights for all FRONTEX activities.

[13] See: http://www.icmpd.org/Ongoing-Projects.1570.0.html.

## Part III -- Future developments

EU return policy has developed considerably in recent years, mainly due to the transposition into national law and implementation by Member States of the Return Directive, which has led to improved and more consistent practice in this area. 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 will follow up on all shortcomings identified by the implementation report and will pay particular attention to the implementation by Member States of those provisions of the Directive which relate to the detention of returnees, safeguards and legal remedies, as well as the treatment of minors and other vulnerable persons in return procedures. The evaluation system established under the new Schengen Evaluation Mechanism, coordinated and supervised by the Commission, will provide new opportunities to examine and assess the concrete practices of Member States in these areas, and to check whether Member States are fully complying with the Directive and international human rights standards.

Return policy alone cannot deal effectively with the management of irregular migration flows to the EU but needs to be part of a more comprehensive approach, including the GAMM, which puts an emphasis on:

- enhanced dialogue and cooperation with non-EU countries of origin and transit on migratory issues, with the objective of establishing partnerships based on mutual interests;
- increased practical cooperation amongst Member States, with FRONTEX, and with international organisations and NGOs;
- parallel enhancement of other tools and policies such as effective border management, fight against trafficking and smuggling;
- integration of foreign policy aspects into the EU migration policy and ensuring linkages between the internal and the external dimensions. The advantages offered by the EEAS' overview of EU's overall external relations should be exploited.

Any future action aimed at developing EU return policy will thus have to take into account all of these aspects and elements.

Future action will focus on the issues and suggestions set out below.

### *1. Ensure proper and effective implementation of the Return Directive*

One of the key priorities for the future will be to strengthen monitoring of the implementation of the Return Directive. The Commission will systematically follow up on all shortcomings identified. Several EU Pilot procedures have already been initiated in relation to issues covered by this report and others will be launched in the near future. National courts already play a very positive role in this process, as a point of first reference for making Union law a reality in Member States and by asking, where necessary, for interpretation via references for preliminary ruling from the ECJ.

*Several parties will play an active role in further improving implementation of the Return Directive:*

⇒ *First and foremost, the Commission, as the* ***Guardian of Union*** *law, in accordance with its powers under Article 258 of the TFEU;*

⇒ *The Commission and Member States, by putting a stronger emphasis on compliance with the EU return acquis in the framework of the new* ***Schengen Evaluation Mechanism****;*

⇒ ***National forced return monitoring bodies*** *under Article 8(6) of the Directive, by fulfilling their role as the inbuilt control mechanism for day-to-day return practices;*

***2. Promote more consistent and fundamental rights-compatible practices***

In addition to working to ensure a proper implementation of the *acquis*, the Commission intends developing a number of **guidelines and recommendations** on the issues below. These will promote more consistent return practices, fully compliant with fundamental rights standards.

⇒ *The Commission will adopt within one year a* ***'Return Handbook'****, on which the Return Contact Group will be consulted. This will contain common guidelines, best practice and recommendations to be used by Member States' competent authorities when carrying out return-related activities and as a point of reference for return-related Schengen evaluations. It will refer to the EU return acquis and relevant international standards such as those developed by the European Committee for the Prevention of Torture and the UN Committee on the rights of the child General Comment No 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration and will address – inter alia – promotion of voluntary departure, proportionate use of coercive measures, forced return monitoring, postponement of removal, return of minors, effective legal remedies, safeguards pending return, human and dignified detention conditions as well as safeguards for vulnerable persons.*

⇒ ***Fundamental rights compatible apprehension practices:*** *The Commission will continue to address this issue in the Contact Group and will include recommendations in the Return Handbook, based on a 2012 Fundamental Rights Agency (FRA) study.*

⇒ ***Promotion of alternatives to detention:*** *The European Migration Network will carry out a study in 2014 on alternatives to detention in order to identify and spread best practices in this area.*

⇒ ***'Criminalisation' of irregular stay of returnees****: The Commission will take up ECJ case law in the Return Handbook on the limits and constraints upon Member States as regards criminal law sanctions for returnees.*

⇒ ***'Non-removable' returnees:*** *The Commission will collect best practice, based on existing best practices at national level, to avoid protracted situations and to ensure that people who cannot be removed are not left indefinitely without basic rights and don´t risk being unlawfully re-detained.*

⇒ ***Codified Council of Europe detention standards****: The Commission supports the declaration of the European National Preventative Mechanisms against torture issued during the Conference on Immigration Detention in Europe (Strasbourg 21-22 November 2013) to call on the Council of Europe to codify a set of detailed immigration detention rules based on existing international and regional human rights standards applicable to deprivation of liberty on the grounds of immigration status.*

***3. Further develop dialogue and cooperation with non-EU countries***

Cooperation with immigrants' non-EU countries of origin and transit is essential to improve capacity for managing migration flows and to address challenges linked to the return of third-country nationals who do not have (or who no longer have) a legal right to stay in the EU.

The EU is engaged in a vast number of bilateral and regional dialogues and cooperation frameworks with non-EU countries in order to build mutually beneficial cooperation in this field. These cover a broad range of issues, from institution and capacity building and effective integration of legal migrants to return management and the effective implementation of readmission obligations. In line with the GAMM, countries of origin and transit should also be encouraged to provide international protection to persons in need thereof in accordance with international standards, to improve their asylum and reception capacities and the development of properly functioning migration systems as well as to protect migrants' fundamental rights paying special attention to vulnerable migrants, such as unaccompanied minors, victims of trafficking, women and children. Cooperation assistance should be provided to these countries to support their efforts in this regard, and the EU should expand its cooperation with relevant non-EU countries in order to build capacity in the field of return and readmission and to assist partner countries in their negotiation of readmission agreements with other non-EU countries.

⇒ ***Return policy*** *will continue to be consistently included in* ***implementing and developing the GAMM****, including the* ***Mobility Partnerships*** *and* ***Common Agendas on Migration and Mobility*** *with non-EU countries;*

⇒ ***Incentives:*** *Care will be taken to ensure that cooperation on return, readmission and reintegration issues is part of a balanced and consolidated EU policy towards a non-EU country, based on shared interest, e.g. linked to enhanced mobility provisions and other policy areas such as trade, enterprise and industry.*

⇒ ***Capacity building****: Efforts to build capacity in non-EU countries in the field of return and readmission will be strengthened by, for example, improving the ability of the responsible authorities in partner countries to respond in a timely manner to readmission applications, identify the people to be returned, and provide appropriate assistance and reintegration support to those who are being returned.*

⇒ *Within the Asylum, Migration and Integration Fund focus will be given to* ***sustainable return and re-integration*** *of irregular migrants in their countries of origin, including through developing the capacity of these countries to better manage return and reintegration.*

*⇒ The Commission will actively follow up on the challenges identified in the **2011 Evaluation of EU Readmission agreements**, and its recommendations, such as the preference for voluntary return (rec no 13) and the launch of a pilot project to monitor the situation of persons after their return (rec no 15).*

### *4. Improve operational cooperation between Member States on return*

Fundamental rights compatible return procedures and coherent return policies will be enhanced by practical and operational cooperation in areas such as:

- promotion of voluntary departure;
- respect of the child's best interests in return procedures;
- interaction between national monitoring bodies;
- improved statistics;
- exchange of personal data;
- issue of travel documents.

*⇒ The Commission will use the **European Migration Network as a platform** to facilitate improved cooperation among States and stakeholders especially **in the field of voluntary departure**, as a key tool for the gathering and sharing of information.*

*⇒ The Asylum, Migration and Integration Fund will focus on measures to **encourage voluntary departure**, whilst taking care that voluntary return incentives do not develop an unwanted pull effect. Measures, in close cooperation with non-EU countries, to facilitate returnees' obtaining necessary travel documents will also be promoted.*

*⇒ As regards **transit by land of voluntary returnees**, improvements could be made through the use of Annex 39 of the Schengen Handbook (Standard form for recognising a return decision for the purposes of transit by land). Those Member States which do not yet use this are encouraged to do so.*

*⇒ Further operational cooperation should be promoted between Member States and between Member States and non-EU countries in implementing return and reintegration processes applied to **unaccompanied minors**. Cooperation between child protection systems of Member States and non-EU countries should also be encouraged, making best use of the funding options in the Asylum, Migration and Integration Fund.*

*⇒ Emphasis will be given to **improving return-related statistical information**, in particular by making use of the detailed information which FRONTEX has started to obtain from Member States, considering ways to improve information on voluntary departures and encouraging more consistent data collection.*

*⇒ The Commission will encourage **enhanced best practices exchange between national forced return monitoring bodies** under Article 8(6) of the Directive, to foster more consistent monitoring, particularly in the context of FRONTEX coordinated joint operations*

*⇒ The **potential of VIS and SIS in the field of return policy should be further enhanced**. In particular the review of SIS II, due by 2016, will be an opportunity to improve consistency between the return policy and SIS II and to suggest introducing an obligation on Member*

*States to enter a refusal of entry alert in SIS II for entry bans issued under the Return Directive.*

*⇒ Operational cooperation between Member States and Member States and non-EU countries will be promoted, focusing in particular on* ***identification and issue of travel documents*** *in compliance with data protection requirements.*

*⇒ The European Migration Network will carry out a study in 2014 on '****Good practices in the return and reintegration of irregular migrants: Member States' entry bans, policy and use of readmission agreements****'. The aim of this study is to enhance the effectiveness of return policies by compiling and comparing Member States' experiences related to these specific aspects of the return process.*

### *5. Enhance role of FRONTEX in the field of return*

There is a clear added value in performing certain operational aspects of return jointly at Union level. FRONTEX has a significant coordination role in this field and should continue to make use of it in a proactive manner. In performing its tasks, FRONTEX also has to make sure that operations are carried out in line with Union *acquis* and the EU Charter of Fundamental Rights.

*⇒ FRONTEX should further increase coordination of JROs in a way which ensures that* ***common standards related to humane and dignified treatment of returnees*** *will be met in an exemplary way, going beyond mere compliance with legal obligations. As a matter of priority the Commission therefore asks* ***FRONTEX to adapt its CoC on JROs*** *and to spell out clearly that each JRO will be subject to independent monitoring.*

*⇒ FRONTEX is encouraged to further support Member States by offering* ***training on return issues*** *with a special focus on safeguarding returnees' fundamental rights during the return procedure.*

**Part IV - Implementation Report: The impact of the Return Directive 2008/115/EC on Member States' return policies and practices**

The deadline for implementation of the Return Directive expired on 24 December 2010. All Member States, except UK and Ireland, as well as the four Schengen associated States are bound by the Directive. Four Member States (EE, ES, PT, SK) notified full transposition before the deadline. Nineteen Member States notified transposition in 2011, and five (BE, LT, NL, PL and SE) notified it in the course of 2012. The Commission opened 20 infringement procedures for non-communication, all of which were closed after Member States belatedly notified their national transposition measures[14]. Only Iceland has not yet notified full transposition.

Since the Directive was adopted, the Commission services have held 14 **Contact Group** meetings[15] with Member State experts. The aim of the Contact Group is to facilitate the identification of possible problems and remaining questions at an early stage and to offer an opportunity for open and informal discussion. These meetings contributed considerably to a consistent implementation of the Directive at national level. Inspired by the discussion at Contact Group level, six **comparative studies[16]** were carried out relating to:

1. *Minors in return procedures*
2. *Forced return monitoring*
3. *Reintegration of returnees*
4. *Situation of non-removable returnees*
5. *Proper legal transposition of the Return Directive by Member States*
6. *The practical impact of the Return Directive*

Based on the findings of the study on the transposition of the Return Directive into national law, the Commission carried out an **organised programme of work on the transposition of the Return Directive (2012-2013)**, during which the Commission questioned Member States about any remaining issues with their transposition of the Directive. In technical bilateral meetings, details of identified shortcomings and possible solutions were discussed. These meetings and discussions proved to be very helpful and the majority of transposition issues were able to be settled. The remaining issues concerned, in particular, the following provisions:

- EU-wide effect of entry bans;
- definition of risk of absconding;
- criteria for prolonging the period of voluntary departure;
- rules to be respected when removing by air;

[14] Links to the national transposition measures are available in the MNE section of EUR-Lex: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:72008L0115:EN:NOT

[15] The compiled minutes of these Contact Group meetings (in the form of a Q&A document) are accessible via the Register of Commission Expert Groups.

[16] Most of these studies are publicly available in the e-library of DG HOME´s Europa website under: ec.europa.eu/dgs/home-affairs/e-library/documents/categories/studies.

- forced return monitoring;
- criteria for imposing detention;
- detention conditions.

With regard to these remaining issues, seven Member States have already amended their national law in order to comply with requests made by the Commission. Thirteen Member States are currently in the process of doing so and six Member States have committed themselves formally to changing their national legislation in the near future, subject to close supervision (bimonthly reporting) by the Commission.

Tangible results of this organised programme have already materialised, notably in relation to detention:

- Six Member States, out of the eleven that had not fully transposed Articles 3(7) and 15(1), changed their legislation to legally define objective criteria to assess whether there are reasons to believe that an irregular migrant will abscond. This helps limiting the number of migrants kept in detention.

- Six Member States, out of the seven that had not fully transposed Article 15(4) of the Directive, have amended or are currently amending their national laws to provide that detention will cease if there is no reasonable prospect of removal.

- Four Member States, out of the six that had thus far not allowed NGOs and international organisations to visit detention centres, have amended or are in the process of amending their laws.

- Four Member States, out of the six who had not yet done so, have now revised their rules on the access to free legal assistance (Article 13(4)).

- Thirteen Member States, out of the sixteen that had not transposed Article 8(6), have already or are currently adopting legislation to set up a forced return monitoring system;

- Eleven Member States, out of the fourteen who had not yet done so, have formalised or are in the process of formalising the commitment that any removal by air will be carried out in line with the Common guidelines on security provisions for joint removals by air annexed to Decision 2004/573/EC.

In those remaining cases in which it was not possible to find agreement and to obtain commitment from Member States to change their legislation in accordance with requests from the Commission, several EU Pilot procedures have already been launched.

As regards the **practical implementation of the Return Directive in Member States,** a study was carried out in 2012-2013 and finalised in October 2013. This study was designed as a 'meta-study' based on different types of existing information and studies, as well as input from all relevant stakeholders.[17]

[17] The stakeholders which had to be consulted by the contractors were:
1. The judicial authorities/judges in charge of monitoring/hearing appeals on return policy (via national and international judges' associations);
2. The lawyers and institutions providing legal aid to returnees (via national and international lawyers' associations);
3. The return monitoring bodies (bodies established under Article 8(6) of the Return Directive);
4. The stakeholders assisting migrants or advocating on their behalf (NGOs, advocacy bodies);

To obtain a broader picture of the situation on the ground, the Commission has also examined focused studies and reports e.g. by the Fundamental Rights Agency, Council of Europe bodies, UNHCR, and NGOs (Amnesty International, Human Rights Watch, Pro-Asyl and others) into the practical situation in Member States. A major difficulty encountered by this information collection exercise was that little quantitative data was systematically collected at Member State level on most of the issues covered by the study. For example, data on basic parameters such as average length of detention, grounds for detention, number of failed returns, and use of entry bans proved to be available in only a limited number of Member States. Moreover, common definitions and approaches concerning data collection are frequently absent, impacting on the comparability of such data across the EU.

As highlighted above, the **Commission will systematically follow up on all shortcomings identified by the present implementation report**. Several EU Pilot procedures have already been launched in relation to issues identified in this report and others will be launched in the near future.

### *1. Detention of returnees for the purpose of removal*

*a) Grounds for and length of detention (Article 15)*

Article 15 of the Directive states that third-country nationals subject to return procedures may only be kept in detention — for 'as short a period as possible', and 'as long as removal arrangements are in progress' — if there is a risk of absconding or if he/she avoids or hampers the preparation of return or the removal process. The detention, which must be ordered by a decision of administrative or judicial authorities, must be reviewed at 'reasonable intervals' and must cease 'when it appears that a reasonable prospect of removal no longer exists for legal or other considerations'. Member States must set a maximum limit of detention, which cannot exceed six months as a general rule and, in exceptional cases, 18 months in total. ECJ case law has clarified several aspects of the Directive's provisions on detention. In its judgment in case C-357/09 (Kadzoev), the ECJ expressly confirmed the protective elements of the **detention-**related articles of the Return Directive by highlighting that **detention ceases to be justified and the person concerned must be released immediately if there is no real prospect of removal to a non-EU country within the authorised maximum period of detention. Moreover the ECJ clarified that reasons of public order and safety cannot be used as justification for detention under the Return Directive.** A judgment in case C 534-11 (Arslan) dealt with the relation between return-related detention and asylum-related detention (under Directive 2003/9) and **clarified that the existence of the two differing regimes does not imply an obligation on Member States to automatically release detained returnees once they make an asylum application, provided that States take a prompt decision under national law to continue detention in compliance with the asylum *acquis***.

The assessment has shown that, while Member States have generally amended their legislation to ensure it is in line with Article 15, there is **great variation** as regards practical implementation. For example, the interpretation of what constitutes 'reasonable intervals' by which **reviews of detention** are to take place varies considerably. Reviews in some Member States take place on a weekly basis, whereas in others it is only guaranteed at the end of the

5. The stakeholders commenting on / studying return policy (NGOs, academia, etc.);
6. International organisations (UNHCR, IOM, Red Cross, etc.) with an interest on return issues.

detention period (thus up to six months). This therefore constitutes an area where more consistency is needed, and where several stakeholders have called for further guidance on the interpretation of 'reasonable intervals'.

On the other hand, the practice is more uniform as regards the **grounds for imposing detention on returnees,** where the risks of absconding and/or hampering return are the main reasons in most Member States. Another frequently cited reason is the need to clarify documentation and identification of the person in question in cooperation with non-EU countries. The **concept of 'risk of absconding'**, of Article 3(7) of the Directive, has had an impact on Member States' definition and use of criteria upon which decisions to detain are based, thereby contributing — to varying extent — to more legal security. In the majority of Member States, the 'lack of documentation' provided by returnees or the 'use of false identity' are the main grounds on which the risk of absconding is assessed. Other frequently used criteria for assessing the risk of absconding are:

- use of false documents or destruction of documents;
- lack of residence;
- explicit expression of intent of non-compliance;
- existence of convictions for criminal offences.

Table 2: Criteria to assess the 'risk of absconding'

| Frequently used criteria for determining 'risk of absconding' | Number of Member States applying the criteria |
|---|---|
| Lack of documentation | 13 |
| No cooperation to determinate his/ her identity | 11 |
| Lack of residence | 7 |
| Use of false documentation or destroying existing documents | 7 |
| Failing repeatedly to report to relevant authorities | 7 |
| Explicit expression of intent of non-compliance | 6 |
| Existence of conviction for criminal offence | 6 |
| Non-compliance with existing entry ban | 5 |
| Violation of a return decision | 5 |
| Prior conduct (i.e. escaping) | 4 |
| Lack of financial resources | 4 |
| Being subject of return decision made in another MS | 4 |
| Non-compliance with voluntary departure obligation | 3 |

*Source: extracted from MATRIX 2013.*

It is to be noted that there has also been a consistent movement towards a **wider implementation of alternatives to detention** across the Member States examined. A large number of Member States now provide for alternatives to detention in their national legislation. Research has shown that alternatives to detention can have several benefits compared to detention and can also, under certain conditions, lead to significant cost savings. In practice, however, several Member States only apply alternatives to detention in rare cases. The main alternatives applied in practice seem to be requiring 'regular reporting to authorities' and an 'order to take up accommodation in premises specified by the authorities'. The 'obligation to surrender passports and documents' is also among the most frequently applied alternatives to detention.

Table 3: Legal and practical application of alternatives to detention

| | Residence restrictions | | Regular reporting to authorities | | Obligation to surrender documents | | Deposit of financial guarantee | | Electronic monitoring | |
|---|---|---|---|---|---|---|---|---|---|---|
| | Legal application | Practical application | Legal application | Practical application | Legal application | Practical application | Legal application | Practical application | Legal application | Practical application |
| AT | yes | yes | yes | yes | no | no | yes | yes | no | no |
| BE[18] | no | no | no | no | no | no | no | no | no | no |
| BG | no | no | yes | n.i. | yes | n.i. | no | no | no | no |
| CY | no | no | no | no | no | no | no | no | no | no |
| CZ | no | no | yes | yes | no | no | yes | no | no | no |
| DE | yes | n.i. | yes | yes | yes | yes | no | no | no | no |
| DK | yes | yes | yes | yes | yes | yes | yes | no | yes | no |
| EE | yes | yes | yes | yes | yes | yes | no | no | no | no |
| EL | yes | no | yes | no | yes | no | yes | no | no | no |
| ES | yes | n.i. | yes | n.i. | yes | yes | no | no | no | no |
| FI | no | no | yes | n.i. | yes | n.i. | yes | n.i. | no | no |
| FR | yes | n.i. | yes | no | yes | yes | no | no | yes | n.i. |
| HU | yes | n.i. | yes | n.i. | yes | n.i. | no | no | no | no |
| IT | yes | n.i. | yes | n.i. | yes | n.i. | yes | n.i. | no | no |
| LT | yes | yes | yes | yes | no | no | no | no | no | no |
| LU | yes | no | yes | no | no | no | no | no | no | no |
| LV | no | no | yes | yes | yes | yes | no | no | no | no |
| MT | no | no | yes | yes | no | no | yes | yes | no | no |
| NL | yes | n.i. | yes | n.i. | yes | n.i. | yes | yes | no | no |
| PL | yes | no | yes | no | no | no | no | no | no | no |
| PT | yes | n.i. | yes | n.i. | yes | n.i. | yes | n.i. | yes | n.i. |
| RO | yes | n.i. | yes | n.i. | no | no | no | no | no | no |
| SE | yes | n.i. | yes | n.i. | yes | n.i. | no | no | no | no |
| SI | yes | yes | yes | yes | yes | no | yes | no | no | no |
| SK | yes | no | yes | no | no | no | yes | no | no | no |
| CH | yes | no | yes | yes | yes | no | yes | no | no | no |
| IS | yes | n.i. | yes | yes | yes | n.i. | no | no | no | no |
| LI | yes | yes | no | no | yes | yes | no | no | no | no |
| NO | yes | n.i. | yes | n.i. | yes | n.i. | no | no | no | no |
| IE | yes | n.i. | yes | yes | yes | n.i. | yes | no | no | no |
| UK | yes | n.i. | yes | n.i. | yes | n.i. | yes | n.i. | yes | n.i. |

**n.i.**: 'no information available'
*Source: extracted from MATRIX 2013*

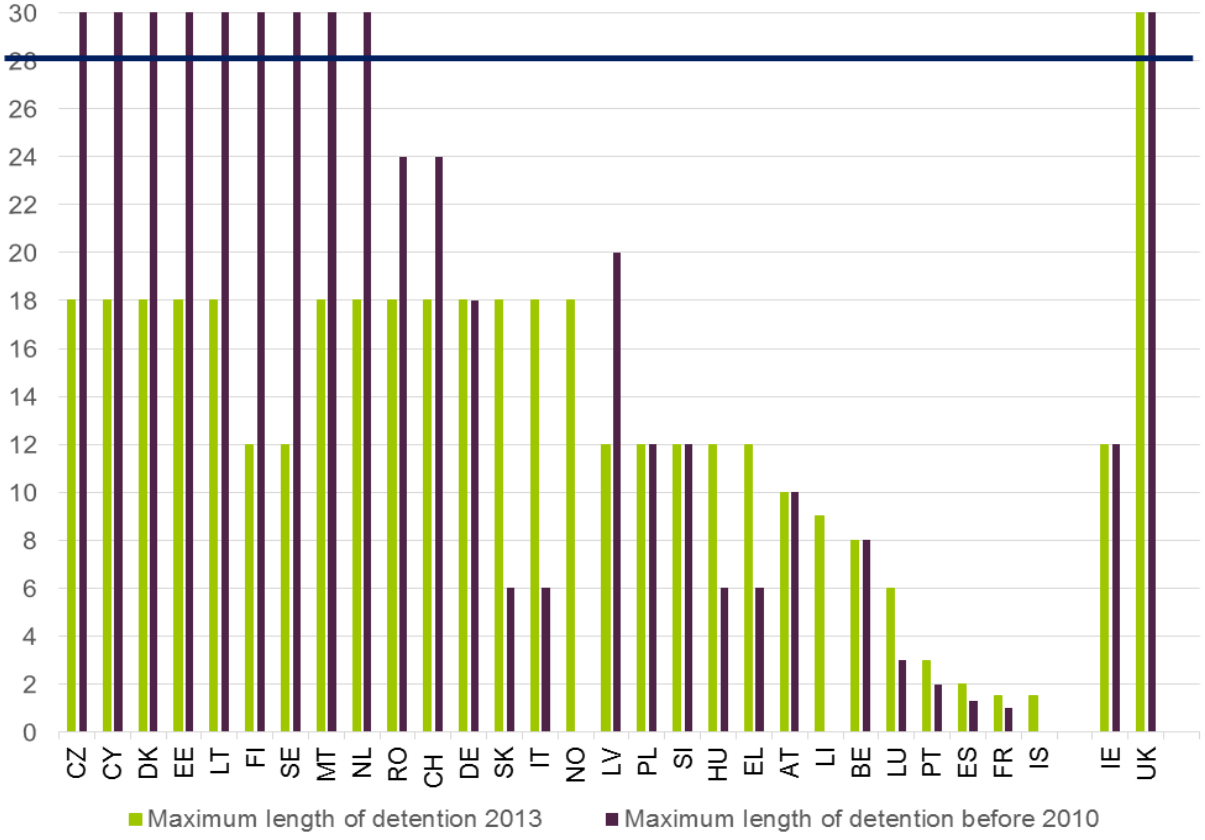
In most Member States, there is a **lack of public support structures** for irregular migrants who are released from detention because no reasonable prospect of removal exists. In the absence of a concrete legal obligation on Member States to provide for material subsistence to this group of people, they find themselves in a 'legal limbo' situation, left to rely on the private or voluntary sectors, or potentially being forced to resort to non-authorised employment for subsistence. A few Member States are currently setting a good example, providing a monthly allowance and helping these people to find accommodation.

Before the Return Directive was adopted, the **maximum length of detention** varied quite significantly across Member States and in at least **nine there was no upper ceiling** on how

[18] While Belgium does not apply any of the listed alternatives to detention, since 2008 it has offered special housing and counselling for families, which has been singled out as a best practice in a recent NGO publication.

long returnees could be detained. The Return Directive has contributed to a convergence — and overall to a reduction — of maximum detention periods across the EU.

Table 4: Maximum length of detention before and after transposition of Return Directive




*Source: MATRIX 2013.*

While the legal time limits of detention have increased in eight Member States, they have decreased in 12 Member States. It is to be noted that the average length of detention applied in practice appears to be considerably lower than the maximum limit provided for.

Table 5: Length of detention experienced in practice

| MS | Length of detention in practice (in days) | Source | Period |
|---|---|---|---|
| AT | 16.6* | National Statistics | 2012 |
| BG | 64* | Study by NGO | 2011 |
| DE | Less than 42*** | National Statistics | 2011 |
| DK | 31* | Study by NGO | 2011 |
| EE | 85* | National Statistics | 2011 |
| EL | At least 180** | International Organisation | 2012 |
| FI | 5-6** | National Public Authorities | - |
| FR | 13* | National Public Authorities | - |
| IT | 31* | Public Authorities in the city of Bologna | - |
| LU | 16* | National Public Authorities | - |
| NL | 120-180** | NGO and International Organisation | - |
| RO | 50* | National Statistics | 2012 |
| SE | Less than 14** | Ministry of Justice | - |
| IS | 1** | Public Authorities and NGOs | - |
| LI | 1-2** | Public Authorities and NGOs | - |

| MS | Length of detention in practice (in days) | Source | Period |
|---|---|---|---|
| UK | 7** | National Public Authorities | - |

** Average calculated on the basis of available data. The source of the data is provided in the third column from the left.*
*** The most frequently applied length of detention estimated by stakeholders interviewed.*
**** In Germany 73% of detainees are kept for less than 42 days according to official statistics.*
*Source: Matrix 2013.*

*b) Detention conditions, including of minors and families (Articles 16 and 17)*

The Directive sets some **basic conditions** that must be respected in relation to the detention of returnees, such as the fact that their detention must take place in specialised facilities (not prisons) or at least they should be kept separated from ordinary prisoners. Returnees kept in detention must be provided with emergency health care and essential treatment of illness and must be allowed to contact legal representatives, family members and consular authorities. NGOs and bodies must be allowed to visit returnees, subject to any requirements set by Member States for advance authorisation. Returnees must be adequately informed of their rights and obligations. As regards **minors** (both unaccompanied and with their families**)** — who must be detained only as a measure of 'last resort' and for the 'shortest appropriate period of time' — their needs must be taken particularly into account (the 'best interests of the child shall be a primary consideration'), and they must have the opportunity to engage in leisure activities and (depending on the length of their stay) have access to education.

The Directive does not regulate in detail issues such as the size of rooms, access to sanitary facilities, access to open air, nutrition, etc. during detention. Recital 17 provides, however, that detainees should be **treated in a 'humane and dignified manner**' with respect for their fundamental rights and in compliance with international law. Whenever Member States impose detention under Articles 15-17 of the Directive, this must be done under conditions that comply with Article 4 of the EU Charter, which prohibits inhuman or degrading treatment. The practical impact of this obligation on Member States is set out in detail in the standards established by the Council of Europe Committee on the Prevention of Torture ('CPT standards'[19]). These standards represent a generally recognised description of the detention-related obligations which must be complied with by Member States in any detention as an absolute minimum, in order to ensure compliance with European Convention on Human Rights obligations and obligations resulting from the EU Charter when applying EU law. The Commission will follow the situation closely and will, in particular, use the possibilities offered by the new **Schengen Evaluation Mechanism** to evaluate facilities used by Member States for pre-removal detention to make sure these benchmarks are met by all Member States. In order to address the most striking cases of inhuman detention conditions, EU Pilot procedures against several Member States have already been launched by the Commission in recent months.

Nine Member States have legislation that does not fully comply with Article 16(1), which requires States to strictly **separate detainees from ordinary prisoners**. Two of these Member States have committed themselves to changing their legislation. EU Pilot procedures have already been opened or will have to be opened against the other Member States concerned. In practice, only half of Member States always provide specialised detention facilities. The other half still detains, occasionally or frequently, irregular migrants in prisons. In this regard, German courts submitted three preliminary references to the ECJ in 2013: In cases C 473-13 (Bero) and C 514-13 (Bouzalmate) the Court was asked whether a Member

[19] document CPT/Inf/E (2002) 1 — Rev. 2013, available at: www.cpt.coe.int/en/docsstandards.htm

State is obliged under 16(1) of the Directive to only detain returnees in specialised detention facilities if it only possesses specialised detention facilities in some of its regional sub-entities (but not in others). Case C-474/13 (Thi Ly Pham) concerns the compatibility with Article 16(1) of a national administrative practice to place a pre-removal detainee in accommodation together with ordinary prisoners if he/she consents to such accommodation. These three cases are still pending at ECJ.

The obligation under Article 16(2) to allow detainees to **contact legal representatives, family members and consular authorities** was properly transposed by all Member States. Evidence collected suggests that in practice this opportunity is not always provided in two Member States. The obligation under Article 16(3) to ensure that **access to health services in emergency situations is guaranteed** was also transposed by all Member States. There are, however, allegations that in six Member States access to this right is occasionally impaired in practice. The Commission will follow up on all identified shortcomings.

The legal transposition of the self-standing right under Article 16(4) of national, international and non-governmental organisations and bodies to have **full access to detention centres** is still problematic in seven Member States. Three of these Member States have already committed themselves to amending their legislation. Practice in four other Member States does not seem to be fully compliant.

Legislation in all Member States complies with the rules in Article 17 on **detention of minors and families**. However in practice, shortcomings were reported to exist with regard to separate accommodation for families in two Member States, access to leisure activities in three Member States, and access to education in five Member States. With regard to the practical use made of the provision under Article 17 to detain minors as a measure of last resort, the evaluation findings reveal that seventeen Member States detain — at least sometimes — unaccompanied minors and nineteen Member States detain — at least sometimes — families with minors. Since the definition of 'measure of last resort' in the Return Directive leaves scope for interpretation, some stakeholders have suggested that Member States should be encouraged to include in their national law a presumption against detention of children, and to use alternatives to detention for unaccompanied minors and families with children.

With regard to **assistance to unaccompanied minors** (Article 10)**,** the evaluation has shown that this is provided in very different ways and by a variety of different bodies.

Table 6: Authority responsible for offering assistance to unaccompanied minors (UAMs)

| Countries | NGOs | International Organisation for Migration | Institution specialised in irregular UAMs | Government Department | General Youth or Social Services | Local Government | General Asylum or Immigrant Services | Prosecutor or Court | Police or Border Guards | No institution formally in charge |
|---|---|---|---|---|---|---|---|---|---|---|
| AT | | | | | ✓ | | | | | |
| BE | | | | ✓ | | | | | | |
| BG | | | | | ✓ | | | | | |
| CZ | | ✓ | | | ✓ | | | | | |
| CY | | | | | ✓ | | | | | |

| Countries | NGOs | International Organisation for Migration | Institution specialised in irregular UAMs | Government Department | General Youth or Social Services | Local Government | General Asylum or Immigrant Services | Prosecutor or Court | Police or Border Guards | No institution formally in charge |
|---|---|---|---|---|---|---|---|---|---|---|
| DE | | | | | ✓ | | | | | |
| DK | ✓ | ✓ | | | | | ✓ | | | |
| EE | | | | | ✓ | ✓ | | | | |
| EL | ✓ | ✓ | | | | | | ✓ | | |
| ES | | | | | | ✓ | | | | |
| FI | | | | | | | | | | ✓ |
| FR | | | | | ✓ | | | | | |
| HU | | | ✓ | | | | | | | |
| IT | | ✓ | | | | | | | | |
| LT | | | | | | | ✓ | | | |
| LU | | ✓ | | | | | | | | |
| LV | | | | | | | | ✓ | ✓ | |
| MT | | | | | | | ✓ | | | |
| NL | ✓ | | | | ✓ | | | | | |
| PL | | ✓ | | | | | | ✓ | ✓ | |
| PT | ✓ | | | | ✓ | | | | | |
| RO | ✓ | | | | | | | | | |
| SI | | | | | ✓ | | | | | |
| SK | | | | ✓ | | | | | | |
| SE | | | | | ✓ | | | | | |
| CH | | | | | | ✓ | | | | |
| IS | | | | ✓ | ✓ | | | | | |
| LI | | | | ✓ | | | | | | |
| NO[20] | | ✓ | ✓ | ✓ | | | | | | |
| IE | | | | | ✓ | | | | | |
| UK | | | | | ✓ | ✓ | | | | |

*Source: MATRIX 2013.*

While most Member States do return minors in practice, only seven Member States report having used the option of returning UAMs to reception centres or social services in their country of origin.

The main areas of change in the field of detention due to the implementation of the Return Directive were found to be the following:

Table 7: Main areas of change in detention due to implementation of Return Directive

| Change | Member State |
|---|---|
| Shorter length of time in detention | BG, CZ, DK, EE, LT, LV, RO, SI, SK, NO |
| Longer length of time in detention | EL, ES, FI, FR, IT, LU |

[20] European Commission (2013) Conformity Assessment of Directive 2008/115/EC Norway. Version 3.0 – 20.06.2013. Unpublished Article 10(1).

| | |
|---|---|
| Specific policy on minors and families with minors (and vulnerable persons) | AT, CZ, SI |
| Better conditions in detention centres | DK, LU, LV, RO, |
| Specialised detention facilities/ separation from prisoners | DE, DK, LU |
| Use of alternatives | BE,DE, LV, NL |
| Provide legal counselling | AT, SK |
| Fixed time limit judicial review/ decision of court | CZ, SK |
| Possibility to appeal | LV |
| Decision in writing | DK |

*Source: MATRIX 2013.*

### *2. Voluntary departure (Article 7) and monitoring of forced return (Article 8(6))*

The introduction of the Return Directive has positively influenced national law and practice regarding **voluntary departure**. Article 7 obliges Member States to allow an appropriate period for voluntary departure of between seven and thirty days. In some Member States, a period for voluntary departure was not previously provided for in national law, or the length was not specified. All Member States have now introduced such a limit. In the majority of Member States examined, the voluntary departure period is provided **automatically**; only three Member States made use of the option under Article 7(1) of the Directive to grant the period only upon application. In October 2013, a Dutch court submitted a preliminary reference to the ECJ (case C-554/13) related to the provision in Article 7(4) not to grant a period of voluntary departure for public order reasons.

The study also demonstrates that the Return Directive has been a driver for change in **forced return monitoring**. A large number of Member States have established monitoring bodies as a direct result of the Directive, often with support from the European Return Fund. Seven Member States were not compliant with the obligation to set up a forced return monitoring system and the Commission has already opened (or will open shortly) related EU Pilot procedures. In those Member States with a monitoring body in place, there tends to be a broad split with monitoring done by civil society (human rights NGOs), Ombudsmen or authorities with ties to a national Ministry. Monitoring systems are provided for either by law or by cooperation agreement. The evaluation demonstrates that the Return Directive has had substantial impact in the establishment of return monitoring bodies and that there are on-going developments as monitoring systems are becoming more established. These monitoring bodies will play an important role as an inbuilt control mechanism for national day-to-day return practices.

Table 8: Forced return monitoring bodies

| Country | Monitoring Body | Type of Monitoring Body |
|---|---|---|
| AT | √ | Ombudsman and NGO |
| BE | √ | Body affiliated to the Belgian Police |
| BG | √[21] | Ombudsman and NGO |
| CY | √ | Ombudsman |
| CZ | √ | Body affiliated to the Czech Parliament |

[21] Proposed only (2012 data via FRA).

| Country | Monitoring Body | Type of Monitoring Body |
|---|---|---|
| DE | Informal | NGO |
| DK | √ | Ombudsman and NGO |
| EE | √ | NGO |
| EL | √ | Ombudsman |
| ES | √ | Ombudsman |
| FI | √ | Ombudsman |
| FR | No | - |
| HU | √ | Ombudsman |
| IT | No | - |
| LT | √ | NGO |
| LU | √ | NGO |
| LV | √ | Ombudsman |
| MT | √ | Body affiliated to the Ministry of Home affairs and National Security |
| NL | √ | Body affiliated to the Ministry of Security and Justice |
| PL | √ | Ombudsman and NGO |
| PT | √ | Body affiliated to the Ministry of Home Affairs |
| RO | √ | NGO |
| SE | No | The Courts, the Parliamentary Ombudsman and the Chancellor of Justice partly perform the function of a monitoring body |
| SI | No[22] | - |
| SK | √ | Ombudsman and NGO |
| CH | √ | Body affiliated to the Federal Department of Justice and Police |
| IS | No | - |
| LI | No | - |
| NO | √ | Ombudsman |
| IE | No | - |
| UK | √ | Bodies affiliated to the Ministry of Justice |

*Source: MATRIX 2013.*

### *3. Safeguards (Articles 12 and 14) and remedies (Article 13)*

The evaluation found that the majority of the Member States examined make use of the option to **apply derogations from the scope of the Directive under its Article 2(2).**[23] The evaluation found that protective obligations under Article 4(4) are applied in the majority of the cases and that there is a similar level of protection between those third-country nationals falling under the scope of the Directive and 'border cases' excluded by Member States from its scope.

The evaluation found that the **procedural safeguards** related to the rights of irregular migrants during the return process are broadly implemented in the national law of Member

[22] A dual monitoring system is currently debated in government which envisages monitoring by the Ombudsman along with NGOs.

[23] Article 2(2)(a) allows MS not to apply the Directive in certain 'border situations' (people refused entry at the border and people apprehended in connection with an irregular border crossing). In this case a set of basic minimum safeguards listed in Article 4(4) still applies. Article 2(2)(b) allows MS not to apply the Directive in certain 'criminal law situations' people subject to return as a criminal law sanction or people who are the subject of extradition procedures).

States. The research findings show that the safeguards of Article 12(1) of the Directive regarding the form of the return decision (in writing, providing reasons in fact and in law and information on available legal remedies) are also generally applied in practice. However some concerns were raised among stakeholders regarding the formulation of the grounds for the decision (lack of detail and motivation). In almost half of the Member States applying the Directive, stakeholders flagged up translation (of the main elements of the return decision) and, to a lesser extent, interpretation as areas for potential improvement.

The evaluation was unable to detect major trends or to measure change over time with regard to **safeguards pending postponed return**. (Article 14 of the Directive covers family unity, health care, access to schooling, needs of vulnerable persons as well as the right to obtain a written confirmation in cases of postponed return.) Basic safeguards appear to be primarily provided by implementing international conventions and universal access legislation (emergency health care and schooling, in particular).

Regarding the obligation for Member States to provide returnees with an **effective legal remedy**, pursuant to Article 13, the evaluation concludes that, even though a legal provision for appeal exists in national law of all Member States, in practice a number of factors come into play that can compromise the right to a real legal remedy. Firstly information about the available remedies is — in spite of proper legal transposition of the Directive — not always sufficiently communicated in practice to third-country nationals in all Member States in a language the returnee understands (translation and explanation/legal aid issue). Secondly, related to the previous point, the possibility of an effective appeal may be reduced due to ineffective provision of legal aid, in cases in which Member States make extensive use of the provision under Article 13(4) of the Directive to make free legal aid subject to conditions listed in Articles 15(3) to (6) of Directive 2005/85/EC. The evaluation found that as a result, in several Member States return decisions were not often appealed in practice, or to a lesser extent than expected. The Commission will closely follow up on this issue.

The Directive allows Member States to decide whether an appeal has an automatic **suspensive effect**, or whether such effect may only be granted on a case by case basis by the appeals body. The evaluation found that an appeal generally temporarily suspends enforcement of the return and/or removal decision automatically under national law in only nine Member States. In most Member States the immigrant has to apply for the temporary suspending effect, which can be rejected (or granted) by the judge in specific circumstances.

Table 9: Suspensive effect of an appeal

| Temporary suspensive effect of enforcement of return decision when appeal is lodged | |
|---|---|
| Yes: Automatic | AT, CZ, DK, FR, LT, MT, PL, RO, SI, UK |
| Sometimes: In a decision of a competent judicial or administrative authority | BE, BG, CY, DE, EE, EL, ES, FI, HU, IT, LU, LV, NL, PT, SE, SK, CH, LI, IS, NO, IE |

*Source: MATRIX 2013.*

In this respect, it is important to stress that the ECJ, in its judgment in case C- 383/13 PPU (G and R),[24] confirmed that the **rights of the defendant referred to in Article 41(2) of the EU Charter** (the right to be heard and the right to have access to the file) must be observed when taking decisions under the Return Directive even when this Directive does not expressly provide for these.

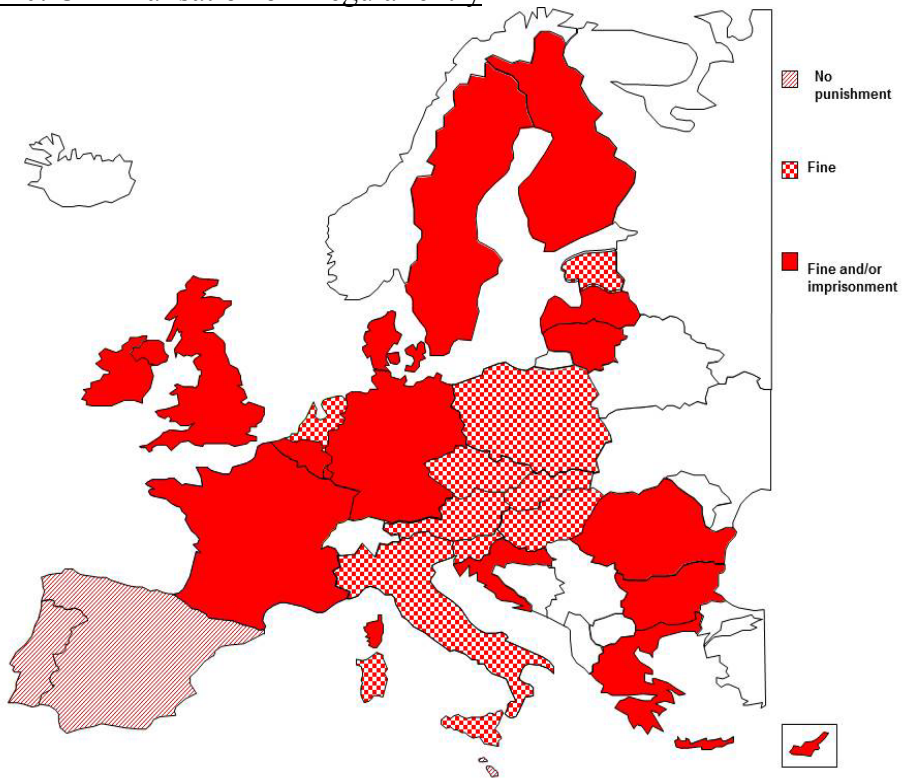
### *4. Criminalisation of irregular entry and stay*

The findings of the evaluation as well as a recent study conducted by FRA show that there are laws in place **criminalising 'irregular entry and/or stay',** in different forms, in the majority of Member States. Neither the Return Directive nor any other EU legal instrument prevent Member States from considering irregular entry and/or stay as a criminal offence under their national criminal law. However, several ECJ judgments have limited and constrained Member States' ability to keep returnees in prison as a consequence of this. In particular, in case C-61/11 (El Dridi) the ECJ found that the Return Directive precludes national rules criminalising irregular stay *in so far as* such rules undermine the effectiveness of the Return Directive. In this respect, the ECJ found that imposing a prison term on an irregularly staying third-country national who has committed no other offence than not complying with an order to leave the national territory is contrary to the Directive. A judgment in a similar case (C-329/11 Achoughbabian) confirmed the findings of the El Dridi judgment and found that national law sanctioning mere irregular stay with a threat of criminal law imprisonment was incompatible with the Return Directive. The judgment in case C-430/11 (Sagor) confirmed that the criminal law sanction of a financial fine which may be replaced by an expulsion order can be applied, provided that the expulsion procedure respects all relevant procedural safeguards of the Return Directive, and that the criminal law sanction of home detention can be applied only insofar as there are guarantees in place to make sure that its conduct does not delay return.

The above-mentioned rulings have resulted in a **wide range of changes to national legislation** in the countries examined and several Member States have recently changed their legislation as a consequence of this jurisprudence. The Commission is following the situation closely and has already launched EU Pilot procedures against certain Member States.

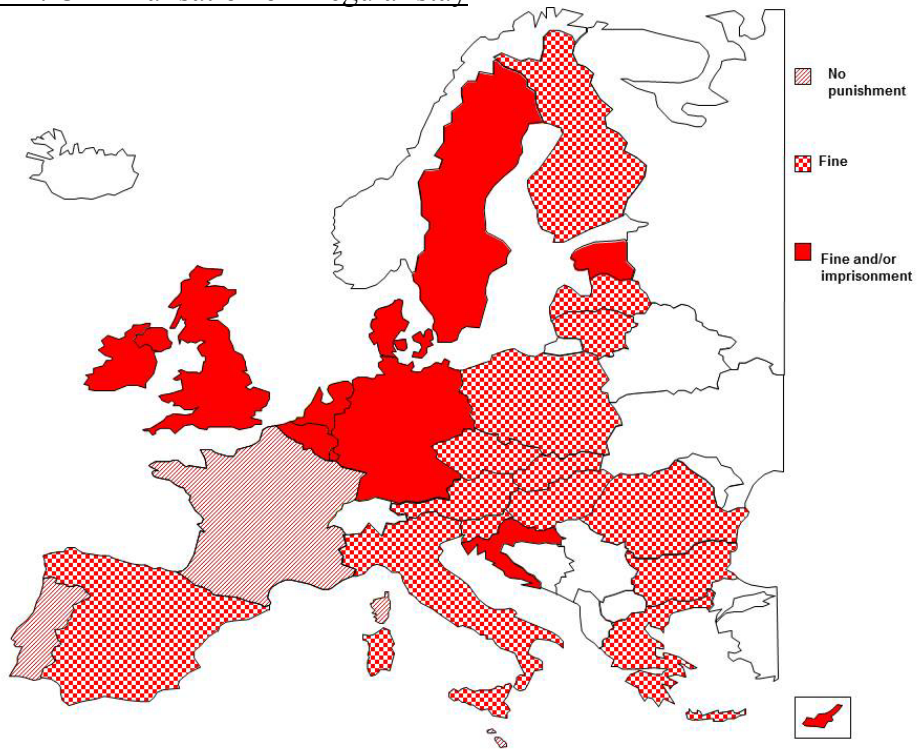
[24] Two other pending preliminary references — C 166/13 (Mukarubega) and C 249/13 (Boudjilida) — relate to similar questions.

Table 10: Criminalisation of irregular entry




*Source: FRA 2014.*

Table 11: Criminalisation of irregular stay




*Source: FRA 2014.*

### *5. Launch of return procedures (Article 6) and entry bans (Article 11)*

With regard to Article 6 of the Return Directive there is a high level of consistency between Member States on the **definition of irregular stay**. In most Member States, national legislation provides detailed lists of circumstances under which a third-country national can be considered to be irregularly staying, the five main categories being: expired visa; expired residence permit; revocation of residence permit; withdrawal of refugee status; irregular entrance. Most Member States apply more favourable rules to person's subject of a pending procedure for obtaining or renewing a permit or visa. The majority of Member States has opted for a **one-step procedure** where the return decision and the removal decision are issued in a single (administrative) act, only nine Member States (IT, LT, LV, MT, PL, SE, IS, IE, UK) have a two-step procedure in place. The Directive has also brought more EU-wide harmonisation regarding the issue of residence permits or other authorisation offering a **right to stay for compassionate, humanitarian or other reasons** to third-country nationals staying irregularly on their territory: All Member States allow for this possibility in their legal framework. The **obligation to launch a return procedure** has not substantially altered the practice of apprehension of third-country nationals and numbers of apprehensions. Whether a Member State seeks irregular third-country nationals through mainstream actions by the general police or on an *ad hoc* basis is not determined by the Directive, but instead depends on domestic factors and considerations. Since the Directive does not explicitly define the concept of **apprehension** nor provides guidance on how to carry out such procedures, Member States have left the existing institutional settings almost unchanged. There are two main types of apprehension practices in Member States: First, apprehension on the basis of routine police controls or targeted operations on sites where there is a reasonable suspicion that undocumented migrants are present. Second, apprehensions initiated at the request of the immigration authorities with regard to persons not respecting an order to leave the territory or not complying with a decision to depart voluntarily.

The Return Directive requires Member States to issue an entry ban with a return decision when no period of voluntary departure has been granted[25] or when the obligation to return has not been complied with. In other cases, the issue of an entry ban is optional. In terms of determining the length of the entry ban, all relevant circumstances must be taken into account, and the maximum duration of five years may be exceeded only if the person represents a serious threat to public policy, public security or national security. The evaluation showed that overall the Return Directive contributed to convergence across Member States regarding the (maximum) **length of return-related entry bans** of five years, as provided for in Article 11(2) of the Directive. Most Member States also determine a maximum length of entry bans for cases where the returnee is regarded as a threat to national security and where, in accordance with the Directive, the length can exceptionally exceed five years. In eight Member States, the length of entry bans was reduced as a result of the implementation of the Directive. However, the research also revealed that in six Member States, the number of entry bans that are issued to returnees has increased. In practice, all Member States offer the opportunity for irregular migrants to request withdrawal or suspension of the entry ban in exceptional humanitarian circumstances. Every entry ban decision is entered into the Schengen Information System, preventing migrants from re-entering the Schengen area. In its

[25] This may be the case when there is a risk of absconding, or if an application for a legal stay has been dismissed as manifestly unfounded or fraudulent, or if the person concerned poses a risk to public policy, public security or national security.

judgment in case C 297/12 (Filev/Osmani) the ECJ reaffirmed that the maximum time-limits for entry bans provided in the Directive also apply to 'historic entry bans' which had been issued before the entry into force of the Directive.

Table 12: Entry bans

| Grounds for use of entry bans | MSs making use of these grounds |
|---|---|
| Entry ban is automatically imposed on all return decision cases | AT, CY, DE, EE, EL, ES, IT, LT, MT, PL, PT, IS, IE, UK |
| Entry ban is not imposed in all cases but is (at least) automatically issued (a) if no period for voluntary departure has been granted<br>(b) if the obligation to return has not been complied with | BE, BG, CZ, DK, FI, HU, LU, LV, NL, RO, SE, SK, CH, NO |
| Entry bans are issued on a case by case basis (different grounds) | FR, SI, LI |

| Changes due to Return Directive | Member State |
|---|---|
| Reduction in length of entry bans | DE, ES, IT, LV, PL, PT, CH, NO |
| Increased number of entry bans issued | AT, BE, DK, FI, NL, CH |
| Specific regulation on entry bans/ standardisation throughout the country | LT, MT, SI |
| Possibility of withdrawal | ES, PL |
| Entry ban in writing | LU, PL |
| Decreased number of entry bans issued | SK |

*Source: MATRIX 2013.*

### *6. ECJ case law related to the Return Directive*

Over the last five years, national Courts submitted several preliminary references related to the interpretation of the Return Directive to the ECJ:

**On detention**:
In its judgement in case C-357/09 (Kadzoev) of 30 November 2009 the ECJ expressly confirmed the protective elements of the detention related provisions of the Return Directive, in particular the obligation to release the person concerned immediately once the grounds prescribed by the Directive are not fulfilled any more.

Three preliminary references from German courts were submitted in summer 2013: In cases C 473-13 (Bero) and C 514-13 (Bouzalmate) (pending) the Court was asked whether a Member State is obliged under Article 16(1) of the Directive to only detain returnees in specialised detention facilities if it disposes of specialised detention facilities only in some of its regional sub entities (and in others not). Case C-474/13 (Thi Ly Pham) (pending) concerns the compatibility with Article 16(1) of the Directive with a national administrative practice to place a pre-removal detainee in accommodation together with ordinary prisoners if he/she consents to such accommodation

**On criminalisation of irregular stay:**
On 28 April 2011, the ECJ delivered a judgement in case C-61/11 (El Dridi). In this far reaching judgement, the ECJ found that the Return Directive precludes national rules imposing a prison term on an illegally staying third-country national who does not comply with an order to leave the national territory, because such penalty is liable to jeopardise the attainment of the objective of introducing an effective policy for removal and repatriation in keeping with fundamental rights. A judgement in a similar case (case C-329/11 Achoughbabian) related to the situation in France was delivered in December 2011. It confirmed the findings of the El Dridi judgement and found national law *sanctioning illegal stay* with a threat of criminal law imprisonment incompatible with the Return Directive. The judgement in case C-430/11 (Sagor) (related to compatibility of provisions of Italian national legislation imposing the penal sanctions of assignment to stay at home and immediate expulsion for illegal stay) was delivered in December 2012 and further refined the ECJs case law on this issue. In its order of 21.3.2013 in case C-522/11 (Mbaye) the ECJ referred to the above case-law and repeated its conclusions. Case C 189/13 (Da Silva) (pending) is a follow-up case to Achoughbabian and relates to compatibility of Return Directive with national law *sanctioning illegal entry* with a threat of criminal law imprisonment.

**On relation between Return Directive and Asylum acquis:**
The May 2013 judgment in case C 534-11 (Arslan) dealt with the relation between return related detention (under Directive 2008/115/EC) and Asylum related detention (under Directive 2003/9/EC) in a situation where a third-country national is detained under the Return Directive and submits an application for asylum with the objective of postponing return. The judgment confirms that asylum-related detention and return-related detention are covered by two different legal regimes with respective legal safeguards adapted to the specific situation of asylum seekers and returnees. The Court made clear that the existence of these two differing regimes doesn´t imply an obligation on Member State to automatically release detained returnees once they make an asylum application: The judgement expressly confirms that detention may be continued – provided Member States take without delay a decision under national law to continue detention in compliance with the asylum acquis.

**On entry bans:**
A judgement of 19.9.2013, in case C 297/12 (Filev/Osmani) relates to the validity of "historic" entry bans issued before the entry into force of the return directive as well as rules on the length of entry bans. In this judgement the ECJ
- confirmed that Article 11(2) precludes a provision of national law which makes the limitation of the length of an entry ban subject to making an *application* seeking to obtain the benefit of such a limit.
- clarified that an entry ban which was handed down more than five years before the date of the entry into force of the national legislation implementing that directive cannot develop further effects, unless the person constitutes a serious threat to public order, public security or national security.
- precludes Member States from excluding under Article 2(2)(b) of that directive persons which during the date on which that directive should have been implemented and the date on which it was implemented, benefited from more favourable direct effect of the Directive.

**On voluntary departure:**
A preliminary reference from the Dutch Raad van State was lodged in October 2013 in case C-554/13 (Zh. and O.) (pending), related to the interpretation of the notion of "risk to public policy" as a reason for not granting a period of voluntary departure in the context of Article 7.

**On right to be heard (Article 41 of the EU Charter) in Return Directive context**:
-Two preliminary references from French judges on this issue were submitted in spring 2013: In cases C 166/13 (Mukarubega) and C 249/13 (Boudjilida) (pending) the Court was asked whether the right to be heard before a decision is taken under Article 41(2) of the Charter applies to return procedures (Mukarubega) and to specify the exact extent of this right (Boudjilida).

In its judgement of 10.9.2013 in case C- 383/13 PPU (G and R), the Court confirmed that the rights of the defence are to be respected when deciding on the extension of detention. It clarified that not every irregularity in the observation of the rights of the defence brings about the annulment of the decision. Such effect would only take place if the national court considers that the infringement at issue actually would have led to a different outcome.

## Part V - Conclusions

This Communication shows that the establishment of an EU return *acquis* over the last decade has led to significant legislative and practical changes in all Member States. The Return Directive has positively influenced national law and practice regarding voluntary departure and has been a driver for change in forced return monitoring. It contributed to a convergence — and overall to a reduction — of maximum detention periods across the EU and there has also been consistent movement towards a wider implementation of alternatives to detention across Member States. It also limited Member States' ability to criminalise mere irregular stay, and its procedural safeguards have contributed to more legal security.

The concern, expressed by some Member States at the time of its adoption, that its protective provisions would undermine the efficiency of return procedures has not materialised: Experience confirms that the procedures foreseen in the Return Directive allow for determined action. The main reasons for non-return relate to *practical* problems in the identification of returnees and in obtaining the necessary documentation from non-EU authorities.

Joint ownership of and support for the key policy objectives of this new EU policy have gradually developed. All Member States now generally accept the following policy objectives:

- *respect for fundamental rights;*
- *fair and efficient procedures;*
- *reduction of cases in which migrants are left without clear legal status;*
- *primacy of voluntary departure;*
- *promotion of reintegration and fostering of alternatives to detention*.

This has become apparent during recent policy dialogues with Member States, conducted in 2013. These positive changes have also been confirmed by the United Nations International Law Commission's eighth report on the expulsion of aliens, in which the UN Special Rapporteur acknowledges that the EU's Return Directive '*contains extremely progressive provisions on such matters that are far more advanced than the norms found in other regions of the world*.'

Despite these positive developments, and the fact that Member States have generally ensured that the Return Directive is transposed in their national law, there is still scope for improvement in the practical implementation of the Directive and of return policies in general, ensuring respect for fundamental rights standards (e.g. detention conditions, effective legal remedies) and effectiveness (e.g. faster procedures and higher rates of — voluntary — return).

The action set out in this Communication focuses on ensuring proper and effective implementation of the existing rules, promotion of fundamental rights-compatible practice, cooperation between Member States as well as cooperation with non-EU States. This action will ensure better implementation and practical application of return policies, consolidating and deepening the achievements of the EUs return policy over the next years, in full respect of the inalienable rights and dignity of all people — whatever their migratory status may be.