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on Refugees and Exiles

ECRE COMMENTS ON THE PROPOSAL FOR A REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL ESTABLISHING A COMMON SYSTEM FOR THE RETURN OF THIRD-COUNTRY NATIONALS STAYING ILLEGALLY IN THE UNION, AND REPEALING DIRECTIVE 2008/115/EC OF THE EUROPEAN PARLIAMENT AND THE COUNCIL, COUNCIL DIRECTIVE 2001/40/EC AND COUNCIL DECISION 2004/191/EC

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SUMMARY OF KEY PROVISIONS

The European Commission proposal for a Regulation establishing a common system for the return of third-country nationals staying illegally in the Union ("the Return Regulation") repeals Directive 2008/115/EC ("the 2008 Return Directive") and aims to establish a Common European System for Returns with "swifter, simpler and more effective return procedures across the EU."

Overall, while the Regulation introduces some strong safeguards such as the reiteration of the principle of *non-refoulement*, concerns arise in relation to the Regulation's implications for fundamental rights and the erosion of procedural guarantees, as well as regarding its complexity and measures aimed at outsourcing responsibilities. The proposal will also make it more difficult for people to return on their own accord following a return decision because it introduces a wide range of circumstances in which voluntary departure is not available.

After an analysis of the key provisions introduced by the Regulation, the following observations can be made:

Article 3: Derogations

As with other recent EU legislation in the Pact on Migration and Asylum,[1] the Regulation allows for broad derogations in Article 3 that potentially capture a large number of applicants for whom limited safeguards would apply, increasing the risk of refoulement and other violations of fundamental rights. This also undermines the Regulation's objective of creating a common system and does not take into account other instruments of EU law which will be applied at the border, notably the Screening Regulation, the Asylum Procedures Regulation (APR) and the Return Border Procedure Regulation (RBPR).

Article 4: Definitions

ECRE has concerns about the significant expansion of countries to which third country nationals (TCNs) can be transferred against their will in Article 4, going far beyond their country of origin or habitual residence, to encompass transit countries, countries which the person has the right to enter, countries deemed safe for the person on the basis of the APR, and countries with which there is an agreement or arrangement. The agreement may be "a legally binding or non-binding instrument" on cooperation between a Member State or the EU and a third country on readmission or other international agreements and arrangements as defined in Article 4. ECRE has grave concerns about using non-binding agreements or arrangements as the basis for return procedures. Article 7 includes that where the country of return cannot be determined at the time of issuing the return decision, a return decision may indicate provisionally one or more countries of return. ECRE is against this provision because without a specific country of return in the decision, it is more difficult for the person to appeal. The provision is all the more concerning given the proposal above to significantly expand the countries to which a TCN may be transferred.

Article 7: Return decisions

ECRE remains opposed to the introduction of a blanket obligation to issue return decisions proposed in Article 7 because other options are available to Member States, including the possibility of granting an authorisation to reside on the territory on humanitarian or other grounds. In contrast, ECRE welcomes the provision in Article 7 on the possibility for Member States to grant at any moment an autonomous residence permit, long-stay visa or other authorisation offering a right to stay for compassionate, humanitarian or other reasons to a third-country national staying illegally on their territory and encourages states to use these options. Where a visa is granted, the issued return decision should be withdrawn as the visa settles the legal stay of the individual. Where return is postponed according to Article 14, if return is not possible after a maximum of two reviews of the postponement, then the return decision should be withdrawn and long-term residence provided.

Article 9: Mutual recognition of return decisions

Article 9 concerns the mutual recognition of return decisions, which is proposed as a mandatory measure from July 2027, despite still divergent recognition rates for asylum applications as well as diverging return systems across the EU. There is a lack of clarity on what happens to TCNs who have already served the maximum

1. See for example ECRE comments on the Regulation of the European Parliament and of the Council addressing situations of crisis and force majeure in the field of migration and asylum and amending Regulation (EU) 2021/1147, https://ecre.org/wp-content/uploads/2024/05/ECRE_Comments_Crisis-and-Force-Majeure-Regulation.pdf.

period of detention or who are still appealing the return decision in the issuing MS. It also seems that the enforcing MS will be allowed to recognise the return decision, but change the return country, which could have a profound effect on individual's rights. For these reasons, ECRE recommends that mutual recognition should not be made mandatory. Where a Member State chooses to recognise a return decision issued by another Member State, the TCN should still be granted the right to legal remedies. Before enforcing the return decision, the enforcing Member State must ensure that its enforcement would not result in a violation of the principle of *non-refoulement* and that all procedural guarantees are upheld. MS should provide counselling on return and reintegration.

Article 10: Expansion of the use of entry bans

Article 10 sets out circumstances in which the Member States must or may issue an entry ban with or even without issuance of a return decision. Entry bans become mandatory in all cases where the person is subject to removal under Article 12 (which covers refusal to cooperation, secondary movement, security risks and failure to comply with the time limits set for voluntary returns), and where they fall under the scope of Article 13 (time limits) or Article 16 (security risks).

Issuing entry bans is optional in other cases, including when there is a lack of cooperation on the part of the person. Given that there are now wide-ranging obligations to cooperate, it is conceivable that the combined application of Articles 10 and 21 may lead to the systematic imposition of entry bans on persons subject to return decisions. The length of the entry ban has also been extended to 10 years with further extensions of 5 years possible with no upper limit specified. In addition, the Regulation does not contain any assertion that the provisions regulating entry bans will apply without prejudice to the right to international protection. Challenging entry bans is provided for in law but likely to be close to impossible in practice.

Article 12 and 13: Limits on voluntary return

Overall, provisions on voluntary return are weaker in the new proposal than in existing law. Voluntary return applies "when the third-country national is not subject to removal in accordance with Article 12" (forcible removal), and covers genuinely voluntary return along with situations of voluntary departure following a mandatory return and voluntary compliance with a return order. Whilst ECRE welcomes the inclusion of a 30-day period for voluntary compliance with the obligation to return, there is no minimum period for voluntary return included. This means in theory that Member States could set very short time limits for voluntary departure, for example, of just two or three days. The concept of voluntary compliance with the obligation to return is also very much linked with the wide-ranging obligation to cooperate (see Article 21). The obligation to cooperate itself is so broad and subjective and places such an excessive burden of proof on the people affected to demonstrate cooperation, it could seriously limit the option of voluntary departure. The proposal introduces a wide range of circumstances in which voluntary return is not available.

On forcible removal, one positive development is that the authorities shall assess compliance with *non-refoulement* by reference to the country of return and duly examine changes in circumstances and new elements before return (Article 12). There is also the possibility for the Member State to provide a date for voluntary return when a third-country national is clearly cooperating, effectively meaning an individual can "change lanes" from forced to voluntary return, which has not always been clear in all Member States.

Article 15: Monitoring of removal

ECRE welcomes the European Commission's proposal to introduce an independent monitoring mechanism with clearer criteria and stronger safeguards than the Return Directive (2008), which lacked clarity and enforceability. However, further improvements are needed. In particular, monitoring should cover all stages of the return process, from the pre-return phase to the final handover of TCNs to the receiving state's authorities.

Article 17: Return hubs

This Article stipulates the conditions under which return can take place to a third country with which there is an agreement or a mere arrangement – the "return hub" concept. There are several extremely concerning elements including the EU outsourcing its fundamental rights responsibilities to third countries with little or no detail about how they will be ensured. It is not stated that the third-country national will be notified in writing of a decision establishing the return hub as a destination for return or deportation, and the possibility to challenge this decision before a judicial authority. There is no information on how the EU will judge whether international human rights standards and principles are respected in the third country. It is not clear which independent body

or mechanism will be able to monitor the situation and any powers they may have in case of violations of rights. In addition, the monitoring body or mechanism monitors only the application of the agreement and not what happens to the individual and their rights.

Article 21: Obligation to cooperate

Article 21 expands the obligations of returnees significantly and adds new and broad obligations which TCNs are unlikely to be able to meet. Non-compliance then leads to various disproportionate penalties and sanctions on the TCNs. In ECRE's view, Article 21's provisions place a disproportionate burden of proof on TCNs, and may result in discriminatory measures and being classified as non-cooperative during the return procedure even where that is not the intention. These measures should be amended or deleted.

Article 22: Consequences of non-compliance with the obligation to cooperate

Article 22 provides a list of sanctions ''in case of non-compliance with the obligations set out in Article 21 (2), points (a) to (k).'' As per the Article, "Member States shall provide for a possibility to impose, following an individual assessment, effective, proportionate and dissuasive measures on the third country national". ECRE recommends deleting Article 22 on the consequences of non-compliance with the obligation to cooperate as it is impractical and difficult to assess in the return context. It may lead to arbitrariness and would add to the complexity of the procedure.

Article 23: Availability for the return process

Article 23(1) states that, to ensure a swift, efficient, and effective return process, third-country nationals should be subject to certain measures during the return procedure. These measures can include being confined to a specific geographical area within the Member State where they can move freely, being required to reside at a designated address, or being obligated to report to the relevant authorities at specified times or intervals. ECRE recommends that competent authorities be required to conduct an individual assessment of each case before imposing any measures contained in the Article. ECRE's primary concern relates to the excessive and potentially unlawful use of detention, particularly in light of Articles 29 and 30; measures under Article 23 should always be preferred to detention.

Article 26, 27 and 28: The right to an effective remedy

ECRE broadly welcomes the fact that under Article 26 third-country nationals are afforded "an effective remedy to appeal against or seek review of" the return decision, the entry ban decision and the removal decision. Reasonable time limits for the competent judicial authority of first instance to examine the appeal shall be set at national level and provide for an adequate and complete examination of the appeal but shall not exceed 14 days. Worryingly, no minimum time limit is given and in a measure which mirrors the erosion of appeal rights under the APR, the suspensive effect of the appeal is not automatic but needs to be applied for within this short time limit, which may cause an obstacle to an effective remedy. ECRE strongly argues that the suspensive effect of the appeal should be automatic in all instances so that the right to an effective remedy can be realised, to ensure the conformity with case law of the European courts, and to limit the burden on national courts.

Article 29,30 and 31: Preventing absconding and increasing detention

The Commission's proposal significantly expands both the grounds for detention and the maximum detention period, extending it to up to 24 months, and potentially for longer when people pose a risk to security. Some of the grounds such as the risk of absconding are extremely broad and could lead to more or less systematic use of detention. Moreover, criteria for assessing the risk of absconding, such as a lack of legal residence, penalise TCNs for circumstances beyond their control and could constitute social discrimination against people who are homeless. The potentially wide interpretation of the risk of absconding could lead to systematic detention and would reverse the presumption whereby detention should only be considered as a last resort (which itself is under threat in the proposed Regulation). Less invasive alternatives to detention should be assessed in every case where detention is considered, as well as being uncoupled from the risk of absconding in Article 30 which is overly broad and punitive and risks limiting the use of alternatives. Unaccompanied minors and families with minors should never be detained as established by international law.

Article 36: Readmission procedure

Article 36 outlines the procedure for readmission that must be followed when TCNs are issued with an "enforceable" return decision. In ECRE's view, Member States should establish a clear time limit for third countries to respond to formal readmission requests. If a third country fails to respond or rejects the request within the specified period, competent authorities should explore alternative solutions, such as granting residence permits, in order to prevent individuals from being left in a prolonged legal limbo without status or protection.

Article 37: Communication with non-recognised third-country entities

Article 37 provides that Member States "may communicate, as necessary, with non-recognised third-country entities responsible for one or more steps in the readmission process. Such communication shall be limited to what is necessary for carrying out the readmission procedure and shall not amount to diplomatic recognition of the entities concerned." ECRE expresses deep concern about the implications of engaging with such entities. The very term "non-recognised entities" highlights the nature of these states, as their lack of recognition may stem from serious governance failures, human rights abuses, or even the existence of ICC arrest warrants for their leaders, as in the case of Afghanistan.

Article 39: Sharing of information with third countries

Sharing personal data in EU return procedures must adhere to data protection principles, ensuring a lawful basis, transparency, and data minimisation, and that individuals are informed of their data being shared in a transparent, intelligible and easily understandable manner. Additional care should be taken given the particularly sensitive nature of much of the data to be shared, and EU Member States must take all necessary measures to prevent information that a third-country national has lodged a claim for international protection from being shared with third countries.

Article 42: Components of a common system for returns

The proposed Article outlines the main elements of a unified return system within the EU. It includes a common procedure for returning third-country nationals who have no legal right to stay, along with a shared approach to readmission. The system also involves mutual recognition and enforcement of return decisions among Member States, adequate resources and trained personnel (including for detention), digital tools for managing return, readmission, and reintegration, cooperation among Member States, and support from relevant EU bodies and agencies in accordance with their mandates.

In ECRE's view, the elements constituting a common system for returns, as set out in the proposal, must be interpreted as including not only the procedural and institutional components, but also the fundamental rights safeguards necessary to ensure compliance with EU primary law and international human rights obligations. These include, inter alia, the respect for fundamental rights in accordance with Article 5 of the proposal, the establishment of independent monitoring and accountability mechanisms pursuant to Article 15, and the guarantee of the right to an effective remedy and access to judicial review, which must be regarded as indispensable pillars of any lawful and rights-compliant return framework.

Article 45: Frontex support

Article 45 outlines how Frontex supports Member States in return and readmission procedures. Member States can request assistance from Frontex-deployed experts, including return and other liaison officers, as allowed under EU Regulation 2019/1896. To enable proper planning aligned with Union priorities, Member States must provide Frontex with information on their anticipated support needs, particularly in relation to return, readmission, reintegration, the return border procedure, the European Asylum and Migration Strategy, and the evaluation of readmission cooperation. In ECRE's views, the Article fails to acknowledge the mandatory deployment of Fundamental Rights Monitors (FRMs) during return operations and joint return operations, as required by Regulation (EU) 2019/1896.

Article 46: Support for return and reintegration

Article 46 provides that ''Member States shall establish return and reintegration counselling structures to provide TCNs with information and guidance about return and reintegration options, including programmes referred to in paragraph 3, as early in the return process as possible''. ECRE welcomes the provision of

Member States establishing return counselling, but emphasises that such counselling must be provided by an impartial and independent body and that tailored counselling should be provided to different nationalities of TCNs and taking their individual profiles and needs into account. ECRE denounces the use of conditionality and punitive measures based on the level of cooperation, type of return, or individual background when providing reintegration to TCNs, as it is counterproductive.

Article 47: Emergency situations

The proposed Article introduces measures that allow Member States to derogate from certain obligations in situations where an exceptionally large number of TCNs need to be returned. These include derogations from obligations under Article 33 concerning the review of detention orders, Article 34 which outlines detention conditions, and Article 35 regarding conditions for the detention of minors and families. ECRE raises profound concerns regarding the proposed measures. First, the Article fails to clearly define what constitutes an "emergency situation," leaving the term open to misinterpretation by Member States. Moreover, ECRE questions the necessity and proportionality of these derogations. The EU Pact on Migration and Asylum already includes provisions for addressing emergency scenarios, and introducing additional derogations may prove redundant and unnecessarily restrictive, as well as contributing to de-harmonisation.

Article 48: Statistics

Article 48 requires Member States to regularly report specific return and detention data to the Commission (Eurostat) and Frontex. ECRE welcomes the improvement of data on returns, which will provide a clearer evidence base for policy making and information to support impact assessments of return measures. It would also be necessary to provide statistics on the length of detention measures and other restrictions of liberty. Statistics could include the average length of detention, as well as the numbers of individuals held for the longest periods permitted.

Article 50: Reporting

ECRE welcomes the fact that the Regulation includes reporting every 5 years on the application of the Regulation. ECRE would like to note that the failure of the European Commission to fulfil its obligation under Article 19 of the Return Directive to report every three years to the European Parliament and the Council on its application by Member States has impeded the effectiveness and accountability of the EU return system.

INTRODUCTION

The Return Regulation seeks to support Member States to meet the long-standing objective of increasing the return rate – that is, increasing the percentage of third-country nationals issued with a return decision who ultimately return to their country of origin or who are deported to a third country.

As an EU regulation is unable to significantly influence the decision-making of third countries, be they countries of origin, transit or other purportedly safe countries, the Regulation focuses on compelling the people affected to opt for return through the use of a range of punitive measures. In doing so, it continues the punitive thread that runs through the reform of the Common European Asylum System (CEAS) which seeks to change individuals' decisions and actions based on penalising a lack of respect for the rules through withdrawal of rights or harsh treatment akin to criminal justice measures. Another typical element of this approach is to introduce extensive yet unclear obligations on the individual and to penalise non-compliance.

The punitive approach to onward movement of asylum applicants as set out in the Asylum and Migration Management Regulation (AMMR) and the new obligations on the applicant and severe penalties for non-compliance in the Asylum Procedures Regulation (APR) are other examples of this approach which is furthered by the Return Regulation. As with the newly adopted CEAS instruments, the Return Regulation links different areas of migration policy, such that a failure to behave may have unrelated procedural consequences or the failure to respect restrictions on movement may lead to a reduction in employment rights.

At the same time, the Return Regulation does very little to incentivise cooperation, a more dignified approach[2] to increasing return numbers. Combined with the reduction of procedural rights which may increase the pool of people to return, and the harsh measures, including significantly expanded use of detention, which evidence shows lead to absconding, the overall impact on the return rate of the proposal is uncertain.

ECRE strongly urges a different approach to this objective: reducing the pool of people to return through ensuring that asylum systems function effectively in granting protection status and through a massively expanded use of national legal statuses – protection and non-protection related. Managed transfer of people into regularised status and out of the return system is in the economic interest of the Member States as it is more cost-effective than expanding detention and deportation apparatus and allows for a strategic rather than ad hoc response to labour market needs. Furthermore, with increased obligations to cooperate on return, there should also be an obligation for the Member States to grant a stay if people cannot be returned due to reasons beyond their control.

The lack of an impact assessment (required by law) justified by reference to urgency, has become a standard approach to legislative proposals. It undermines legal standards and leads to policy proposals that raise significant concerns regarding fundamental rights impact.

2. Danish Refugee Council, DRC asylum, Dignified return, available here

ANALYSIS OF KEY PROVISIONS

Recitals

Analysis of key provisions in the Recitals are generally included below in the sections on the relevant Articles. Here, ECRE underlines the welcome reiteration of the principle of *non-refoulement* in Recitals (11) and (13).

According to Recital (11), no one may be removed, expelled or extradited to a third country where there is a serious risk that they would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment. The Recital is a useful reiteration of the principle of *non-refoulement* in a context where this principle – the cornerstone of refugee protection – is at risk within Europe.

Recital (13) further provides that the authorities are required to verify compliance with the principle of *non-refoulement* on the basis of an individual assessment and that any changes and new elements should be examined. The obligation is integrated into the substantive articles at Article 12(3) on removal. These provisions incorporate the case law of the European courts, notably the test outlined in ***Ilias and Ahmed.***[3]

CHAPTER I: GENERAL PROVISIONS

Article 1: Subject Matter

The subject matter of the Regulation is the creation of a "common system" for the return of illegally staying third country nationals (TCNs), in accordance with fundamental rights. Its objective is "to ensure the effective return and readmission" of these TCNs in line with the "comprehensive approach" to migration and asylum established in the Asylum and Migration Management Regulation (AMMR).

These elements build on the Explanatory Memorandum which states that the "key objective" of the Commission's proposal is "to simplify the return process and make it clearer for national authorities and for the third-country nationals concerned".

Article 2: Scope

Article 2 sets out the scope of the Regulation, which is to encompass all third country nationals "staying illegally on the territory of the Member States", with the exception of those covered by Article 2(5) of the Schengen Borders Code (the SBC) ("persons enjoying the freedom of movement under Union law"). The scope thus remains as per the 2008 Return Directive.

Article 3: Derogations

Article 3 sets out derogations from some of the provisions in the Regulation for two groups of third-country nationals: a) Those subject to a refusal of entry at an external border in accordance with Article 14 of the SBC; and b) those apprehended or intercepted by the competent authorities in connection with an illegal crossing of an external border and who have not subsequently obtained an authorisation or a right to stay in the Member State. This replicates Article 2(2)(a) of the Return Directive.

When Member States apply the derogations, they shall rely on national law for the purpose of ensuring the return of these categories of third-country nationals and shall respect the principle of *non-refoulement*. Articles on coercive measures (Article 12(4)), carrying out removals by air (Article 12(5)), postponement of return decisions, emergency health care and the special needs of vulnerable people (Article 14(2) and (6)(c) and (e)) and detention conditions (Articles 34 and 35) shall apply. The list does not include all the safeguards in the Regulation.

ECRE raises a number of concerns about the derogations allowed by Article 3(1)(b).

3. ECtHR, Ilias and Ahmed v. Hungary, Application no. 47287/15, Judgment of 14 March 2017. In the C-663/21, the CJEU reaffirmed that the consequences of return have to be considered when adopting a return decision. CJEU, Judgment of 6 July 2023, Bundesamt für Fremdenwesen und Asyl v AA, C-663/21, ECLI:EU:C:2023:540, par. 49-52. In its recent judgment in Case C-156/23, the Court held that Article 5 of the Return Directive, read in conjunction with Article 19 of the Charter of Fundamental Rights, obliges Member States to reassess the risk of non-refoulement prior to enforcing any return decision - even when the decision is not connected to a prior application for international protection. CJEU, Judgment of 17 October 2024, Ararat, C156/23, ECLI:EU:C:2024:892, par. 51.

First, the scope of the derogations is broad, potentially capturing a large number of applicants. Second, for these people excluded from the scope of the Regulation very limited safeguards would apply, increasing the risk of *refoulement* and other violations of fundamental rights. Third, the provision undermines the Regulation's objective of creating a common system by allowing Member States to revert to national legal provisions for a potentially large category of people. Fourth and relatedly, the provision appears not to take into account other instruments of EU law which will be in application at the border, notably the Screening Regulation, the Asylum Procedures Regulation (APR) and the Return Border Procedures Regulation (RBPR).

Above all, the interaction with the Screening Regulation is unclear. It is mandatory for Member States to apply the screening process for the category of people specified in Article 3(1)(b) – those apprehended "in connection with" an illegal crossing of the border. The outcome of the screening process is that if the person does not apply for asylum, their entry is not authorised and they are referred to the authorities responsible for the Return Directive. If they apply for asylum, they are referred to the asylum authorities. If their application is examined in an asylum border procedure, their entry is still not authorised. If they receive a rejection decision, a return decision is issued and they are transferred to the return border procedure, regulated by the RBPR.

Given that these processes and procedures at the border are the cornerstone of the 2024 reform of the CEAS, it seems paradoxical that the Return Regulation will allow Member States to apply national law and operate outside the CEAS for a potentially large number of applicants. According to Recital (6), the "an effective return policy should ensure coherence with and contribute to the integrity of the Pact on Migration and Asylum…". Allowing Member States to set up parallel systems applying national law contradicts these objectives.

The European Parliament report on the implementation of the Return Directive[4] showed that Member States make use of the possibility offered in the current Return Directive Article 2(2)(a) not to apply the Directive in such "border cases." The report concludes that this creates parallel regimes and procedures falling outside the scope of the Directive that offer fewer safeguards compared to the regular return procedure. They highlight the following: no term for voluntary return, no suspensive effect of an appeal and fewer restrictions on the length of detention, as well as lower levels of protection increasing the risks of push-backs and *refoulement*.

ECRE recommends the deletion of Article 3(1)(b). If the co-legislators decide to keep it, the appropriate links with wider asylum *acquis* need to be made.

ECRE proposes the deletion of Article 3(1)(b).

If the Article is retained, ECRE proposes the following amendments to Article 3:

Article 3
Derogations

If Article 3(1)(b) is maintained, it should be amended to include reference to the Screening Regulation and other relevant elements of the *acquis:*

By the end of the screening within the territory, the third-country nationals concerned should be subject to a return procedure. Those who do not fall within the scope of the Return Regulation should instead be covered by the Return Border Procedure Regulation.

Article 4: Definitions

Article 4(3) Country of return

In Article 4(3) on definitions, "country of return" can mean any one of the following:

(a) a third country that is the country of origin of the third-country national;

(b) a third country that is the country of formal habitual residence of the third-country national;

(c) a third country of transit on the way to the Union in accordance with Union or Member States' readmission agreements or arrangements;

4. European Parliament, Report on the implementation of the Return Directive 2.12.2020 - (2019/2208(INI)), Committee on Civil Liberties, Justice and Home Affairs, available here.

(d) a third country, other than the one referred to in points (a), (b) and (g), where the third-country national has a right to enter and reside;

(e) a safe third country in relation to which the application for international protection of a third-country national has been rejected as inadmissible, pursuant to Article 59(8) of Regulation (EU) 2024/1348;

(f) the first country of asylum in relation to which the application for international protection of a third-country national has been rejected as inadmissible, pursuant to Article 58(4) of Regulation (EU) 2024/1348;

(g) a third country with which there is an agreement or arrangement on the basis of which the third-country national is accepted, in accordance with Article 17 of this Regulation.

With Article 4(3), the Commission proposes a significant expansion of countries to which third-country nationals can be returned or deported against their will, going far beyond their country of origin or habitual residence to encompass transit countries, countries which the person has the right to enter, countries deemed safe for the person on the basis of the APR, and countries with which there is an agreement or arrangement.

Given that the list includes countries that the person has not visited, the term "country of return" is a misnomer: countries of deportation or countries of transfer would be more accurate terms.

Under the current Return Directive Article 3(3), people can only be returned or removed to their country of origin, to a country of transit in accordance with Community or bilateral readmission agreements or other arrangements, or to another third country to which the third-country national concerned voluntarily decides to return and in which they will be accepted. ECRE has strongly disagreed with returns or removal to a country under other (non-formal) arrangements permitted under the current Return Directive and rejects this further expansion of countries of return and deportation.

In conjunction with Article 17, Article 4(3)(g) aims to create the legal basis for the extensively discussed concept of "return hub" – centres in third countries to which people with a return decision would be transferred on the basis of an agreement between the EU Member State and that third country.

The many options for countries of "return" adds to questions regarding the protection of fundamental rights of the people concerned. These include what would happen to people who are then stranded in third countries, whether the return/removal is safe and dignified, and whether possibilities for reintegration are sustainable. Irrespective of the reform proposal and potential changes in EU law, the practical, political and financial obstacles to such arrangements remain. Whether any countries outside the EU will agree to be part of such arrangements is also unclear.

ECRE recommends deleting Article 4(3) and replacing it with:

Article 4
Definitions

Article 4 (3) 'country of return' means one of the following:

(a) a third country that is the country of origin of the third-country national;

(b) a third country that is the country of formal habitual residence of the third-country national;

(c) another third country, to which the third-country national concerned voluntarily decides to return to and in which he or she will be accepted.

Article 4(6): voluntary return

In the proposed Return Regulation "voluntary return" is defined "as compliance by the illegally staying third-country national with the obligation to leave the territory of the Member States within the date set out in the return decision."

ECRE is concerned that since 2008 each new recommendation and/or reiteration of return legislation has further chipped away at the meaning of the word "voluntary" in the return context, making it more and more

misleading as it obscures the real – mandatory – nature of return, and the sanctions and incentives that promote it. Clarity is needed to ensure the term does not lose all meaning.

ECRE makes a distinction between three categories of return: voluntary return, mandatory return and forced return.[5] Voluntary return is when people make a free choice to return to their country of origin. Mandatory return sits between the two: individuals are required by law to leave the country and issued with a return decision but they may be able to choose when and how they return. What is termed voluntary return in the Regulation is more properly described as "voluntary departure" – combined with a mandatory return – or simply as voluntary compliance with a return decision. The contrast in the Regulation is between voluntary compliance, meaning the cooperation of the returnee, and a forcible removal due to lack of cooperation. As discussed below, even voluntary compliance takes place in a context of significant pressure, with punitive consequences for non-compliance.

ECRE proposes the following amendments to Article 4:

Article 4
Definitions

Article 4 (6): 'voluntary ~~return~~ ***compliance with an obligation to return'*** means compliance by the illegally staying third-country national with the obligation to leave the territory of the Member States within the date set out in the return decision ~~**in accordance with Article 13 of this Regulation;**~~

Article 4(12): Readmission instrument

Article 4(12) of the proposed Regulation defines "readmission instrument" as "a legally binding or non-binding instrument, containing provisions on the cooperation between a Member State or the Union and a third country on the readmission procedure, such as readmission or other international agreements and arrangements". This is new text compared to the Return Directive.

The EU and Member States increasingly use informal arrangements for migration cooperation, however there are as yet no clear figures on who is being returned by informal agreement. ECRE has grave concerns about using non-binding agreements or arrangements as the basis for return procedures. Informal agreements bypass the scrutiny of the European Parliament and, due *inter alia* to disquiet in the third countries, some are not even public. The monitoring of these informal agreements is done through joint working groups with no public information on the results.

ECRE proposes the following amendments to Article 4:

Article 4
Definitions

Article 4(12): 'readmission instrument' means a legally binding ~~**or non-binding**~~ instrument, containing provisions on the cooperation between a Member State or the Union and a third country on the readmission procedure, such as readmission or other international agreements and arrangements;

New Article 4(a) Vulnerabilities

Article 3(9) of the current Return Directive on the definition of vulnerable persons has been deleted and no definition of vulnerability is included in the Regulation. Rather than advocating for the introduction of a definition of vulnerability that could encompass all possible potential scenarios, ECRE emphasises the importance of recognising and addressing the special needs of vulnerable individuals within return procedures on a case-by-case basis. This includes ensuring that individuals in vulnerable situations or with specific vulnerabilities, such as unaccompanied children, those who have experienced trauma, and people with disabilities, receive

5. See for example, ECRE Policy Note (2018) Voluntary Departure and Return: Between a Rock and a Hard Place, available here.

appropriate support. Where not already carried out, or where there are additional, previously unidentified indications of vulnerability, vulnerability checks should be undertaken.

ECRE suggests adding the following new Article to ensure that people in a vulnerable situation or with vulnerabilities are given the support they need.

ECRE proposes introducing this additional Article 4(a):

Article 4(a) Vulnerabilities

1. Where relevant, it shall be assessed whether a third-country national in a return procedure is in a vulnerable situation, a victim of torture or has special needs or needs special procedural guarantees as within the meaning of the Reception Conditions Directive and Asylum Procedures Regulation.

2. Where there are indications of vulnerabilities, special needs or procedural guarantees, the third-country national concerned shall receive timely and adequate support in view of their physical and mental health. In the case of minors, support shall be given by personnel trained and qualified to deal with minors, and in cooperation with child protection authorities.

Article 5: Fundamental Rights

ECRE welcomes the focus on fundamental rights in Article 5, and particularly that the proposal requires Member States to make an explicit assessment of *refoulement* risks ahead of any forced returns. This is important as the risk of refoulement is not necessarily assessed in the appeal against the negative asylum decision because a first instance decision on an asylum application is concerned with an assessment of whether or not an applicant meets the eligibility criteria for refugee or subsidiary protection status or whether an application can be rejected on admissibility grounds.

The absolute nature of the principle of non-refoulement is enshrined in Article 3 European Convention on Human Rights (ECHR) and Article 19 EU Charter of Fundamental Rights (EU Charter) as well as reflected by both the jurisprudence of both the European Court of Human Rights (ECtHR) and the Court of Justice of the EU (CJEU). Recitals (10) and (11) of the Regulation reaffirm that its application must respect fundamental rights, in particular those related to the EU Charter and the Geneva Convention.

ECRE proposes the following amendments to Recital 11:

Recital 11:

Recital (11) The principle of non-refoulement and the prohibition of collective expulsion provided for in Article 19 of the Charter should be respected when applying this Regulation. No one ~~**may**~~ ***shall*** be removed, expelled or extradited to a third country where there is a serious risk that he or she would be subjected.

CHAPTER II: RETURN PROCEDURE

Article 6: Detection and initial checks

Under Article 6(1) Member States shall put in place efficient and proportionate measures to detect third-country nationals who are staying illegally on their territory in view of carrying out the return procedure and to carry out any additional verifications needed, including any vulnerability and security verifications. ECRE expresses concern that this provision may institutionalise and normalise racial profiling and discriminatory identity checks in the process of identifying third-country nationals who are staying illegally within the territory of a Member State

Under Article 6(2), for the purposes of detection, the authorities shall rely upon previous checks carried out under Regulation (EU) 2024/1356 (the Screening Regulation). Under Article 6(3) they may carry out additional security verifications for the purpose of carrying out the return procedure where needed based on a risk assessment and objective criteria set out in national law.[6]

This raises questions as to what efficient and proportionate measures entail, how risk assessments are conducted, and the objective criteria in national law which is analysed in more detail in relation to Article 29 on grounds for detention.

ECRE suggests the following amendments to Article 6:

Article 6
Detection and Initial Checks

1. Member States ~~**shall**~~ ***may*** put in place efficient ~~and~~, proportionate ***and non-discriminatory*** measures ***based on objective criteria*** to detect third-country nationals who are staying illegally on their territory in view of carrying out the return procedure and to carry out any additional verifications needed, including any vulnerability and security verifications. ***This shall be carried out with full respect for fundamental rights and the principles of necessity and data protection.***

Article 7: Issuance of a return decision

As per Article 7(1) a return decision shall be issued to any third-country national staying illegally on their territory, except for the cases mentioned in Article 8, below.

Recital (15) refers to the obligation to "swiftly" issue a return decision in these circumstances and further specifies that it should be "based on an individual assessment taking into account all facts and circumstances".

Recital (17) requires the competent authorities to determine the country of return on the basis of the information available and indicate the most likely country or countries in the return decision.

The obligation to issue a return decision would provide some legal certainty, as all TCNs will be informed in writing of the end of legal stay, the return decision, and their rights and obligations. However, there are several categories of TCNs who may have recourse to a different status, e.g. victims of human trafficking. Stateless persons may have submitted or intend to submit an application for stateless status under the 1954 Convention and a national determination procedure after having their application for asylum refused. In addition, there could be humanitarian or other grounds for granting the right to stay on the territory of a Member State.

Alternatives to return

ECRE remains opposed to the introduction of a blanket obligation to issue return decisions when other options may be available to Member States. Member States should take into consideration all relevant circumstances in each individual case before issuing a return decision, including the possibility of granting an authorisation to reside on the territory on humanitarian or other grounds. ECRE thus recommends that the language on

6. The list of examples of "objective criteria" established by the MS regarding the risk of absconding was included in: ECRE/AIDA, The implementation of the Dublin III Regulation in 2018, March 2019, available at: https://bit.ly/3vCJ63s, pp. 14-17.

individual assessment in Recital (15) be repeated in the substantive Article. In addition, a single country of return should be indicated, rather than multiple "most likely" countries. This is crucial for the individual to be able to appeal, particularly given the tight time frames proposed.

A return decision automatically issued to all would also mean that many people who are not able to be returned – often through no fault of their own – will also receive a return decision. There is no explicit provision in the proposed Regulation to address the situation of those who cannot be returned. These persons often find themselves in situations of limbo and/or facing destitution, with limited access to rights including no possibility of working legally for a living.

Obligations for TCNs to cooperate on return have been increased, to ensure balance, Member States should also be obliged to review the options for granting a legal status to certain categories of people, including those who are vulnerable, who cannot be returned for reasons beyond their control, and those working or with strong family connections. In the case of asylum seekers whose applications have been rejected and who have been resident in a host country for some years, due to for example an asylum procedure backlog, the time spent in the host country should be taken into account when states are considering whether to pursue their return and Member States should give them the opportunity to apply for a permanent legal status.

Impact on the return rate

The low return rate has long been a driving factor for return policy and legislation at EU level. In the proposal, increasing the number of return decisions without the possibility to return may actually push down the return rate. The approach also runs counter to the economic interests of the Member States, many of which have been engaged in seeking labour migration and/or in regularisation programmes to manage the acute labour market shortages faced by all European states. In this context, reviewing the possibilities of legal status before issuing a return decision would reduce the administrative burden of the Member State.

Reasons for issuing a return decision

Article 7(3) allows Member States to limit the information provided to third-country nationals on factual reasons for the return decision where national law provides for the right for information to be restricted or where it is necessary to safeguard public order, public security or national security. The reference to national law leaves wide room for discretion and creates an obstacle to harmonisation. At the same time, assessing threats to public order is based on a very high threshold as set out in CJEU jurisprudence. The Court has held that posing a threat to public order entails, in any event, the existence of a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society[7], in addition to the disturbance of the social order which any infringement of the law involves. In the context of asylum decision making and implementation of the Qualification Directive in relation to national security questions, the Court has established that at least the "essence of the grounds" for decision making should be provided.

Limiting information on the factual reasons for the return decision may infringe the right to an effective remedy. In addition, the text does not specify whether this information is limited only for the third-county national, or also for their counsel. The practice could be disproportionate, depending on the scope of provisions in national legislations.

Article 7(5) provides that the TCN shall, upon request, be provided with a written or oral translation of the main elements of the return decision, as referred to in paragraph 2, including information on the available legal remedies in a language the third-country national understands or may reasonably be presumed to understand. Given the short timeframes and other proposed limits on appeals, it is essential that Member States ensure that the third-country national automatically receives a written or oral translation to ensure they understand their rights and next steps.[8]

Country of return

7. CJEU, Judgment of 15 February 2016, J. N. v Staatssecretaris voor Veiligheid en Justitie. C601/15 PPU, ECLI:EU:C:2016:84, para 65.

8. The CJEU has affirmed that Member States must respect the rights of defence, including the right to be heard, in return procedures, ensuring these are not rendered impossible or excessively difficult to exercise CJEU, Judgment of 10 September 2013, M. G., N. R., C-383/13 PPU, ECLI:EU:C:2013:533, para 35. In Boudjlida, the Court stressed that return decisions must contain sufficiently specific reasons to allow individuals to understand and effectively challenge them. CJEU, Judgment of 11 December 2014, Khaled Boudjlida, C-249/13, ECLI:EU:C:2014:2431, para 38. Additionally, national courts must assess whether a failure to provide adequate information deprived the individual of the opportunity to present their case and influence the outcome. CJEU, Judgment of 8 September 2022, Staatssecretaris van Justitie en Veiligheid, C-568/21, ECLI:EU:C:2022:642, para 126.

Article 7(4) provides that when a country of return cannot be determined on the basis of the information available to the competent authorities at the time of issuing the return decision, a return decision may indicate provisionally one or more countries of return. Without a specific country of return in the decision, it is very difficult for the TCN to appeal the return decision. The provision is particularly concerning given that the proposal significantly expands the countries to which a third country national may be returned or deported (see earlier section on *Article 4: Definitions*).

In ECRE's view, if a Member State cannot determine the country of return or deportation, then a return decision should not be issued. At the same time a third-country national should be able to choose to return voluntarily to a country if they will be accepted by that country, as is the case under the Return Directive. If the wrong country is indicated in the return decision, the return decision should be withdrawn, and the issuing Member State should update or delete the alert in the SIS accordingly. A new return decision should only be issued when the country of return has been identified.

The jurisprudence of the ECtHR supports this position. In *Auad v. Bulgaria*, the Court held that the failure to specify the country of destination in an expulsion order may violate the principle of legal certainty, especially in the context of detention. The Court noted that "In cases of aliens detained with a view to deportation, lack of clarity as to the destination country could hamper effective control of the authorities' diligence in handling the deportation."[9]

Similarly, in *Asalya v. Turkey*, the ECtHR found a violation of Article 13 of the Convention where the deportation order did not indicate the destination country. The Court stated: "Such ambiguity is unacceptable, not only because it exacerbated the applicant's already precarious position, but also because it inevitably hampered a meaningful examination of the risks involved in his deportation, thus rendering the protection afforded under Article 13 illusory."[10]

ECRE welcomes the provision in Article 7(9) on the possibility for Member States to grant at any moment an autonomous residence permit, long-stay visa or other authorisation offering a right to stay for compassionate, humanitarian or other reasons to a third-country national staying illegally on their territory and encourages states to use these provisions. In such cases, it is stated that an issued return decision shall be withdrawn or suspended for the duration of the validity of the residence permit, long-stay visa or other authorisation granting a right to stay. ECRE believes it should be withdrawn rather than suspended as the issuance of permit settles the legal stay of the individual.

Where return is postponed as per Article 14, if return is not possible after a maximum of two reviews of the postponement, then the return decision should be withdrawn and long-term residence awarded (see Article 14).

ECRE recommends the following amendments to Article 7:

Article 7
Issuance of a return decision

Article 7(1): A return decision ~~shall~~ ***may*** be issued to any third-country national staying illegally on their territory by competent authorities of the Member States, without prejudice to the exceptions referred to in Article 8.

New Article 7(1)(a)

Where a return decision cannot be issued, including because return is currently not feasible or possible, the Member State should review the options available in national law and where relevant a temporary status shall be issued allowing the third-country national to reside lawfully on the territory of the Member State. Their legal status, rights and obligations will be provided to them in writing in a language they understand or could be reasonably expected to understand.

Article 7(4) should be replaced by the following:

A return decision shall indicate the country of return. A third-country national has the right to

9. ECtHR, Judgment of 11 October 2011, Auad v. Bulgaria, Application no. 46390/10, para 133.
10. ECtHR, Judgment of 15 April 2014, Asalya v. Turkey, Application no. 43875/09, para 113.

take an informed decision to return to a different country, other than the one named in the return decision, should they so wish and the third country be willing to accept them.

Article 7(5): The third-country national shall, ~~**upon request**~~, be provided with a written or oral translation of the main elements of the return decision, as referred to in paragraph 2, including information on the available legal remedies in a language the third-country national understands or may reasonably be presumed to understand.

Article 7 (9) This Article shall not affect Member States' decisions to grant at any moment an autonomous residence permit, long-stay visa or other authorisation offering a right to stay for compassionate, humanitarian or other reasons to a third-country national staying illegally on their territory. In such cases, an issued return decision shall be withdrawn ~~**or suspended for the duration of the validity of the residence permit, long-stay visa or other authorisation offering a right to stay**~~.

Recital (17) Often, and especially in cases where there is no cooperation by the third country national, it is difficult for the competent authorities to identify the country of return at the time of issuing the return decision. In such cases, the competent authorities should ~~**determine the country of return on the basis of the information available and indicate the most likely country or countries in the return decision**~~ ***not issue a return decision. If it is discovered that the wrong country has been identified, then the return decision should be withdrawn and any corresponding alert deleted in the Schengen Information System by the issuing Member State.***

Article 8: Exceptions from the obligation to issue a return decision

Article 8 provides for instances where Member States are not obliged to issue a return decision, creating exceptions to the obligation in Article 7, above. The first exception is when there is a transfer to another Member State as part of the procedure provided for in Article 23a of the SBC, the immediate return at an internal border of the EU to the Member State that the person is leaving. ECRE remains critical of this procedure which could be seen as an extension of the unlawful practice of summary returns at the EU's internal borders.[11]

Although it is not made explicit, ECRE's reading of the proposal is that if the person falls within the scope of the Return Regulation, then the receiving Member State is required to issue a return decision, with the exception applying only to the Member State transferring the person. (It should be noted that asylum applicants are excluded from this provision of the SBC so anyone who has made or who makes an asylum application should not be transferred back in any case.)

As noted in Article 3 on the scope of the Regulation, the European Parliament report on the implementation of the Return Directive[12] showed that Member States make use of the possibility offered in the current Return Directive Article 2(2)(a) not to apply the Directive in certain cases. They conclude that this creates parallel regimes and procedures falling outside the scope of the Directive that offer fewer safeguards compared to the regular return procedure. They highlight no term for voluntary return, no suspensive effect of an appeal and fewer restrictions on the length of detention as concerns, as well as lower levels of protection, increasing the risks of push-backs and *refoulement*. For these reasons, ECRE recommends deleting Article 8(1).

ECRE suggests the following amendments to Article 8:

Article 8
Exceptions from obligation to issue a return decision

Delete Article 8(1).

Article 8(4): A return decision ~~shall~~ ***may*** not be issued in cases where the third-country national is the subject of an enforceable return decision issued by another Member State. In this case, the procedure described in Article 9 shall apply.

11. See ECRE Comments on the Schengen Borders Code: ECRE Comments on the Commission Proposal to Amend the Schengen Borders Code | European Council on Refugees and Exiles (ECRE)
12. European Parliament, Report on the implementation of the Return Directive 2.12.2020 - (2019/2208(INI)), Committee on Civil Liberties, Justice and Home Affairs, available here.

Article 9: Recognition and enforcement of return decisions issues by another Member State

The Regulation will eventually render mandatory the (currently little used) option for the mutual recognition of return decisions. Under Article 9(2), the Regulation foresees a transition period until July 2027, during which the "legal and technical arrangements" should be put in place by the Member States to implement the provisions on the European Return Order. The Commission will then assess the situation and prepare an Implementing Decision to render mutual recognition mandatory. Until then it remains optional as per Article 9(1).

Under Article 9(4), a Member State may refuse to recognise a return decision if it plans to remove the person to a third country other than the one stated in the original decision. This seems to mean that a Member State should only recognise the return decision itself, but that the destination country for return can change depending on the enforcing Member State's decision.

Obstacles to mutual recognition

Despite the relevant Directive[13] being in place since 2001 and the European Commission's 2023 Recommendation on mutual recognition,[14] many Member States still do not apply the provisions on mutual recognition of return decisions. The obstacles identified include the non-transposition of the relevant EU legislation into their national legislation, difficulties relating to data protection, the quality and timeliness of data on return decisions issued, and different information contained in return decisions from different Member States.[15] A reluctance to take accountability for decisions taken by other Member States and the heavy administrative burden have also been reported.[16]

Since 7 March 2023, the renewed SIS has allowed Member States to see whether a third-country national is already subject to a return decision issued by another Member State, making it easier to recognise the return decision issued, although currently little is known about whether this has increased the uptake of mutual recognition or about any impact it on individuals and their rights.

Concerns about mutual recognition

There are several concerns associated with the mandatory mutual recognition of return decisions. Currently, recognition rates for asylum applications vary significantly across Member States, a situation often referred to by ECRE as an "asylum lottery".[17] For example, in 2024[18], recognition rates for certain groups of asylum seekers range from as low as 10% in Bulgaria to as high as 88% in Italy, 76% in Spain, or 39% in Belgium, without any clear, case-based justification for such disparities.

Although the APR aims to harmonise asylum procedures across Member States, discrepancies in recognition rates may still persist. As a result, an individual who receives a return decision in a Member State with a low recognition rate might otherwise have qualified for protection in another Member State.

In addition, decisions to grant national forms of protection on humanitarian or other grounds remain entirely at the discretion of individual Member State, depending on their willingness, capacity and legal tools for doing so. Article 7(9) of the Return Regulation proposal allows Member States to grant, at any time, an autonomous residence permit or another form of authorisation for compassionate or humanitarian reasons. This implies that a Member State could proceed with the removal of a TCN who might otherwise qualify for residence under its national law.

The proposal lacks clarity on the situation of TCNs who have already served the maximum period of detention under the proposed Return Regulation in one Member State. If such individuals are subsequently found in another Member State, it is unclear whether they could be subjected to detention again, raising serious concerns about legal certainty and proportionality.

The proposal fails to clarify the status of TCNs located in the enforcing Member State while the return decision

13. Directive 2001/40/EC on the mutual recognition of decisions on the expulsion of non-EU nationals
14. European Commission, Commission recommendation on mutual recognition of returns and expediting returns, 2023, https://home-affairs.ec.europa.eu/commission-recommendation-mutual-recognition-returns-decisions-and-expediting-returns_en.
15. Council of the European Union, Information from the Presidency regarding a pilot project on mutual recognition of return decisions, available here.
16. EPC, Returns under the spotlight: Towards an effective common EU system? March 2025 Available here.
17. ECRE, Analysis of asylum statistics in Europe, June 2020, available here
18. EUAA, Latest asylum trends – annual analysis, March 2025, available here

is under judicial review in the issuing Member State, particularly with respect to the possibility of attending the hearing remotely or submitting new information from the enforcing Member State. Member States would only be able to avoid recognition of another Member State's return decision on public policy grounds or if the country of return differs from that in the original decision.

Given the difficulties that have been experienced to date with mutual recognition of return decisions, and the lack of any impact assessment, including on fundamental rights such as the right to an effective remedy**,** allowing Member States to adapt their systems before making mutual recognition obligatory would be a prudent way to proceed. To ensure that the various concerns regarding fundamental rights are addressed, the proposed assessment should also include a review of compliance with fundamental rights standards carried out by the Fundamental Rights Agency (FRA). Depending on the outcome of such an assessment, the decision to proceed with the issuance of an implementing decision should be taken. Thus, a Council Implementing Decision should only be adopted if a comprehensive assessment confirms that it is warranted.

Overall, ECRE recommends that mutual recognition should not be made mandatory. In cases where a Member State chooses to recognise a return decision issued by another Member State, the TCN should still be granted the right to legal remedies — both to appeal the return decision and before enforcing the return decision. The enforcing Member State must ensure that its enforcement would not result in a violation of the principle of *non-refoulement* and that all procedural guarantees are upheld. The enforcing Member State should also provide counselling on return and reintegration support.

The Regulation does not require the enforcing Member State to assess whether the new destination country is safe for the individual, which also raises concerns. Taking as an example gender-specific risks, if a woman challenges her return decision in the issuing Member State, her legal arguments are likely to be based on the original return destination. Different countries have different levels of protection for women and since Member States interpret "vulnerability" differently, a woman recognised as vulnerable in one country might not receive the same protections if transferred to another. Therefore, if the enforcing Member States changes the destination, she may lose the opportunity to challenge the return based on real risks in the new country. If a woman or girl is originally set to be returned to country where she has some protection such as family support but the enforcing Member State chooses a different country, she may face increased risks of GBV, trafficking, or other forms of persecution.

Mutual recognition of protection decisions

If the co-legislators decide to progress with the mutual recognition of return decisions, then the proposal for mutual recognition of protection decisions should also be revived. If it is considered that sufficient harmonisation of decision-making and mutual trust is present for the mutual recognition of return decisions to become a mandatory requirement, there is no logical reason for not similarly advancing with the mutual recognition of decisions to grant international protection.

ECRE recommends the following amendments to Article 9:

Article 9
Recognition and enforcement of return decisions issued by another Member State

Article 9(2):

By 1 July 2027, the Commission ~~shall~~ ***may*** adopt an implementing decision for the application of paragraph 3, ***pending the outcome of*** ~~**based on**~~ an assessment of whether the legal and technical arrangements put in place by the Member State to make available the European Return Order through the Schengen Information System referred to in Article 7(7) are effective. ***This should include an assessment of the European Return Order with fundamental rights standards carried out by the Fundamental Rights Agency, as well as of the impact of this provision on fundamental rights more generally, including on the right to effective remedy.*** The Commission shall inform the European Parliament and the Council of the results of its assessment. The implementing decision shall be adopted in accordance with the procedure referred to in Article 49(2).

(4) For the purposes of applying paragraph 3, a Member State may decide not to recognise or enforce a return decision of the issuing Member State where the enforcement is manifestly contrary to public policy in the enforcing Member State, or on the humanitarian and compassionate ground or where the third-country national is to be removed to a different third-country than indicated in the return decision of

the issuing Member State. ***The following safeguards should be considered:***

a) the new destination must be at least as safe as the original one in terms of international human rights and refugee law protections

b) The third country national shall have the right to appeal a change in destination if it exposes the person to persecution or other risks of inhumane or degrading treatment.

Recital (18) where a third-country national present on the territory of a Member State subject to an enforceable return decision from another Member State, that decision ~~**should**~~ ***may*** be recognised and enforced. Recognition and enforcement of return decisions should facilitate and accelerate the return process on the basis of enhanced cooperation and mutual trust between Member States. They can also contribute to deterring irregular migrants and discouraging unauthorised secondary movements within the Union, as well as limiting delays in the return process. ~~**The remedy against the return decisions should be exercised in the issuing Member State**~~. ***Individuals should have access to legal remedies to appeal against the return decision issued by another Member State as well as to appeal any change in country of return.***

Article 10: Issuance of an Entry Ban

Issuing an entry ban

Article 10 sets out circumstances in which the Member States must or may issue an entry ban with the return decision and where they may impose an entry ban even without issuance of a return decision. Recital (20) also mentions that the effects of national return measures should continue to be given a Union dimension by establishing an entry ban prohibiting entry into and stay on the territory of all Member States. It is unclear which "national return measures" fall within the scope of the Regulation.

Article 10(1) lays down an obligation for Member States to impose an entry ban on irregularly staying third country nationals in all cases where the person is subject to removal under Article 12, covering refusal to cooperate, secondary movement, security risks, and failure to comply with the time limits set for voluntary return, and then those falling under the scope of Article 13 on time limits or under Article 16 (security risks). The points at Article 10(1)(b) and (c) appear redundant because it repeats categories already captured by Article 10(1)(a) as Article 12 on removal covers cases under Articles 13 and 16. In short, Member States must issue an entry ban – of up to 10 years – for all people who refuse to cooperate as defined in Article 21, who constitute a security risk or who refuse to leave by the time limit set for voluntary departure.

Under Article 10(2), in all other cases the issuing of an entry ban remains optional, taking into account the relevant circumstances, in particular the level of cooperation of the third-country national. Given that there is now a wide-ranging obligation to cooperate, it is quite conceivable that the combined application of Articles 10 and 21 may lead to the near systematic imposition of entry bans on persons subject to return decisions, given how many people may be found to be non-cooperative.

Length of entry bans

The length of the entry ban has also been extended to 10 years with further extensions of 5 years possible and no upper limit specified, possibly aiming to facilitate Poland's recent proposal for life-long entry bans.[19] According to Article 10(7) the extensions will be based on an individual assessment with due regard to all the relevant circumstances, in particular duly substantiated reasons from the competent authorities as to why it is necessary to stop the third-country national from re-entering the territory of the Member States. The idea of a Member State conducting a detailed individual assessment 10 or 20 years after a person has been banned from entering the EU seems difficult to say the least, as does the ability for individuals to access their right to defence in practice.

Entry bans without return decision

Article 10(4) allows Member States to impose an entry ban which does not accompany a return decision on a third-

19. Statewatch, Polish government proposes life-long EU entry bans for deportees (2025) available here.

country national who has been irregularly staying in the territory of the Member States and whose irregular stay is detected in connection with border checks carried out at exit in accordance with Article 8 of the SBC. This is justified on the basis of the specific circumstances of the individual case, taking into account the principle of proportionality and the rights of defence and avoiding postponing the departure of the third country national as much as possible. Recital (20) states that the aim is to prevent further re-entry and reduce the risks of irregular migration.

The possibility to impose an entry ban for the Schengen area to a person who clearly intends to leave the territory of the Member States voluntarily seems contrary to the rationale of entry bans, which is to sanction a person's non-compliance with an obligation to return. Imposed upon exit on persons who have stayed irregularly on the territory, the entry ban would be used as a tool to retroactively penalise irregular residence. This may in practice be counterproductive in view of the Commission's objective of increasing the number of returns because the prospect of an entry ban imposed upon exit may discourage TCNs from leaving the EU. Moreover, carrying out an individual assessment taking into account proportionality on the occasion of a border exit check, without being able to rely on a reasoned return decision, seems extremely challenging and may result in poorly grounded decisions with potentially grave consequences for the individual concerned.

Article 10(5) provides that the authorities may refrain from issuing an entry ban in individual cases for humanitarian reasons or if the third-country national duly cooperates with the competent authorities, including by enrolling in a return and reintegration programme.

ECRE reiterates its disagreement with the imposition of an entry ban on asylum seekers whose applications have been rejected and who are facing return because removal should be considered a sufficient resolution of their situation.[20] Furthermore, in practical terms such a measure may have far-reaching negative consequences for persons seeking asylum in the EU. An EU-wide entry ban constitutes a blunt instrument because it does not take into account possible changes in the countries of origin that may entail a risk of persecution and force individuals to leave again after they have been returned. A re-entry ban may have devastating effects on the right to asylum and may lead to serious breaches of international human rights and refugee law, including the risk of separating families.

In addition, persisting disparities in asylum procedures (the "asylum lottery") means that asylum seekers are still likely to be unfairly denied protection in some Member States but not others. In this context, EU-wide entry bans could place the consequences of poor implementation of the asylum *acquis* on the individual because someone unfairly denied protection and issued with a return decision may also receive an entry ban, denying future access to an asylum procedure. In addition, the Regulation does not state that the provisions regulating entry bans will apply without prejudice to the right to international protection as was included in the recast Return Directive proposal. The lack of tangible guarantees safeguarding such a right, combined with the obligation to register the entry bans in the SIS, would very likely undermine the right to asylum.

ECRE recommends the following amendments to Article 10:

Article 10
Issuance of an entry ban

Article 10(1): Return decisions ~~**shall**~~ ***may*** be accompanied by an entry ban XX. The rest of the Article should be deleted.

Deletion of Article 10(2), 10(3), 10(4), 10(6), 10(7):

Deletion of Recital (20)

Article 10(5): The competent authorities may refrain from issuing an entry ban in individual cases ***particularly*** for humanitarian reasons or ~~**if the third-country national duly cooperates with the competent authorities, included by enrolling**~~ ***where an individual has enrolled*** in a return and reintegration programme.

Article 11: Withdrawal, suspension or shortening of the duration of an entry ban

Article 11(1) details how an entry ban may be withdrawn, suspended or shortened where the third-country

20. ECRE, Information note on the 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, January 2009: https://bit.ly/2Aqr2J3

national demonstrates (a) they have returned voluntarily; (b) they have not already been the subject of a return decision or removal order in the past; or (c) have not entered the territory of a Member State while an entry ban was in force. Article 11(2) provides for the withdrawal, suspension or shortening of an entry ban in individual cases including for humanitarian reasons, taking into account all the relevant circumstances. Article 11(3) affords third-country nationals the possibility to request the withdrawal, suspension or shortening of the entry ban.

As such and similarly to provisions in other instruments, the Regulation is excessively complex, by first setting out an unnecessary obligation which is then followed by a set of exceptions to the obligation. For the people affected and Member States alike, retaining discretion would be preferable to imposing blanket or automatic provisions and then adding exceptions.

In addition, how to appeal an entry ban is not entirely clear. It seems from Article 11(1)(a) that the third-country national will have left the EU at this stage and then demonstrates from outside the territory of a Member State that they are no longer present. In Article 27 on appeals, if an entry ban is the only decision to be challenged, it may be appealed separately from the return decision. However, there is no clear procedure as to how this would be done from a third country, including in cases where entry bans could then be extended for decades.

This is of particular concern in light of recent reports of at least one Member State providing potentially misleading information in cases where no information about the entry ban alert was provided to the data subject, for instance due to threats to public or national security. The same report includes that the national data authority did not have the capacity to supervise the SIS and VIS databases.[21]

ECRE recommends the following amendments to Article 11:

Article 11
Withdrawal, suspension or shortening of the duration of an entry ban

New 11(4) The procedure for the withdrawal, suspension or shortening of the duration of an entry ban shall be set out in national law and include an accessible procedure for third-country nationals who have already left the territory of the EU. This procedure shall be communicated to the third-country national in writing, in simple and accessible language and in a language which the third-country national understands or is reasonably supposed to understand, including through written or oral translation and interpretation as necessary.

Article 12: Removal

Article 12 deals with the enforcement of removal, whereby the state removes the person from the country. Removal (as distinguished from voluntary return in Article 13) is required where the third-country national refuses to cooperate, moves to another Member State without authorisation (including during the voluntary return process), is a security risk according to Article 16, or does not leave the territory of the Member State by the time the period of voluntary return is over.

A Member State may issue a separate administrative or judicial decision in writing ordering removal (Article 12(2)) and necessary and proportionate coercive measures that do not exceed a threshold of reasonable force may be used (Article 12(4)). Issuing a separate administrative or judicial decision in writing to order the removal means that it can be challenged separately to the return decision if needed.

A positive development is that the authorities shall assess compliance with *non-refoulement* by reference to the country of return and duly examine changes in circumstances and new elements before return (Article 12(3)). The provision reflects the case law of both European courts which reiterates the absolute nature of the principle of *non-refoulement*[22] enshrined in Article 3 ECHR and Article 19 EU Charter. This is in line with Recital (11), which states that no one may be removed, expelled or extradited to a third country where there

21. Statewatch, Italian police are "misleading" people about Schengen entry bans, says internal EU report, 24 February 2025, available here.
22. See for example: ECtHR, Saadi v Italy, no. 37201/06, 28 February 2008, para 127. ECtHR, Judgment of 23 July 2020, M.K. and others v Poland, Applications nos. 40503/17, 42902/17 and 43643/17, para 178; CJEU, Judgment of 5 April 2016, Aranyosi, C-404/15 and C-659/15 PPU, paras 85-87.

is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment.

However, other elements should also be examined, not only *refoulement*. The jurisprudence of the ECtHR, for example, has expanded the scope of protection against deportation by interpreting Article 3 of the ECHR as prohibiting expulsion where there are risks of other violations of human rights.[23]

There is also the possibility for the Member State to provide a date for voluntary return (Article 12(6)) when a third-country national is clearly cooperating, effectively meaning an individual can "change lanes" from forced to voluntary return, which has not always been clear in all Member States.

ECRE recommends the following amendments to Article 12:

Article 12
Removal

1.When the third-country national is not subject to removal in accordance with Article 13 the third-country national subject to a return decision shall be removed when: […]

2.Member States' competent authorities ~~may~~ shall issue a separate administrative or judicial decision in writing ordering the removal.

Recital (21) Third-country nationals can be returned by coercive measures through removal or by voluntarily complying with the obligation to leave. The two types of return should be linked to avoid gaps in the system. Whereas cooperating third-country nationals should continue to be returned primarily through ***voluntary return compliance with an obligation to return,*** reinforced rules on removal seek to ensure a direct and immediate consequence in case the third-country national does not respect the date by which they need to leave. Coercive measures should be subject to the principles of proportionality and effectiveness with regard to the means used and objectives pursued.

Article 13: Voluntary return

The proposal for a Return Regulation now only includes the concept of voluntary return and not voluntary departure in addition to voluntary return – the two are run together. In the current Return Directive Article 3(8), voluntary departure refers to compliance with the obligation to return within the time-limit fixed for that purpose in the return decision and, despite some ambiguity in the text, is still distinct from voluntary return.

In ECRE's view, return can only be truly voluntary when people make an informed choice and freely consent to return. At the opposite end of the spectrum, forcible removal is a situation describes the return or deportation of people who are required by law to leave but have not consented to do so, and who are then removed by force or coercive measures by the state. Voluntary departure lies between the two: the individual is required to return but they have some choice as to when and how they return. In the current Return Directive where there are no reasons to believe that it would undermine the purpose of a return procedure, voluntary departure should be given preference over forced removal and a period for voluntary departure must be granted (Recital (10)).

In the proposed Return Regulation, first, the concepts of voluntary return and voluntary departure are merged. Only the term voluntary return is used, including for situations which in ECRE's view should more accurately be termed voluntary departure. Second, while cooperating TCNs should be returned primarily through "voluntary return", reinforced rules on forced return seek to ensure a direct and immediate consequence if the person does not respect the deadline to leave (Recital (21)).

Article 13(1) begins "When the third-country national is not subject to removal in accordance with Article 12", thus distinguishing voluntary return from forcible removal. The reasoning behind the shift is the view that if forcible removal becomes a real threat, then more people will opt for voluntary return, i.e. will comply with

23. Prohibiting removal not only where there is a risk of torture or inhuman or degrading treatment (ECtHR, Soering v United Kingdom, 7 July 1989, Application No. 14038/88, para. 111; ECtHR, Sufi and Elmi v United Kingdom, 28 June 2011, Applications Nos. 8319/07 and 11449/07, paras 213–218; but also where there is a real risk of the death penalty (ECtHR, Al-Saadoon and Mufdhi v United Kingdom, 2 March 2010, Application No. 61498/08, paras 115–120), a risk of slavery (ECtHR, Ould Barar v Sweden, 19 January 1999, Application No. 42367/98), serious violations of the right to liberty and security (ECtHR, Othman (Abu Qatada) v United Kingdom, 17 January 2012, Application No. 8139/09, paras 232–233), or a flagrant denial of justice (ECtHR, Al Nashiri v Poland, 24 July 2014, Application No. 28761/11, paras 563–565).

the return order. Voluntary return becomes the means of avoiding forcible removal rather than a genuinely voluntary decision to return. Increasing numbers of individuals will consent to leave when induced to do so by means of incentives, threats or sanctions, and harsh conditions, which often force "consent".

Article 13(2) says Member States shall set a date for voluntary return, depending on the individual circumstances of the case. This should not exceed 30 days from the date of notification of the return decision indicating the individual can leave earlier. ECRE welcomes the inclusion of a 30-day period for voluntary compliance with the obligation to return, however, there is no minimum period specified –

the previous minimum time period of at least seven days has been deleted. This means in theory that Member States could set very short time limits for voluntary departure, for example, they could decide on a period for voluntary compliance of just two or three days.[24]

Member States have collected little information on what supports third-country nationals to accept voluntary return,[25] but there is scant evidence to show that providing a period of voluntary departure of less than seven days will increase the number of those who will take up voluntary departure. The Danish Refugee Council uses an evidence-based methodology[26] for return counselling that recommends that people have sufficient time to be able to relate to their (new) situation in a return procedure, consider their choices, and build-up trust in the return counsellor. To take a decision in less than seven days would be insufficient and people and families would be forced to take quicker decisions with very little time to prepare including the preparation for return and reintegration. It should be recalled that the objective is to encourage the use of voluntary departure after a return decision so reasonable minimum time periods should be set. ECRE recommends reinstating the seven-day period of the Return Directive.

Member States may provide for a longer period than 30 days (Article 13(3)) taking into account the specific circumstances of the individual case, such as family links, children attending school, participation in a programme supporting return and reintegration, and compliance with the obligation to cooperate in Article 21. ECRE welcomes the possibility of an extension, in particular, allowing children to complete the current school period should constitute a key consideration for Member States when deciding on the timing of return.

Finally, the concept of voluntary compliance with the obligation to return is very much linked with the wide-ranging obligation to cooperate (see Article 21). People such as rejected asylum seekers who receive return decisions, have believed until that point that they were refugees, and after having been through often complicated asylum procedures, need time to really understand the legal decision and its consequences. The time limits do not allow this time for reflection. The obligation to cooperate itself is so broad and subjective and places such an excessive burden of proof on the people affected to demonstrate cooperation, it could seriously limit the option of voluntary departure.

Thus, while the Commission claims that voluntary return is its priority, the measures introduced in the proposal suggest otherwise. The proposal will make it more difficult for people to return of their own accord following a return decision as it introduces a wide range of circumstances in which voluntary return is not available.

ECRE proposes the following amendments to Article 13:

Article 13
Voluntary return

Article 13: Voluntary ~~Return~~ ***Compliance with an obligation to return***

1.~~**When the third-country national is not subject to removal in accordance with Article 12, the**~~ The return decision shall indicate a date by which the third-country national shall leave the territory of the Member States and shall state the possibility for the third-country national to leave earlier.

2.The date referred to in paragraph 1 shall be determined with due regard to the specific circumstances of the individual case. The date by which the third-country national shall leave ***shall be at least 7 days but*** not exceed 30 days from the date of notification of the return decision.

24. In DRC's experience with return counselling, providing sufficient time is important to establish trust and provide information about options. Read more here: DRC Return Counselling Methodology Brief | DRC Danish Refugee Council
25. See EMN inform Incentives and motives for voluntary departure, 2022 available here.
26. Danish Refugee Council, Return Counselling Methodology, DRC Return Counselling Methodology Brief | DRC Danish Refugee Council.

3.Member States may provide for a longer period or extend the period to leave their territory in accordance with paragraph 1 taking into account the specific circumstances of the individual case, such as family links, the existence of children attending school, ***any specific preparation needed, particularly for vulnerable groups including the assessment of health and medical needs***, participation in a programme supporting return and reintegration pursuant to Article 46(3) ~~**and compliance with the obligation to cooperate as set out in Article 21**~~. Any extension of the period to leave shall be provided in writing to the third-country national.

New 3(a) Where voluntary compliance with an obligation to return is not considered suitable for the third-country national and return in accordance with Article 12 is ordered, the third-country national will receive the reasoning behind this decision in writing including an outline of the accessible legal remedies available.

4.The third-country national shall leave the territory of the Member States by the date determined pursuant to paragraph 1. If not, ***the circumstances shall be reviewed to see*** if the third-country national ~~**shall**~~ ***should*** be subject of removal in accordance with Article 12***, or if a further extension is needed.***

Article 14: Conditions for postponing removal

Article 14 describes the circumstances under which Member States must postpone removal, which include situations when it would violate the principle of *non-refoulement* (Article 14 (1)(a)) or when the appeal against a return decision has suspensive effect (Article 14 (1)(b)). The Article requires requests for postponements to be duly substantiated (Article 14(3)).

The removal should be postponed for an appropriate period, taking into account the specific circumstances of the individual case. The individual should receive a written confirmation that sets out the period of the postponement and their rights during the period. The Article also obliges Member States to regularly review the postponement, which should take place at least every 6 months.

During the time of the postponement, the Article requires Member States to consider the person's basic needs; family unity with family members present in the Member State's territory; emergency health care and essential treatment of illness; access of minors to the basic education system subject to the length of their stay; and special needs of vulnerable persons (Article 14 (6)).

Article 14 also allows Member States to apply alternatives to detention to people whose removal is postponed.

ECRE welcomes the provision allowing for the postponement of return in situations where there is a risk of violation of the principle of *non-refoulement,* as well as the accompanying guarantee that, during such postponements, TCNs shall have access to basic rights and services. However, where there is a clear and persistent risk of *refoulement* and where the situation in the country of origin is unlikely to improve in the foreseeable future, a return decision should not be issued at all. Instead, people should be granted a right to stay on humanitarian or compassionate grounds, in line with Article 7(9) of the proposed Regulation. These forms of protection are already subject to periodic review, and where the risk of *refoulement* persists following two extensions, the competent authorities should grant the person concerned a right to long-term residence.

A useful example can be found in Germany,[27] where authorities issue a residence permit based on a "ban on deportation" to TCNs who do not qualify for asylum, refugee status, or subsidiary protection, but whose return would nonetheless violate the principle of *non-refoulement*. This approach would also help address low return rates by avoiding the issuance of return decisions in cases where there is no realistic prospect of enforcement and also provide clarity and stability for individuals who cannot be returned.

In addition, beyond the scope of the principle of *non-refoulement*, there are other categories of TCNs who cannot be returned but who nonetheless still receive a return decision. The proposed Regulation contains no explicit provisions to address the situation of these individuals. As a result, they frequently find themselves in legal limbo, with limited or no rights, and without the possibility of lawful employment, exposing them to destitution and marginalisation.

27. Federal Office for Migration and Refugees, National ban on deportation, November 2018, available here

The Regulation does not establish a direct obligation for Member States to explore legal pathways to regularisation for individuals who cannot be returned or deported, such as those who are vulnerable, who cannot be returned for reasons beyond their control, or for those who are engaged in work, or have strong family or community ties. ECRE believes that Member States should be required to undertake an individual assessment according to the possibilities available in national law where these factors apply. In the case of asylum seekers whose applications have been rejected, but who have resided for several years in the host country, often due to lengthy or backlogged procedures, Member States should take into account the duration and depth of their integration when considering whether to pursue return. These individuals should be provided with the opportunity to apply for permanent legal status, in line with principles of fairness, dignity, and inclusion.

Paragraph 7 states that if removal is postponed, alternative measures to detention, as set out in Article 31, may be applied. ECRE questions the use of detention and other restrictive measures for individuals for whom return is not possible, be that a temporary or permanent situation. Detention and restrictive alternatives to detention should be used only following an individual assessment and only where there is a realistic prospect of return.[28]

ECRE recommends the following changes to Article 14:

Article 14
Conditions for postponing removal

Removal pursuant to Article 12 shall be postponed in the following circumstances:

a. when it would violate the principle of non-refoulement; or
b. when and for as long as suspension of the return decision in accordance with Article 28 is in place.

2. Removal pursuant to Article 12 may be postponed for an appropriate period, taking into account the specific circumstances of the individual case.

3. If the third-country national requests postponement of removal, the request shall be duly substantiated.

4. When taking a decision in accordance with paragraph 1 or paragraph 2, Member States shall provide the third-country national concerned with a written confirmation setting out the period of postponement and their rights during that period.

5. The decision to postpone removal in accordance with paragraph 1 or paragraph 2 shall be regularly reviewed, and at least every 6 months ***and after two reviews if the conditions do not change on the ground, the competent authorities shall grant access to a long-term residence permit***.

6. The following shall be taken into account concerning the situation of the third-country national during periods for which the removal has been postponed:

a. basic needs;
b. family unity with family members present in the Member State's territory;
c. emergency health care and essential treatment of illness;
d. access of minors to the basic education system subject to the length of their stay;
e. special needs of vulnerable persons.

~~**7. If the removal is postponed, the measures set out in Article 31 may be applied when the conditions are fulfilled.**~~

Article 15: Monitoring of removal

Article 15 provides that Member States establish an independent monitoring mechanism during return operations. It sets out the following:

1. Member States shall provide for an independent mechanism to monitor the respect of fundamental rights during removal operations. Member States shall equip the independent monitoring mechanism with

28. Before applying any restrictive measures, authorities must conduct an individual assessment, as underlined by the ECtHR in Louled Massoud v. Malta where the Court expressed serious doubts about the validity of detention based on deportation grounds in the absence of a realistic prospect of removal and due diligence by domestic authorities. ECtHR, Judgment of 27 July 2010, Louled Massoud v. Malta, No. 24340/08, para. 69.

appropriate means.

2. The independent monitoring mechanism shall select the removal operations to monitor based on a risk assessment and conduct its activities on the basis of desk review and on-the-spot checks which may be unannounced. Member States shall inform the monitoring body in advance about upcoming removal operations and ensure access to relevant locations.
3. Substantiated allegations of failure to respect fundamental rights during removal operations shall be communicated to the competent national authority by the monitoring mechanism. The competent authorities shall deal with such allegations effectively and without undue delay.

In ECRE's view an effective and independent monitoring mechanism for return procedures is essential to ensure that TCNs are returned in full compliance with fundamental rights and human dignity at all stages of the process. The Return Directive requires Member States to establish an ''effective'' monitoring system for return procedures. However, it lacks detail and reference to specific safeguards, leading to inconsistent implementation across Member States. As a result, many Member States have failed to establish truly independent and effective monitoring mechanisms. FRA's 2024 annual report[29] on forced return monitoring highlights persistent challenges across Member States, including a lack of independence, transparency and funding. Funding remains a key challenge. In some Member States, return monitoring has been disrupted due to financial constraints.

ECRE welcomes the proposal to introduce an independent monitoring mechanism with clearer criteria and stronger safeguards than the Return Directive, which lacked clarity and enforceability. However, further improvements are needed. In particular, monitoring should cover all stages of the return process, from the pre-return phase to the final handover of TCNs to the receiving state's authorities. In addition, gender expertise in the monitoring mechanism should be required. The monitoring body's ability to effectively assess whether women's and girls' rights are respected could be severely limited without such expertise. Additionally, return monitors should be required to publish regular reports on their activities and findings to enhance transparency and accountability of the return process.

Finally, the monitoring mechanism in the proposed Return Regulation should mirror that of Article 10 of the Screening Regulation (EU) 2024/1356 and the safeguards and provisions it includes. This aligns the Return Regulation with the Pact as well as providing a seamless link between procedures and monitoring of fundamental rights.

ECRE strongly recommends that the co-legislators extend the provision for monitoring return procedures to include the return border procedure, as the RBPR[30] currently lacks measures for monitoring of forced returns.

ECRE proposes the following amendments to Article 15:

Article 15
Monitoring of the removal

1.Member States shall provide for an independent mechanism to monitor the respect of fundamental rights during removal operations ***and cover all stages of the return procedure***. Member States shall equip the independent monitoring mechanism with appropriate means, ***including adequate funding and resources.***

2.Put in place adequate safeguards to guarantee the independence of the independent monitoring mechanism. National Ombudspersons and national human rights institutions, including national preventive mechanisms established under the OPCAT, shall participate in the operation of the independent monitoring mechanism and may be appointed to carry out all or part of the tasks of the independent monitoring mechanism.

3.The independent monitoring mechanism may also involve relevant international and non-governmental organisations and public bodies independent from the authorities carrying out the monitoring.

4.The Fundamental Rights Agency shall issue general guidance for Member States on the

29. FRA, Forced Return Monitoring Systems 2024 update, October 2024, available here.
30. Regulation establishing a return border procedure, and amending regulation (EU) 2021/1148, available here

establishment of a monitoring mechanism and its independent functioning. Member States may request the Fundamental Rights Agency to support them in developing their independent monitoring mechanism, including the safeguards for independence of such mechanisms, as well as the monitoring methodology and appropriate training schemes.

5.The independent monitoring mechanism shall ensure that its monitoring procedures incorporate a gender-sensitive perspective and include specific protocols for identifying and addressing gender-based violations. The independent monitoring body shall include experts trained in identifying gender-based violence, exploitation, and other rights violations affecting women and girls.

6.Member States shall extend the provision of an independent monitoring mechanism to monitor the respect of fundamental rights during the return border procedure.

~~2~~ 7. The independent monitoring mechanism shall select the removal operations to monitor based on a risk assessment and conduct its activities on the basis of desk review and on-the-spot checks which may be unannounced. Member States shall inform the monitoring body in advance about upcoming removal operations and ensure access to relevant locations.

~~3~~ 8. Substantiated allegations of failure to respect fundamental rights during removal operations shall be communicated to the competent national authority ***via establishing a confidential, child and gender-sensitive complaint mechanism*** by the monitoring mechanism. The competent authorities shall deal with such allegations effectively and without undue delay.

9. ***The independent monitoring mechanism shall publish reports on its activities and findings related to return operations.***

Article 16: Return of third-country nationals posing security risks

TCNs deemed to pose a security risk and thus fall under the scope of Article 16 are a) those "who pose a threat to public policy, to public security or to national security"; b) those for whom "there are serious grounds for believing that they have committed a serious criminal offence" (as defined in Article 2(2) of Council Framework Decision 2002/584/JHA48[31]; and c) where there are "clear indications" that the person intends to commit a serious criminal offence in the territory of a Member State.

TCNs posing a security risk shall be subject to removal as per Article 12. Article 16(3) then provides for derogations from other provisions of the Regulation which allow (but do not oblige) Member States to apply differential treatment to returnees posing a security risk. As follows:

a) They may be subject to an entry ban of up to 20 years rather than the maximum initial duration of 10 years set by Article 10 for other cases.

b) They may be detained (Article 29 provides that posing a security risk is a ground in itself for the use of detention).

c) They may be detained in prisons (albeit separated from criminals)

d) They may be subject to detention for longer than the maximum period of 24 months (12 months with the possibility to extend for another 12 months) set out in Article 32(3). No limit is set but the duration has to be determined by a judicial authority based on the individual circumstances and reviewed every three months.

A further derogation at Article 16(4) provides that the enforcement of the return decision shall not be suspended "unless there is a risk to breach the principle of non-refoulement".

ECRE's primary concerns are the definition of security risk and the range of discretionary measures available to Member States. The definition in Article 16(1)(a-c) generates concerns since it may be based on beliefs, fears and indications left to the interpretation and discretion of Member State authorities. Moreover, the maximum duration of detention (beyond the 24-month maximum period in Article 32(3)) is not set in the text but left to the discretion of the judicial authority.

The Pact also provides for TCNs who pose a security threat to have their application processed through the

31.

return border procedure with a separate ground to detain them.[32]

ECRE recommends the following amendments:

Article 16
Return of third-country nationals posing security risks

1.This Article shall apply to third-country nationals where:

a.they pose a threat to public policy, to public security or to national security;

~~b.there are serious grounds for believing that they have committed a serious criminal offence as referred to in Article 2(2) of Council Framework Decision 2002/584/JHA 48 ;~~

~~c.there are clear indications of his or her intention to commit an offence pursuant to point (b) of this paragraph in the territory of a Member State.~~

2.Third-country nationals falling within the scope of this Article shall be subject to removal in accordance with Article 12.

3.By way of derogation from the relevant provisions of this Regulation, third-country nationals falling within the scope of this Article may be:

~~a.subject to an entry ban issued in accordance with Article 10 that exceeds the maximum duration referred to in Article 10(6) by an additional maximum period of 10 years;~~

b.detained in accordance with Article 29(3), point (c);

~~c.detained in prisons and be kept separated from ordinary prisoners;~~

~~d.subject to detention for a period that exceeds the maximum duration referred to in Article 32(3) and that is determined by a judicial authority taking into account the circumstances of the individual case, and that is subject to a review by a judicial authority at least every three months.~~

~~4.By way of derogation from the provisions of Article 28(2) and (3), the enforcement of a return decision issued to a third-country national falling within the scope of this Article shall not be suspended unless there is a risk to breach the principle of non-refoulement.~~

Article 17: Return to a third country with which there is an agreement or arrangement

Return hubs

Article 17 covers return to a third country with which there is an agreement or arrangement and provides the legal basis for the development of "return hubs" – centres in third countries to which people with a return decision will be deported (with the exception of unaccompanied minors and families with minors (Article 17(4)).

ECRE raises the following concerns about the new provisions on transfer to third countries with which there is an agreement or arrangement. First, allowing return hubs to be established following "arrangements" is a flimsy legal basis for EU and Member State actions with significant legal and human consequences. Second, the use of informal arrangements in migration cooperation is a long-established means of avoiding the procedural requirements for the conclusion of international agreements set out in the Treaties and related judicial scrutiny, and as such undermines the rule of law in general and respect for EU primary law in particular. Third, such arrangements generally lack transparency in order to avoid generating popular opposition and thus undermine democratic accountability in the EU and the third country alike. Finally, ECRE notes that not all the specific pre-requisites recommended by FRA in its Position Paper on return hubs are included (see below).

Conditions for agreements or arrangements with third countries

Article 17(2) sets out the conditions that have to be met by the agreement or arrangement with the third

32. Article 5(3), Regulation (EU) 2024/1349 of 14 May 2024 establishing a return border procedure.

country. First, an agreement or arrangement "may only be concluded with a third country where international human rights standards and principles in accordance with international law, including the principle of non-refoulement, are respected." Second, the agreement or arrangement has to include the following elements:

a. the procedures applicable to the transfer of illegally staying third-country nationals from the territory of the Member States to the third country referred to in paragraph 1;
b. the conditions for the stay of the third-country national in the third country referred to in paragraph 1, including the respective obligations and responsibilities of the Member State and of that third country;
c. where applicable, the modalities of onward return to the country of origin or to another country where the third-country national voluntarily decides to return, and the consequences in the case where this is not possible;
d. the obligations of the third country referred to in the second sentence of paragraph 1;
e. an independent body or mechanism to monitor the effective application of the agreement or arrangement;
f. the consequences to be drawn in case of violations of the agreement or arrangement or significant change adversely impacting the situation of the third country.

Despite the references to fundamental rights, there is little or no detail on how the third countries will be expected to ensure fundamental rights. It is not stated that the third-country national will be notified in writing of a decision establishing the return hub as a return destination, and the possibility to challenge this decision before a judicial authority. There is no information on how the EU will judge whether international human rights standards and principles are respected in the third country. It is not clear which independent body or mechanism will be able to monitor the situation and any powers they may have in case of violations of rights. In addition, the monitoring body or mechanism monitors the application of the agreement and not what happens to the individual and their rights. Although Article 17(2)(f) covers violations of the agreement or adverse impacts on the situation of the third-country, there is no such provision on adverse impacts on the situation of the TCN and obligations of the EU.

FRA's Position Paper

In February 2025, FRA published a Position Paper on return hubs, in which it finds that, "Primary EU law does not ban the creation of return hubs but imposes considerable limitations". The paper sets out extensive preconditions that are required for return hubs to be lawful. It underlines that they are not "rights-free zones", not can they be used by states to evade their obligations. Member States and/or Frontex remain accountable for rights violations after the returnees are transferred to any hub and that this is different (ECRE would argue significantly different) from the situation where Member States hand over a third-country national without the right to stay to the authorities of a (neighbouring) third country based on a readmission agreement and then stop any further involvement with the returnee.[33]

FRA describes an extensive list of preconditions for the use of return hubs, including the following. Clear and robust safeguards are required. Articles 4 and 19 of the Charter prohibit any transfer if third-country nationals moved there would be exposed to serious harm, to inhuman or degrading treatment or to a flagrant breach of the right to liberty (such as arbitrary detention). There should be a formal international agreement between the EU or the Member State and third country. Considering the serious fundamental rights risks connected with the running of return hubs, any agreement which may be concluded with third countries envisaging the establishment of return hubs should include provisions on effective and independent human rights monitoring mechanisms. Then, a formal return decision should have been issued.

Other elements noted include that detention should only be used if it would have been lawful within the EU, and all entitlements to remedies should still be in place. To avoid a situation of limbo, the country of ultimate return should be indicated. Finally, the EU or the Member State will remain responsible for removal to the country of origin.

Thus, in FRA's view, the agreement setting up the return hub should comply with all elements of EU fundamental rights law, prevent arbitrary detention and set minimum standards for the material conditions and treatment of third-country nationals accommodated in the hub. If EU funds cover the costs of the return hub, even

33. Ibid.

partially, the specific safeguards applicable to the relevant EU funding instrument also apply.[34] As it stands, the Regulation falls short of the pre-requisites for such agreements proposed by FRA.

Onward transfer

Article 17(2)(c) and (f) list the modalities of onward return or further deportation to the country of origin or to another country where the third-country national voluntarily decides to return, and the consequences in the case where this is not possible. It then explains the consequences to be drawn in case of violations of the agreement or arrangement or significant change adversely impacting the situation of the third country. The inclusion of "consequences" here is a sharp reminder that these agreements are an outsourcing of Member States' responsibilities to countries where fundamental rights according to the Charter cannot be guaranteed.

In addition, no element of Article 17 clarifies the Commission's intentions regarding the use of these hubs: are they the last country of return or a temporary stopover while organising return to the country of origin? The lack of a definition gives rise to risks that hubs may be used opportunistically, particularly by Member States seeking to remove third-country nationals who cannot be returned to their country of origin (for health issues, risks of persecution), therefore shifting the legal limbo from the Member State to the return hub.

Families, women and girls

Article 17 poses clear risks of violations of human rights for all those being removed to a return hub however, but there are also specific risks to those in vulnerable situations, including women and girls, including the risk of violation of Article 4 (prohibition of torture and inhuman or degrading treatment) and Article 21 (non-discrimination) of the Charter, the non-refoulement principle under the 1951 Refugee Convention, and Article 5 of the Istanbul Convention, which obliges states to prevent, investigate, and prosecute acts of violence against women.

The ECtHR case *R.H. v. Sweden*[35] ruled that returning a woman to a country where she faces gender-based persecution can violate Article 3 (prohibition of inhuman treatment). There is also a lack of family reunification guarantees in third countries. Even if the returnee is sent to a third country and later seeks reunification with their family in the EU, there is no guarantee that the third country will allow them to leave or that the EU will permit reunification. The case *El Dernawi v. Libya* dealt with a Libyan man who was granted asylum in Switzerland. His wife and children, who remained in Libya, were approved for family reunification. However, they were unable to leave Libya because the authorities had confiscated their passports.[36]

Women fleeing domestic violence, honour-based violence, forced marriage, female genital mutilation (FGM), human trafficking, or other forms of gender-based persecution risk being directed into inappropriate asylum procedures that lack gender sensitivity. This may lead to their return to third countries where they face a serious risk of persecution, torture, inhuman or degrading treatment, or other human rights abuses. For instance, the Netherlands has considered designating Uganda as a return hub for African migrants, despite Uganda's poor human rights record, such as its 2023 Anti-Homosexuality Law, which includes severe penalties such as the death penalty for repeat "offenders".[37]

Although unaccompanied minors and families with minors are explicitly excluded from returns under this provision, there are still indirect risks related to family unity that disproportionately affect women. Dependent adult children may not be protected under this clause, resulting in potential separation. The principles established in CJEU cases like *Chavez-Vilchez v. Netherlands*[38] emphasise the importance of assessing the dependency relationships within families, regardless of the children's age. The CJEU highlighted that the assessment should consider the emotional and physical dependency between family members, not solely the legal definitions of minority. In addition, there could be potential issues with how Member States interpret this exclusion in specific situations, especially with single mothers and their children already in the EU. There could be a misinterpretation in some legal or policy settings where states might incorrectly believe that the exclusion of families with minors only applies to families arriving together (mother and child arriving simultaneously).

34. FRA, Planned return hubs in third countries: EU fundamental rights law issues, February 2025, https://fra.europa.eu/en/publication/2025/return-hubs?page=1#read-online.
35. European Database of Asylum Law (EDAL), ECtHR - R.H. v. Sweden, No. 4601/14, 10 September 2015, https://www.asylumlawdatabase.eu/en/content/ecthr-rh-v-sweden-no-460114-10-september-2015
36. Council of Europe, Realising the right to family reunification of refugees in Europe, p.18, https://migrant-integration.ec.europa.eu/library-document/realising-right-family-reunification-refugees-europe_en
37. Infomigrants, Migrant offshoring: the EU's plan to deport more rejected asylum seekers under scrutiny, https://www.infomigrants.net/en/post/63745/migrant-offshoring-the-eus-plan-to-deport-more-rejected-asylum-seekers-under-scrutiny
38. CJEU judgement H.C. Chavez-Vilchez and Others v Raad van bestuur van de Sociale verzekeringsbank and Others., https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:62015CJ0133

Many women returned under Article 17 will not have legal status in the third country, making them easy targets for traffickers. Women trafficked for sexual exploitation may be re-trafficked upon return.[39] In the ECtHR case *L.E. v. Greece*, the Court ruled that failure to prevent trafficking or protect victims violates Article 4 of the ECHR (prohibition of slavery and forced labour).

In addition, due to the lack of additional safeguards, women and girls may risk facing sexual and gender-based violence by guards, smugglers, or traffickers in return hubs or transit centres. Many third countries have documented cases of sexual violence against female migrants. For example, two Nigerian women have filed a case against Italy and Libya with a UN Committee, alleging that both countries failed to protect their human rights, exposing them to trafficking, exploitation, and abuse. They claim they were enslaved and sold by criminal gangs en route from Nigeria to Libya.[40]

In this regard, externalisation measures that heighten the risk of non-identification or re-victimisation, such as return without individual assessment or transfers to countries lacking victim protection, may breach states' positive obligations under Article 4 ECHR.[41] Such practices undermine the duty to adopt effective safeguards and ensure that trafficking victims are identified and able to access remedies in practice.[42]

ECRE recommends deleting Article 17 and Recital 23.

Article 18: Best interest of the child

In accordance with international law, Article 18 underlines the primacy of the principle of the best interests of the child.

ECRE and its partners have developed a flowchart outlining the procedural steps and implementation measures to apply when return is considered a durable solution in the best interests of the child.[43]

Article 19: Age assessment of minors

Article 19 outlines that, when there are doubts about whether a TCN is a minor based on their statements, available documents, or other relevant indications, the competent authority may carry out a multi-disciplinary age assessment including a psychosocial assessment. It shall be carried out by qualified professionals. Article 25 of the APR shall apply "by analogy" to the assessment.

Introducing a multi-disciplinary approach to age assessment is positive, particularly considering the risks associated with relying solely on medical examinations.[44] However, aligning the procedure with the provisions of APR only "by analogy" create certain legal limitations and ambiguities. Since the rule is applied by analogy, it is not directly binding. This means that certain parts of Article 25 of the APR might not fully apply to Article 19, depending on how authorities interpret the term "by analogy".

If Article 19 does not explicitly include all the safeguards from Article 25 of the APR (least invasive medical methods, right to information, consent requirement, no automatic negative consequences for refusal of an examination, recognition of age assessment decisions across Member States), there is a risk that certain protections for minors could be weaker in the return process than in the asylum process.

In addition, although the Article provides for a "multi-disciplinary assessment", it does not define a clear, uniform method across EU countries. This could result in inconsistent or arbitrary assessments, increasing the risk of misclassification. Age assessments are often based on subjective evaluations including doctors'

39. Infomigrants, Libya repatriates 174 Nigerian migrants, plans more returns, https://www.infomigrants.net/en/post/58040/libya-repatriates-174-nigerian-migrants-plans-more-returns
40. Infomigrants, Exploitation and enslavement: Two Nigerian migrants take rights case to UN Committee, https://www.infomigrants.net/en/post/37752/exploitation-and-enslavement-two-nigerian-migrants-take-rights-case-to-un-committee
41. Francesca Tammone, Challenging Externalization by Means of Article 4 ECHR: Towards New Avenues of Litigation for Victims of Human Trafficking?, Neth Int Law Rev 71, 89–117 (2024), https://link.springer.com/article/10.1007/s40802-024-00254-8#citeas.
42. ECtHR, Judgment of 7 January 2010, Rantsev v. Cyprus and Russia, App. no. 25965/04, paras 282-284.
43. Flowchart, children rights in return policies 2019, available here
44. ECRE, Legal note on age assessment in Europe: applying European and international legal standards at all stages of age assessment procedures, Legal note #13, 2022, https://ecre.org/wp-content/uploads/2023/01/Legal-Note-13-FINAL.pdf.

assessments of bone and dental testing and psychological interviews that have known margins of error.[45] Incorrect assessments could classify minors as adults, leading to their wrongful detention or deportation.

Particular risks arise for girls since many age assessment techniques were developed using male-biased data, making them less accurate for girls, especially those from diverse ethnic backgrounds.[46]In addition, cultural and psychological barriers during assessments may also increase errors. Girls, particularly from conservative or trauma-affected backgrounds, may be less likely to disclose personal history, such as experiences of forced marriage or sexual violence, leading to incorrect assessments.

Finally, reports show that age assessment methods involving nudity or genital examinations can be highly traumatic for children, particularly those who have experienced abuse.[47] The Committee on the Rights of the Child (CRC) condemned such practices in its 2021 decision on *R.Y.S. v. Spain*, where a Cameroonian child underwent invasive tests despite signs of abuse.[48] The CRC ruled that these examinations violate a child's dignity, privacy, and bodily integrity and should not be used for age determination, especially without informed consent or legal representation. To prevent such practices in Member States, Article 19 should include additional safeguards.[49]

ECRE recommends the following amendments to Article 19:

Article 19
Age assessment

Where, as a result of statements by the third-country national, available documentary evidence or other relevant indications, there are doubts as to whether or not he or she is a minor, the competent authority may undertake a multi-disciplinary assessment, including a psychosocial assessment, which shall be carried out by qualified professionals, to determine the third-country national's age. ~~**Article 25 of Regulation (EU) 2024/1348 shall apply by analogy to such assessment**~~. ***Multi-disciplinary age assessments shall be conducted in a manner that is safe, child-sensitive, and gender-sensitive, ensuring full respect for human dignity. Methods involving nudity or the examination, observation, or measurement of genitalia or intimate areas shall not be employed for age assessment purposes. Furthermore, children shall have the right to request that examinations be conducted by an individual of the same sex. Article 25 of Regulation (EU) 2024/1348 shall apply to this assessment, including all procedural guarantees and safeguards, with necessary adaptations for return procedures.***

Article 20: Return of unaccompanied minor

Article 20(2) requires that a representative or a person trained to protect the best interests of the child be appointed to represent, assist and act on behalf of an unaccompanied minor during the return process. If a representative has been appointed pursuant to the APR, the same person shall be appointed for the purposes of the Return Regulation.

The option of appointing a trained person rather than a representative allows for a lower standard than generally recognised good practice, given the evolution of evidence and understanding of the protection of the best interests of the child. ECRE proposes that a trained person should only be appointed when there is no available representative, and then only on a temporary basis. Additionally, while the provision specifies that representatives must be "appropriately trained," it does not define minimum training standards or requirements. This could result in inconsistencies in the quality of representation, particularly across different jurisdictions.

Unlike the provisions in the recast RCD and the APR, there is no clear guidance on the time within which a representative must be appointed nor on the maximum number of children a single representative can handle.

45. Council of Europe, A guide for policy makers: Age Assessment for children in migration, a human rights based approach, https://rm.coe.int/ageassessmentchildrenmigration/168099529f and ECHR judgement concerning F.B.V.Belgium available here
46. Sebastián Eustaquio Martín Pérez, Isidro Miguel Martín Pérez , Jesús Vega González , Ruth Molina Suárez , Coromoto León Hernández , Fidel Rodríguez Hernández , Mario Ulises Herrera Perez, Precision and accuracy of radiological bone age assessment in children among ethnical groups, p.25, https://www.researchgate.net/publication/373844373_Precision_and_Accuracy_of_Radiological_Bone_Age_Assessment_in_Children_among_Ethnical_Groups
47. ECRE Policy Paper, Rights of Women and Girls in the Asylum Procedures, p.21, https://ecre.org/wp-content/uploads/2024/12/ECRE-Policy-Paper-14_Rights-of-Women-and-Girls-in-the-Asylum-Procedure.pdf
48. *Ibid.*
49. *Ibid.*

The absence of timelines has been shown to cause delays in appointing representatives and/or lead to a representative assuming responsibility for a large number of children, which adversely in turn adversely affects the children's interests.

Similarly, unlike the provisions in the recast RCD and the APR, the proposed Regulation does not include the right for an unaccompanied minor to lodge a complaint against their representative in a confidential and safe manner, in an age-appropriate process. This is particularly important for identifying representatives who are not acting in the best interests of the child. Therefore, both this right and the mechanism for making complaints should be clearly outlined. Additionally, as stated in the recast RCD and APR, Member States must ensure that there are administrative or judicial authorities, or other entities, responsible for supervising the proper performance of representatives and those temporarily acting as representatives. This includes reviewing the criminal records of appointed representatives and designated persons at regular intervals to identify any potential conflicts with their role.

The proposal's language in Article 20(3) stating that the best interests of the child will be considered and that return will occur to a family member, nominated guardian, or "adequate reception facilities" lacks the necessary safeguards and clarity to ensure the actual protection of unaccompanied minors. While the text mentions that the best interests of the child will be assessed, this phrasing is quite general and lacks the substantive criteria and procedural guarantees needed for proper implementation. The determination shall be conducted in line with the AMMR Article 23(4), taking into account the child's specific vulnerabilities, cultural and social background, need for continuity of care, and any risks of exploitation or gender-based violence. Any return decision must be preceded by a robust, individualised risk assessment that evaluates whether the specific family or guardian environment is safe and stable for the child, in line with safety and security considerations under AMMR Article 23(4)(iii).

The term "adequate reception facilities" is also vague and open to inconsistent interpretation across Member States. To ensure compliance with EU standards, this must be aligned with recast RCD (Directive (EU) 2024/1346), which provides detailed standards for child-appropriate reception conditions.

ECRE recommends the following amendments to Article 20, in line with the New Pact on Migration and Asylum (particularly the APR, recast RCD, and AMMR):

Article 20
Return of unaccompanied minors

20 (2):

~~**A representative or a person trained to safeguard the best interest of the child shall be appointed to represent, assist and act, as applicable, on behalf of an unaccompanied minor in the return process.**~~

Designate as soon as possible a representative being a person with the necessary skills and expertise to assist the minor in order to safeguard his or her best interests and general well-being which enables the minor to benefit from the rights under this Directive

The representative shall be appointed as soon as possible and no later than 15 working days from the date on which the application is made.

If necessary, a person trained to safeguard the interests of the child shall be appointed to represent the child until a representative has been appointed;

It shall be ensured that the appointed representative is appropriately trained in child-friendly and age-***and-gender***-appropriate communication and that they speak a language that the minor understands. ***Appointment of same sex representatives upon request should be provided***. ~~**That person**~~ ***The representative or the person referred to in paragraph 2*** shall be the person designated to act as a representative under Directive (EU) 2024/1346 where the person has been designated in accordance with Article 27 of that Directive.

20 (3):

The unaccompanied minor shall be heard, either directly or through the representative or ~~**trained person**~~ ***the trained person provisionally acting for the child until a representative has been appointed*** referred to in paragraph 2, as part of a comprehensive best interests determination. ***A best interests assessment must be comprehensive and take into account: i. family reunification possibilities;***

ii. the minor's well-being and social development in the short, medium and long term, including situations of additional vulnerabilities such as trauma, specific health needs or disability, taking into particular consideration the minor's ethnic, religious, cultural and linguistic background, and having regard to the need for stability and continuity in the social and educational care; iii. safety and security considerations, in particular where there is a risk of the minor being a victim of any form of violence or exploitation, including trafficking in human beings; iv. the views of the minor, in accordance with his or her age and maturity; v. where the applicant is an unaccompanied minor, the information provided by the representative in the Member State where the unaccompanied minor is present; vi. where the applicant is an unaccompanied minor, the information provided by the representative in the Member State where the unaccompanied minor is present; vii. any other reasons relevant to the assessment of the best interests of the child

Before removing an unaccompanied minor from the territory of a Member State, the authorities shall be satisfied ***based on an individualised and documented assessment that return is in the best interests of the child, and that the child will be received by a safe and appropriate caregiver including a family member or nominated guardian or in reception conditions meeting the standards of Directive (EU) 2024/1346. The existence of a family connection shall not in itself be considered sufficient to ensure the child's safety or well-being upon return.***

20 (4) (new):

The competent authorities shall place a natural person acting as representative or a person suitable to provisionally act as a representative in charge of a proportionate and limited number of unaccompanied minors of no more than 30 unaccompanied minors at the same time, in order to ensure that he or she is able to perform his or her tasks effectively.

Member States shall ensure that there are administrative or judicial authorities or other entities responsible to supervise, on a regular basis, the proper performance of tasks by the representatives and persons designated.

Member States shall develop clear and accessible procedures for unaccompanied children to file complaints against their representatives or designated persons.

The competent authority shall immediately inform the unaccompanied minor about how to lodge a complaint against the person referred in paragraph 2 in confidence and safety.

Member States shall establish a complaint mechanism that is sensitive to the needs of children and gender, ensuring safety and clarity.

Member States shall develop guidelines on the complaint mechanism's functioning in collaboration with child protection experts. These guidelines should be presented to children in an easily understandable manner.

CHAPTER III: OBLIGATIONS OF THE THIRD-COUNTRY NATIONAL

Article 21: Obligation to cooperate

One of the central features of the Return Regulation proposal is a new obligation to cooperate; it mirrors similar obligations previously proposed in the 2018 recast Return Directive proposal and those included in the APR. Article 21 significantly expands the obligations of returnees and adds new – and at points unclear – obligations which TCNs may struggle to meet. Non-compliance then leads to various penalties. Article 21 lists the following twelve obligations to cooperate for TCNs which cover all stages of the return and readmission procedures.

As per Article 21(2), TCNs are required to:

a) remain on the territory of the Member States competent for the return procedure of which the third-country national is the subject and not abscond to another Member State;

b) provide, where requested by competent authorities and without undue delay, all information and physical documentation necessary for establishing or verifying identity or otherwise relevant within the return and readmission procedure that they possess;

c) not destroy or otherwise dispose of such documents, use aliases with fraudulent intent, provide other false information in an oral or written form, or otherwise fraudulently oppose the return or readmission procedure;

d) provide an explanation in case they are not in possession of any identity or travel document;

e) provide information on the third countries transited;

f) provide biometric data as defined in Article 2(1), point (s) of regulation (EU) 2024/1358 of the European Parliament and of the Council;

g) provide precise contact details, including current place of residence, address, telephone number where they may be reached and, where available, an electronic mail address;

h) provide, without undue delay, information on any changes to the contact details referred to in point (g);

i) remain available in accordance with Article 23 throughout the return and readmission procedures, and in particular appear for the departure for the transportation for return;

j) provide all required information and statements in the context of requests lodged with the competent authorities of relevant third countries for the purpose of obtaining travel documents and cooperate with these authorities of third countries as necessary;

k) when necessary, appear in person or when difficult by means of videoconference, before the competent national and third-country authorities at the location indicated by such authorities where necessary to establish his or her own nationality;

l) where required by competent authorities, participate in return and reintegration counselling''.

At the same time, as per Article 24(1)(b), Member States must inform the third country national of the consequences of not complying with these obligations, including the impact on the determination of the risk of absconding and the granting of a period for voluntary departure, the possibility to impose detention, and implications for access to programmes providing logistical, financial and other material or in-kind assistance. The failure or refusal of the applicant to cooperate leads to punitive measures as per Article 22.

TCNs must provide all information and documents to verify identity or as “otherwise relevant” under Article 21(2)(b), followed by a related obligation not to destroy documents or provide false or fraudulent information (Article 21(2)(c), and to provide an explanation in case documents are lacking (Article 21(2)(d).

Article 21(3) specifies that the information and documentation shall cover a wide range of topics, including personal data, family information, travel and ID documents, residence permits, authorisations, return decisions,

and information on countries of previous residence, travel routes and travel documentation.

Expansion of obligations

In ECRE's view, these provisions place a heavy burden on TCNs, which may result in being classified as non-cooperative during the return procedure even though that is not the intention. Determining whether someone deliberately disposed of their documents or if they were lost, stolen, or taken by smugglers is often challenging. For instance, in June 2024, the Administrative Court of Giessen in Germany suspended[50] the deportation of a Turkish applicant after ruling that BAMF had committed procedural errors in rejecting the asylum claim as manifestly unfounded based on allegations of deliberate document destruction.

The provision leaves a considerable margin of discretion for the authorities as regards the assessment of the level of detail to be provided by the applicant in order to avoid being considered "non- cooperative". In this regard, it is unclear, for instance, whether the individual's declared identity and statement that they are not in possession of an identity document would be sufficient to comply with the duty to provide all elements necessary to verify identity. Assessing the veracity of the individual's statement and therefore compliance with the obligation to cooperate may become highly subjective and arbitrary in such cases. Consequently, it could be extremely difficult for an individual to discharge their duty to cooperate.

Under Article 21(2)(j) and (k), obligations to cooperate with third-country authorities are introduced. Fulfilling these obligations may put individuals at risk of refoulement or put their family members residing in third countries at risk if their personal data is shared with countries where they face persecution or serious harm.

In addition, those who have applied for asylum may have had the application rejected and a return decision issued automatically at the same time, as allowed under Article 37 of the APR. Therefore, they could be appealing the rejection of their asylum application at the same time as appealing a return decision on the grounds that it is unsafe for them to return to that third country. Were they to be forced to lodge a request to obtain a valid travel document at that stage, they could, as presumptive refugees, be considered as re-availing themselves of the protection of their country of origin and therefore be (potentially wrongfully) presumed to no longer have an interest in challenging the negative decision on their asylum application. Individuals should not be forced to choose between their fears for their personal safety, being at greater risk of detention or having their options for voluntary departure limited or eliminated because of a perceived lack of cooperation.

Article 21(5) states that the TCN shall accept any communication from the competent authorities, whether by telephone, electronic mail, or post. It also provides that Member States shall establish the methods of communication in national law or utilise digital systems developed and/or supported by the EU for this purpose. However, the paragraph does not address situations in which TCNs are unable to understand such communications, whether due to illiteracy, lack of familiarity with digital systems, or language barriers.

Finally, the Article does not account for individuals who may be unable to comply due to age, mental or physical health conditions, or trauma (e.g., victims of human trafficking). As it stands, the provision leaves a considerable margin of discretion for the authorities as regards the assessment of the level of detail to be provided by the applicant in order to avoid being considered ''non-cooperative''. Therefore, it is crucial for the TCNs in the return procedure to have access to impartial counselling on return and reintegration as it allows the organisations providing return and reintegration to inform authorities about possible vulnerabilities or difficulties understanding messages from the authorities (e.g. on obligations or sanctions) which could hinder the person from engaging in the return process.

The obligation to cooperate as it stands could also have a disproportionate effect on stateless persons who are already particularly vulnerable to detention in removal proceedings and who would find it impossible to provide the information required of them by this provision. Reports show that states largely fail to acknowledge their specific situation and do not have procedures in place to identify statelessness and protect stateless people. This can lead to arbitrary detention and makes them particularly vulnerable in removal proceedings.

In line with the Revised Returns Handbook and the judgment of the CJEU in *Kadzoev*, Members States should make sure that there is a reasonable prospect of removal that justifies imposing or prolonging detention. In the proposal, the recognition of the fact that some people may not be able to provide the information they have a duty to give, or indeed may not have a third country that would recognise them as citizens, seems to be missing.

50. Germany, Regional administrative court, Applicant v Federal Office for Migration and Refugees (Bundesamt für Migration und Flüchtlinge, BAMF), 4 L 1954/24.GI. A, 27 June 2024.available here

Finally, the Article lacks explicit provisions for appealing or challenging both the imposed measures and the assessment by authorities that the person is not cooperating during the return procedure.

ECRE recommends deleting Article 21, as it imposes a disproportionate burden on TCNs, leads to unfair treatment, and may result in severe sanctions or in the detention of the vast majority of individuals with return decisions.

If maintained, ECRE recommends the following amendments to Article 21:

Article 21
Obligation to cooperate

3.Third-country nationals shall:

c.Not destroy or otherwise dispose of such documents, use aliases with fraudulent intent, provide other false information in an oral or written form, or otherwise fraudulently oppose the return and readmission procedure. Not deliberately destroy or otherwise dispose documents with the intent to obstruct the return or readmission process. The assessment of intent shall consider individual circumstances, including coercion, trafficking, or lack of access to documentation. The use of aliases or the provision of false information shall only be considered fraudulent if done with the deliberate purpose of misleading authorities and opposing lawful return.

~~**e.Provide information on the third countries transited;**~~

i.remain available ~~**in accordance with Article 23**~~ throughout the return and readmission procedures, and in particular appear for the departure for the transportation for return

j.provide all required information and statements in the context of requests lodged with the competent authorities of relevant third countries for the purpose of obtaining travel documents. ~~**and cooperate with these authorities of third countries, as necessary**~~;

~~**k.when necessary, appear in person or when difficult by means of videoconference, before the competent national and third country authorities at the location indicated by such authorities where necessary to establish his or her nationality**~~. ***when necessary, appear in person or, when difficult, by means of video conference, before the competent national and third-country authorities at the location indicated by the asylum authorities and in full consent of the TCNs.***

5. The third-country national shall accept any communication from the competent authorities, be it by telephone, electronic mail or mail, using the most recent contact details indicated by himself or herself to the competent authorities in accordance with paragraph 2, points (g) and (h). Member States shall ~~**either**~~ ***ensure that such communication is made in a language the TCN understands and in a format accessible to individuals with limited literacy or digital skills and*** establish in national law the method of communication and the point in time at which the communication is considered received by and notified to the third-country national ***in a language the third-country national understands or may reasonably be presumed to understand*** or make use of digital systems developed and/or supported by the Union for the purpose of such communication

Recital 27. To reinforce the effectiveness of the return procedure, clear responsibilities for third-country nationals should be established. Third-country nationals should cooperate with the authorities at all stages of the return procedure. Third-country nationals should remain available and provide the necessary information to prepare the return. ~~**In case the obligations to cooperate are not respected, effective and proportionate consequences should be imposed, including, for instance, reduced benefits and allowances granted in accordance with national law, seizure of travel documents or the extension of an entry ban.**~~ The competent authorities should inform the third-country national of the different steps of the return procedure. ~~**their obligations and the consequences of not complying with those obligations.**~~

Article 22: Consequences of non-compliance with obligation to cooperate

Article 22 provides a list of sanctions to be applied "in case of non-compliance with the obligations set out in Article 21(2), points (a) to (k)." As per the Article, "Member States shall provide for a possibility to impose, following an individual assessment, effective, proportionate and dissuasive measures on the third-country national". The sanctions should be selected from the following list:

(1) refusal or reduction of certain benefits and allowances granted under Member State law to the third-country nationals concerned unless this would lead to the persons; inability to make provision of their basic needs

(2) refusal or reduction of incentives granted to promote voluntary return in accordance with Article 13 or reduced assistance in return and reintegration programmes pursuant to Article 46 (3)

(3) Seizure of identity or travel documents provided that the third-country national receives a copy

(4) Refusal or withdrawal of work permit, pursuant to national law;

(5) Extension of the duration of an entry ban in line with Article 10(7);

(6) Financial penalties.

In ECRE's view, Article 22 raises concerns due to the severe and wide-ranging sanctions that may be imposed on TCNs, including those who may unintentionally fail to comply with their obligations, especially given the extensive list of obligations in Article 21. In addition, by allowing Member States to select from a list of measures, a lack of harmonisation is likely. If the efforts are to promote voluntary return, the aim should be to provide incentives for the TCNs to cooperate rather than punitive measures. Evidence suggests[51] that incentives and support mechanisms are more effective in fostering cooperation than coercive measures. Member States should prioritise individualised assessments and engagement strategies over punitive sanctions.

For instance, the refusal or reduction of benefits and allowances (point 1) could place TCNs in situations where they are unable to meet their basic needs, potentially leading to inhumane or degrading treatment. While the provision states that this should not lead to destitution, the lack of clear thresholds or monitoring mechanisms raises concerns about its enforcement across Member States. This ambiguity risks violating Article 3 of the ECHR, which prohibits inhumane or degrading treatment.[52]

The broad scope of penalties and the potential for their cumulative application raise concerns about arbitrary punishment. Certain groups[53], such as asylum seekers, stateless individuals, or those facing persecution, may be disproportionately affected due to an inability to comply rather than intentional non-cooperation.

ECRE recommends deleting Article 22 on the consequences in case of non-compliance with the obligation to cooperate as it is impractical, difficult to assess in the return context, may lead to arbitrariness and add to the complexity of the procedure.

ECRE recommends deleting Article 22.

51. ECRE, Policy note, Return Policy: Desperately seeking evidence and balance, July 2019, available here and DRC's dignified return available here

52. For example, in V.M. and Others v. Belgium, the ECtHR found a violation of Article 3 where families were excluded from reception facilities and left without access to basic needs, with appeals considered ineffective due to delays (ECtHR, Judgment of 17 November 2016, V.M. and Others v. Belgium, App. No. 60125/11, paras. 149, 159). In H. and Others v. France, the Court held that failure to meet asylum seekers' essential needs amounted to degrading treatment, stressing that even young, healthy adults may suffer inhuman treatment when wholly dependent on state support (ECtHR, Judgment of 2 July 2020, H. and Others v. France, App. No. 28820/13, para. 184). The CJEU similarly emphasized in Cimade and Gisti that asylum seekers must not be deprived of minimum reception conditions, even temporarily, as this would breach their right to human dignity (CJEU, Judgment of 27 September 2012, Case C-179/11, Cimade and Gisti, para. 56).

53. In Denmark, the use of obligations and sanctions for non-compliance was introduced in 2021. DRC has seen that it has a negative impact on rejected asylum seekers, especially extremely vulnerable asylum seekers and people with mental illness as they have difficulties understanding the obligations and the consequences of non-compliance. They also do not understand what it means that they have to "actively" cooperate.

Article 23: Availability for the return process

Article 23(1) provides that to ‘’ensure a swift, efficient and effective return, third-country nationals shall, for the duration of the return procedure, be subject to one or more of the following measures:

a) Allocation to a geographical area within the Member State’s territory in which they are able to move freely;

b) Residence at a specific address;

c) Reporting to the competent authorities at a specified time or at reasonable intervals.”

The restrictions are imposed on all individuals subject to the return procedure, regardless of whether or not they are cooperating. Many TCNs subject to a return decision may still be employed, attend school or have families in other parts of the country. Requiring them to relocate to a specific geographical area or to reside at a designated address could unnecessarily disrupt their lives and livelihoods. Therefore, before applying such restrictions, authorities should confirm the absence of a risk of absconding as per Article 30, and assess whether the measures are strictly necessary and proportionate.

While it may be reasonable to expect returnees to remain available, in order to ensure consistency and legal certainty, ECRE recommends that the competent authorities be required to conduct an individual assessment before deciding on the measure to impose to ensure availability.

The requirement to report to the competent authorities “at a specified time or at reasonable intervals” should be applied in a reasonable and proportionate manner, such as requiring attendance two or three times per week.

The availability and appropriateness of the measures in Article 23(1) should always be considered by authorities before the decision is taken to use detention; these measures remain preferable to the use of detention.

ECRE proposes the following amendments to Article 23:

Article 23: Availability for the return process

1. To ensure a swift, efficient and effective return ***while avoiding the use of detention***, third-country nationals ***shall-may only when strictly necessary and proportionate***, for the duration of the return procedure ***following an individual assessment of their situation***, be subject to one or more of the following measures:

a.allocation to a geographical area within the Member State’s territory in which they are able to move freely;

b.residence at a specific address;

c.reporting to the competent authorities at a specified time or at reasonable intervals, ***taking into account the individual’s circumstances, including work, education or other justified obligations.***

2. Paragraph 1 shall ***not be applied in a discriminatory or automatic manner*** and shall only be applied to the extent that it is compatible with the special needs of vulnerable persons and the best interests of the child.

3. Upon request, competent authorities may grant the third-country national permission to:

a.temporarily leave the geographical area for duly justified urgent and serious family reasons or necessary medical treatment which is not available within the geographical area;

b.reside temporarily outside the place designated in accordance with paragraph 1, point (b);

c.temporarily not comply with the reporting obligation.

4. Decisions regarding the permissions listed in paragraph 3, first subparagraph, shall be taken objectively and impartially on the merits of the individual case and reasons shall be given if such permission is not granted.

5. The third-country national shall not be required to request permission to attend appointments with authorities and courts if the attendance of that third-country national is necessary. The third-country national shall notify the competent authorities of such appointments.

6. The decisions taken in accordance with paragraph 1, points (b) and (c), shall be made in writing, be proportionate and take into account specific circumstances of the third-country national concerned.

CHAPTER IV: SAFEGUARD AND REMEDIES

Article 24: Right to information

In Article 24(2) there are specific provisions requiring information for minors to be "provided in a child-friendly and age-appropriate manner" with the involvement of the holder of parental responsibility or the representative referred to in Article 20(2).

Article 24(2) also requires that information shall be provided by means of standard information sheets, either in paper or in electronic form. Guidance should be provided on how to do this from the EUAA, particularly on how to provide information for minors.

ECRE supports the use of child-friendly tools and agrees with the provision that the information provided shall be given without undue delay in simple and accessible language and in a language which the third-country national understands or is reasonably supposed to understand, including through written or oral translation and interpretation as necessary.

Article 25: Legal assistance and representation

Article 25 includes the provisions on legal assistance and representation; it adds extensive detail compared to Article 13 of the Return Directive.

In case of an appeal or review under Article 27, on the request of the TCN the Member State must ensure that free legal assistance and representation is available. Unaccompanied children shall automatically be provided with free legal assistance and representation.

Article 25(3) explains that the assistance and representation consist in the preparation of the appeal or review, and sets out the minimum elements that are required, including preparation of the documents required and participation in the hearing. It should be provided by "legal advisors or other suitably qualified persons, as admitted or permitted under national law". Importantly the providers' interest should not conflict or potentially conflict with those of the TCN appealing. According to Article 25(8), Member States should lay down procedural rules for the requests for free legal assistance and representative.

Article 25(5) allows Member States to exclude the provision of free legal assistance and representation in four situations, including where an appeal has "no tangible prospect of success" or is "abusive." This may be an obstacle to accessing an effective remedy, given the discretion allowed when interpreting what an abusive appealis.[54]

The decision not to grant free legal assistance and representation may be challenged before a judicial authority (Article 25(9)) if it was taken on the basis that the appeal has no tangible prospects of success or is abusive. The TCN is entitled to request free legal assistance and representation for this purpose. However, as the proposal also recommends not granting automatic suspensive effect for appeals, it would be very unlikely that third-country nationals would have time to challenge this decision, further undermining their rights.

For third-country nationals other than unaccompanied children exceptions to free legal assistance and

54. The CJEU underlined that legal aid is essential to effective judicial protection under EU law (CJEU, Judgment of 4 December 2003, Evans, Case C-63/01, ECLI:EU:C:2003:644, para. 77). In Y.N. v. Republika Slovenija, it confirmed that asylum applicants must have access to legal assistance at all stages, including after a negative decision, with potential for free legal aid (CJEU, Judgment of 27 September 2023, Y.N., Case C-58/23, ECLI:EU:C:2023:748, para. 30). In M.S.S. v. Belgium and Greece, the ECtHR held that a lack of legal assistance can render remedies under Article 13 ECHR ineffective and inaccessible. (ECtHR, M.S.S. v. Belgium and Greece, Application No. 30696/09, judgment of 21 January 2011, para 319). In Feilazoo v. Malta, the Court stressed that legal representation must cover both procedural and legal issues and that serious failings that amount to ineffective representation in special circumstances may incur the State's liability under the Convention (Application no. 6865/19, 2021).

representation include the possibility to impose time and financial limits (Article 25(7)(a)), and to grant partial legal assistance. The text does not specify the grounds on which the administration may base its decision to impose these limits and whether the decision can be challenged.

Such limitations on access to legal aid can significantly undermine an individual's ability to understand the procedure and to effectively present their views before a decision is made. For this reason, restrictions on legal aid should only be allowed where they do not infringe upon the fundamental right to be heard. This right, a core principle of EU law,[55] requires that individuals whose interests may be adversely affected by a decision have the opportunity to express their views beforehand. This is especially crucial in return procedures, where the risk of refoulement may arise. [56]

Given the potentially serious consequences of return and deportation for many people, ECRE believes all third-country nationals should be provided with free legal assistance and representation in the case of an appeal or a review.

ECRE recommends the following amendments to Article 25:

Article 25
Legal assistance and representation

1.In the case of an appeal or a review before a judicial authority in accordance with Article 27, Member States shall, ~~**at the request of the third-country national**~~, ensure that free legal assistance and representation is made available ***without any delay*** ~~**as necessary**~~ to ensure the right to an effective remedy and fair trial.

2.~~**Unaccompanied minors shall automatically be provided with f**~~*F*ree legal assistance and representation ***shall be provided automatically***.

3.The legal assistance and representation shall consist of the preparation of the appeal or request for review, including, at least, the preparation of the procedural documents required under national law and, in the event of a hearing, participation in that hearing before a judicial authority to ensure the effective exercise of the right of defence. Such assistance shall not affect any assistance provided for under Regulation (EU) 2024/1348.

4.Free legal assistance and representation shall be provided by legal advisers or other suitably qualified persons, as admitted or permitted under national law, whose interests do not conflict or could not potentially conflict with those of the third-country national.

5-9 delete

10.Member States ~~may~~ ***shall*** provide for free legal assistance and representation in the administrative procedure in accordance with national law.

Article 26: The right to an effective remedy

Article 26 stipulates that third-country nationals shall be entitled to an effective remedy against return decisions under Article 7, against entry bans under Article 10, and against removal decisions under Article 12(2). In a change compared to Article 13 Return Directive, the appeal must be before a judicial authority. The remedy should include a full and *ex nunc* examination of facts and law. Article 26(3) includes an explicit reference to the judicial authority ensuring compliance with the principle of *non-refoulement*, either at the request of the TCN or *ex officio*.

ECRE broadly welcomes the provisions under Article 26(1); it is also positive that that appeals against return

55. CJEU, Judgment of 22 November 2012, M.M. v Minister for Justice, Equality and Law Reform, Case C-277/11, ECLI:EU:C:2012:744. paras 85-89.
56. Although in the context of Dublin returns, the CJEU reaffirmed in Cases C-228/21, C-254/21, C-315/21, and C-328/21 that, to ensure the effectiveness of the right to be heard, a transfer decision taken without a personal interview must be annulled unless national legislation guarantees that the individual's arguments can be effectively presented during an appeal. CJEU, Judgment of 30 November 2023, Ministero dell'Interno (Brochure commune – Refoulement indirect), C228/21, C254/21, C297/21, C315/21 and C328/21, ECLI:EU:C:2023:934, para 118.

decisions must be heard exclusively by a judicial authority with the power to review decisions including the possibility of temporarily suspending their enforcement, in line with Article 47 of the Charter.

Understanding the decision and available legal remedies will be complicated in itself given that the decision will be issued in the language of the Member State and Article 7(5) provides that the third-country national shall, upon request, be provided with a written or oral translation of the main elements of the return decision, as referred to in Paragraph 2, including information on the available legal remedies in a language the third-country national understands or may reasonably be presumed to understand.

The general right to information under Articles 24 and 25 on legal assistance is important, but access to an effective remedy also relies on the TCN filing a request for legal assistance according to the rules set by the Member State in Article 25(8) and that the decision to grant free legal assistance will be positive given that a Member State may impose monetary or time limits on the provision of free legal assistance and representation Article 28 (7)(a).

Article 27: Appeal before a competent judicial authority

According to Article 27(1), time limits for the competent judicial authority of first instance to examine the decisions referred to in Article 7, Article 10 and Article 12(2), shall provide for an adequate and complete examination of the appeal but shall not exceed 14 days. Where a return decision is based on, or issued in, the same act as a decision refusing or ending the legal stay, the time limits to appeal the return decision may be those laid down in national law for appealing the decision ending or refusing legal stay (Article 27(3)).

Where an entry ban is issued together with a return decision as referred to in Article 7, it shall be appealed jointly with that return decision, before the same judicial authority and within the same judicial proceedings and time limits. Where an entry ban is issued separately from the return decision or is the only decision to be challenged, it may be appealed separately. The same time limits will apply.

Time limits

While reasonable time limits for lodging an appeal are essential to ensuring the effectiveness of the remedy, no time limit is specified in the proposal; they should be set at national level. Guidance can be found in the case law of the European courts.

In the case of *Samba Diouf*, which concerned the lack of an appeal against the decision to examine an asylum application in an accelerated procedure in Luxembourg, the CJEU considered that the period prescribed for lodging an appeal in the accelerated procedure must be sufficient in practical terms to enable the applicant to prepare and bring an action. In this case, the CJEU ruled that a fifteen-day time limit for bringing an action did not seem unreasonable but also held that it is for the national court to determine whether that time limit is sufficient in view of the circumstances.[57]

The reasonableness of appeal time limits must be balanced against the effectiveness of procedural guarantees. In *LH* (C 564/18), the CJEU confirmed that while Member States may set time limits as they have procedural autonomy, these must respect the principles of effectiveness and equivalence. An eight-day limit may be insufficient in some cases, requiring courts to disapply such rules.[58] Similarly, in *Y.N. v Republika Slovenija* (C 58/23), the Court found that a three-day deadline, including holidays, for appealing international protection decisions, especially in accelerated procedures, violated the right to an effective remedy, as it impeded access to interpreters, legal assistance, and case files.[59]

The ECHR provides that the applicant must be afforded a hearing “within a reasonable period of time”. When determining whether the duration of criminal proceedings has been reasonable, the Court has had regard to factors such as the complexity of the case, the applicant’s conduct and the conduct of the relevant administrative and judicial authorities.[60] Furthermore, while the Court accepts that time-limits should be established, it considered that the speed of the proceeding should not undermine the effectiveness of the procedural guarantees that aim to protect the applicant against refoulement.[61]

57. CJEU - C-69/10, Brahim Samba Diouf v. Ministre du Travail, de l’Emploi et de l’Immigration, Judgment of 28 July 2011, par. 66-68.
58. CJEU, Judgment of 19 March 2020, LH v Bevándorlási és Menekültügyi Hivatal, Case C-564/18, ECLI :EU :C :2020 :218, paras 63, 75.
59. CJEU, Judgment of 27 September 2023, Y.N. v Republika Slovenija, Case C-58/23, ECLI:EU:C:2023:748, para. 33-34.
60. See e.g. ECtHR, *Pedersen and Baadsgaard v Denmark,* Application No 49017/99, Judgment of 17 December 2004.
61. ECtHR, *I.M. v France*, Application No 9152/09, Judgment of 2 February 2012, par. 147.

The reduced time for applicants to appeal return decisions will have a particular negative impact on women and girls. Women fleeing gender-based persecution or human trafficking often do not have enough time to gather evidence for their asylum claims, and survivors of gender-based violence may hesitate to speak out immediately due to trauma in situations of rushed deportations.

Member States should have the flexibility to extend time periods depending on the individual circumstances of the particular case. In *Pontin*, the CJEU considered a fifteen-day time limit for a dismissed pregnant woman to bring an action for reinstatement. In this case, one of the main factors that the CJEU took into account was the particular situation in which pregnant women find themselves. It also took into account that some of the days included in that fifteen-day period could expire before the applicant was even notified of her dismissal.[62]

ECRE recommends the following amendments to Article 27:

Article 27
Appeal before a competent judicial authority

Article 27(1) For the purpose of ensuring the right to an effective remedy in accordance with Article 26, Member States shall lay down in their national law reasonable time limits for the competent judicial authority ~~**of first instance**~~ to examine the decisions referred to in Article 7, Article 10 and Article 12(2), providing for an adequate and complete examination of the appeal. The period for lodging an appeal before a judicial authority of first instance shall ~~**not exceed**~~ ***between a minimum of two weeks and a maximum of one month***

Article 28: Suspensive effect

Under Article 28(1), the effect of decisions on return, entry bans and removals are suspended until the deadline for lodging the appeal has been reached. As described above, according to Article 27, the time limit is laid down by the Member State and must be reasonable. It shall not exceed 14 days.

Under Article 28(2), in a measure which mirrors the erosion of appeal rights under the APR, beyond the time limit for lodging the appeal the suspensive effect of the appeal is not automatic. It needs to be applied for during the same time limit as the lodging of the appeal. A judicial authority shall have the power to decide whether or not to suspend the effect of the decision pending the outcome of the appeal. By Article 28(4), the judicial authority has 48 hours to take the decision on the application for the suspension, which can be extended if there are complex issues of fact or law.

In an important addition, the last line of Article 28(2), reiterates a principle of EU and International Law, "The enforcement of the return decision shall be suspended where there is a risk to breach the principle of non-refoulement".

Per Article 28(3), where a further appeal against a first or subsequent appeal decision is lodged, the enforcement of a return decision shall not be suspended unless the third-country national requests suspension and a competent judicial authority decides to grant it, taking due account of the specific circumstances of the individual case.

Complexity of appeal rules

In ECRE's view, these rules generate a complex situation for the third-country national, navigating which will rely on them having access to legal assistance. The rules would also generate a significant burden for the courts, and also for legal representatives who would need to react fast and prepare multiple applications for suspensive effect within tight deadlines. As with similar provisions that remove the automatic suspensive effect of appeals under the APR,[63] ECRE also questions the conformity of these provisions with the case law of the European courts, and notably the *Gnandi* judgment. In ECRE's view, the removal of automatic suspensive effect of the decision itself undermines the obligation underlined in Recital (30) for the rules "to comply with the

62. CJEU, Case C-63/08 *Pontin v. T-Comalux SA*, Judgment of 29 October 2009.
63. Issue of removal of suspensive effect in the context of APR is discussed in: ECRE Comments on the Regulation of the European Parliament and of the Council establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU October 2024, p. 108-111.

right to an effective remedy as provided for in Article 47 of the Charter of Fundamental Rights".[64]

Providing the third country national with an automatic right to remain on the territory during the time limit within which the right to an effective remedy has to be exercised and pending the outcome of the remedy when the individual exercises their right, constitutes the best guarantee that the right to an effective remedy is respected in practice, especially when other human rights such as the right to family unity are at risk.

Providing a right to remain would reduce not only the risk of human rights violations, but also reduce the burden on the judicial system. Moreover, the suspensive effect of the appeal, and the effectiveness of the remedy in practice, would depend less on factors that may be beyond the third-country national's control, such as access to and availability of adequate information and quality legal assistance. Given the scarcity of legal assistance in many Member States, requiring the submission of a separate appeal in order to be allowed to remain on the territory pending the examination of the appeal is highly onerous for both legal advisers and courts because it requires double scrutiny of the same material.

As ECRE noted in its comments on the proposal for a recast Return Directive, both in the case of *Conka v. Belgium*[65] and the case of *M.A. v. Cyprus,* the ECtHR stated that the requirements of Article 13 ECHR, and other provisions of the Convention, take the form of a guarantee and not of a mere statement of intent or a practical arrangement and "pointed out the risks involved in a system where stays of execution must be applied for and are granted on a case-by-case basis".[66] The Court held in particular that "it is not possible to exclude the risk that in a system where stays of execution must be applied for and are discretionary they may be refused wrongly, in particular if it was subsequently to transpire that the court ruling on the merits has nonetheless to quash a deportation order for failure to comply with the Convention, for instance, if the applicant would be subjected to ill-treatment in the country of destination or be part of a collective expulsion. In such cases, the remedy exercised by the applicant would not be sufficiently effective for the purposes of Article 13".[67]

The absence of suspensive effect may also hinder access to the right in Article 33(3)(b) to initiate a judicial review of the lawfulness of the detention order, which should be concluded as rapidly as possible after the launch of the relevant proceedings, and no later than 15 days thereafter. If there is no suspensive effect, the person may not be able to appeal their detention while awaiting the removal. The suspensive effect of the appeal should thus be automatic in all instances for the reasons set out.

ECRE recommends the following amendments to Article 28:

Article 28
Suspensive effect

1.The enforcement of the decisions issued pursuant to Article 7, Article 10 and Article 12(2) shall be suspended until the time limit within which they can exercise their right to an effective remedy before a judicial authority ~~**of first instance**~~ referred to in Article 27 has expired.

2.***(new) All subsequent appeals allowed in national law should have suspensive effect.***

Delete Article 28(2)-(4).

64. CJEU, Judgment of 19 June 2018, Sadikou Gnandi v. Etat Belge, C-181/16, ECLI:EU:C:2018:465;See: CJEU, X v Belastingdienst/ Toeslagen, Case C175/17, Judgment of 26 September 2018, available at: https://bit.ly/3XDp8RA, ECLI:EU:C:2018:776, para. 33; CJEU, X,Y v Staatssecretaris van Veiligheid en Justitie, Case C180/17, Judgment of 26 September 2018, available at: https://bit.ly/4cbdulz, ECLI:EU:C:2018:775, para. 29-30. The requirement of automatic suspensive effect has also been confirmed in respect of complaints under Article 4 of Protocol No. 4: ECtHR, M.K. and others v. Poland, Application nos. 40503/17 42902/17 43643/17, 23 July 2020, available at: https://bit.ly/4cpy01t, para. 220; ECtHR, Hirsi Jamaa and Others v. Italy, Application No 27765/09, Judgment of 23 February 2012, available at: https://bit.ly/3RzPMH4, para. 206.

ECtHR, Čonka v. Belgium, Application No. 51564/99, 5 February 2002, available at: https://bit.ly/4cg4Q5k, para. 81-83;

65. Ibid.
66. ECtHR, M.A. v. Cyprus, Application No. 41872/10, Judgment of 23 July 2013, par. 137
67. ECtHR, Conka v. Belgium, par. 82.

CHAPTER V: PREVENTION OF ABSCONDING AND DETENTION

Article 29: Grounds for detention

Compared to the Return Directive, the Commission's proposal significantly expands both the grounds for detention and the maximum detention period, extending it to up to 24 months and potentially longer when people pose a risk to security.

The exhaustive list of grounds for detention, which should be laid down in national law are as follows:

a) risk of absconding determined in accordance with Article 30;

b) the third-country national avoids or hampers the preparation of the return or the removal process;

c) the third-country national poses security risks in accordance with Article 16;

d) to determine or verify his or her identity or nationality;

e) non-compliance with the measures ordered pursuant to Article 31 (alternatives to detention).

Crucially, Article 29(2) maintains the condition that "Member States may only keep in detention a third-country national for the purpose of preparing the return or carrying out the removal".

Procedural guarantees

While the proposal reiterates the principles of international and EU law that require an individual assessment and proportionality for the use of detention, it does not explicitly state that detention should be used as a measure of last resort – also a long-standing principle of international law – as is the case in the RCD (Recital (33)). There is also no reference in the Article to the legal requirement to ensure that less coercive alternatives to detention are unavailable, although it appears in Recital (32).

To comply with human rights obligations, detention must always be a measure of last resort, justified by concrete evidence that less restrictive alternatives are insufficient. The current provision fails to meet this threshold and opens the door to arbitrary and potentially discriminatory detention practices.

Grounds for detention

In ECRE's view, certain of the grounds, such as the risk of absconding, are very broad and could lead to more or less systematic use of detention. With such broad grounds, detention risks violating the principle of necessity and proportionality, and may fall short of the standards set out in Article 5 of the ECHR, which safeguards the right to liberty and security of the person. The lack of consideration of less coercive alternatives, further undermines the lawfulness of such detention measures.[68]

ECRE also raises serious concerns about the provision allowing TCNs to be detained solely on the basis of the need to "determine or verify" their identity or nationality. This provision does not adequately consider the particular circumstances of certain groups, such as stateless individuals, who may face significant and legitimate difficulties in providing identity documents.[69]

Per Article 29(5), detention shall be ordered by administrative or judicial authorities. Detention shall be ordered by a written decision giving the reasons in fact and in law on which it is based as well as information about

68. See for example: ECtHR, Judgment of 29 March 2010, Medvedyev v France [GC], No. 3394/03, paras 79-80.

ECtHR, Judgment of 22 December 2015, Nabil and Others v. Hungary, No. 62116/12, para 18. ECtHR, Judgment of 29 January 2008, Saadi v. UK [GC], No. 13229, para 74; ECtHR, Judgment of 20 December 2011, Yoh-Ekale Mwanje v. Belgium, No. 10486/10, paras 117-119.

69. The CJEU outlined the standards regarding the pre-removal detention reaffirming that detention is a serious interference with the right to liberty under Article 6 of the Charter and must be based on a strictly individualised assessment, subject to the principle of proportionality and limited to cases where less coercive measures are insufficient (CJEU, Mahdi, C146/14 PPU, ECLI:EU:C:2014:1320, paras 40, 70, 72; El Dridi, C61/11 PPU, ECLI:EU:C:2011:268, para 41; Gaydarov, C430/10, ECLI:EU:C:2011:749; Sagor, C430/11, ECLI:EU:C:2012:777, para 41; Zh. and O., C554/13, ECLI:EU:C:2015:377, paras 48, 50). More recent case-law reinforces that detention must respect both EU law and international obligations, including the ECHR and the Refugee Convention (CJEU, M and Others, C673/19, EU:C:2021:127, para 47). The Court has held that detention cannot be based on vague or general criteria and must follow clearly defined, binding, and foreseeable legal provisions to avoid arbitrariness (CJEU, I.L., C241/21, EU:C:2023:100, paras 47–55; Al Chodor, C528/15, EU:C:2017:213, paras 36, 39, 42). The CJEU has reiterated that detention serves the administrative aims of return or transfer, not punishment, and must always operate within strictly circumscribed legal limits (CJEU, C, B and X, Joined Cases C704/20 and C39/21, EU:C:2023:325, paras 74–75).

available legal remedies. The decision shall be notified to the third-country national in a language that the third-country national understands or may reasonably be presumed to understand.

ECRE welcomes the fact that Member States shall take into account any visible signs, statements or behaviour related to, or made or shown by, the third-country national indicating that he or she is a vulnerable person but stress the importance of non-visible vulnerabilities as they are equally important and often overlooked by the authorities.

In terms of the extended length of detention permitted, evidence indicates that prolonged detention does not necessarily increase the likelihood of return and poses serious risks to migrants' rights.[70]

ECRE recommends the following amendments to Article1 29:

Article 29
Grounds for detention

1.Member States may detain a third-country national pursuant to this regulation on the basis of an individual assessment of each case and only in so far as detention is proportionate ***and is a measure of last resort***

2.Member States may only keep in detention a third-country national for the purpose of preparing the return or carrying out the removal ***and when the measures set out in Article 31 are not applicable.***

3.A third-country national may only be detained based on one or more of the following grounds for detention:

…

~~**d) to determine or verify his or her identity or nationality**~~

~~**e) non-compliance with measures ordered pursuant to Article 31**~~

Article 30: Risk of absconding

Identifying any risk of absconding is central to the Return Regulation proposal; the risk of absconding serves as a ground in itself for the use of detention and should be taken into account in any decision on the use of detention or alternatives to detention. The text proposes a very wide definition of the risk of absconding, with an (exhaustive) list of eleven standalone criteria to be used by Member States to assess the risk. This approach mirrors that of the 2018 proposal for a recast of the Return Directive, albeit with an adapted list of criteria.

Under Article 30(1), the risk of absconding is to be found "unless proven otherwise" in three situations: the case of a third-country national moving to another Member State; being subject to a return decision from another Member State; or not complying with obligations as per Article 23. Under Article 30(2), for the remaining eight criteria, the risk is to be determined on the basis of an "overall assessment of the specific circumstances of the individual case".

Presumption of the risk of absconding

ECRE strongly opposes the presumption of the risk of absconding because it switches the burden of proof to the individual who then has to rebut the presumption. Then, there is no reason to assume that the person will abscond based on a lack of compliance with the obligations listed. For example, there is a strong focus on onward movement in line with the punitive approach to second movement which runs as a thread through the reform of EU asylum law. However, the reasons for onward movement include factors such as poor reception conditions and decision-making in the Member State responsible, and the presence elsewhere of family members and job opportunities, which do not have any bearing on absconding risks – and indeed may even mean it is less likely.

70. European Parliament, The Return Directive 2008/115/EC European Implementation Assessment STUDY, p 47.

Rather than creating the presumption of absconding, ECRE believes a case-by-case assessment of the risk of absconding should be required in all cases in order to reflect the varied reasons for non-compliance with obligations, and as required under the right to good administration as a general principle of EU law.[71]

For the other eight criteria under Article 30(2), ECRE welcomes the requirement of a case-by-case assessment of the risk of absconding, as this is required under the right to good administration as a general principle of EU law. However, ECRE has serious concerns about the number and nature of the criteria listed, each of which can alone constitute a risk of absconding. Article 30 could become a "catch-all" provision: as the list stands, there are few people who arrive in Europe to seek international protection who would not fulfil at least one of the criteria. Notably, the criterion at Article 30(2)(f) constitutes a ground for detention where the person is:

".., f) using false or forged identity or travel documents, residence permits or visas, or documents justifying conditions of entry, destroying or otherwise disposing of such documents, using aliases with fraudulent intent, providing false information in an oral or written form, or otherwise fraudulently opposing the return or readmission procedure".

Unfortunately, the use of false or forged identity documents is for a vast majority of refugees a necessity to reach safety. This is recognised as the reality in Article 31 of the Refugee Convention, which prohibits states from penalising refugees for irregular entry into their territory. Moreover, many undocumented migrants will by definition lack documentation proving identity, residence or financial resources or have irregularly entered into the territory of a Member State at some point in their migration experience. This also applies to stateless persons.[72]

Then, some of the criteria used to assess the risk are factors beyond the control of the individual. Some may even be caused by the policies and actions of Member States themselves. For example, in several Member States support including accommodation is withdrawn when a return decision is issued and secondary movements can take place for a variety of reasons, often because of difficulties in Member States such as deficiencies in reception conditions. To then use a lack of an address or secondary movement as criteria to establish a risk of absconding seems unfair.

An overly broad definition of the risk of absconding would lead to systematic detention and would contravene the long-standing principle that detention is a last resort. Where the co-legislators consider maintaining a list of criteria to assess the risk of absconding, any such list should be restricted to criteria that relate to the individual's stated intention not to comply with the return decision. Criteria should be conducive to a risk assessment of the individual's future conduct after return has been ordered, rather than his or her past conduct.

ECRE recommends deleting Article 30 and replacing it with:

Article 30
Risk of absconding

The existence of a risk of absconding shall be determined on the basis of an assessment of the specific circumstances of the individual case and on the basis of an exhaustive list of objective criteria laid down in national legislation. The criteria should be conducive to a risk assessment of the individual's future conduct or relate to the individual's stated intention not to comply with the return decision. A risk of absconding should not be automatically presumed on the basis of the third-country national's past conduct.

Article 31: Alternatives to detention

Article 31 requires Member States to provide for alternative measures to detention in national law and to take into account the individual circumstances of the third-country national concerned, including any vulnerabilities, when ordering such measures.

71. CJEU, M. M. v Minister for Justice, Case C-277/11, Judgment of 22 November 2012, available at: https://bit.ly/4cpD4mh, ECLI:EU:C:2012:744, para. 81-99.
72. See the *Return Handbook*, section 14.4.1 'Attention should be paid to the specific situation of stateless persons, who may be unable to benefit from consular assistance by third countries in view of obtaining a valid identity or travel document', page 72: https://bit.ly/2nITCQi

ECRE welcomes the introduction of these requirements which support respect for the principle enshrined in EU and international law that detention should be used only when other less coercive measures are unavailable. The principle means that alternatives must be assessed whenever detention is under consideration.

The first paragraph makes a link with the risk of absconding, stating that the alternative measure should be "proportionate to the level of the risk of absconding assessed in accordance with Article 30." This suggests that when the risk of absconding is higher, then more coercive alternative measures can be applied.

Article 31(2) sets out a list five alternatives to detention covering reporting obligations, surrender of documents, residing in a designated location, provision of a financial guarantee, and electronic monitoring. While the alternatives to detention listed still entail restrictions of liberty (which should be proportionate), they are nevertheless considerably less invasive and damaging than detention. There is some overlap with Article 23.

Article 31(4) and (5) set out procedural guarantees in relation to alternatives to detention that mirror those that apply to the use of detention, including notification in writing of the decision to use a measure, the consequences of non-compliance (including the use of detention), and the available remedies. The decision to use an alternative to detention is subject to review with a time limit of two months.

Although the provisions on alternatives to detention represent an important shift toward more humane and rights-based migration management, its current formulation risks overlooking the particular vulnerabilities and needs of women, girls, children, and other marginalised groups. While Article 31(1) requires "individual circumstances" and "vulnerabilities" to be taken into account, there is no explicit recognise of how gender and age intersect with detention practices. Women and girls, for instance, are more likely to be survivors of trauma, experience economic marginalisation, or serve as primary caregivers. These factors profoundly shape their ability to comply with certain measures such as frequent reporting, financial guarantees, or restrictions on movement. Similarly, unaccompanied or separated children, pregnant women, and persons with mental health challenges may be ill-suited to surveillance-based alternatives like electronic monitoring, which may replicate the control and psychological distress of detention.

Furthermore, the listed alternatives – while more humane than detention – still lean toward mechanisms of control rather than support. They may inadvertently reproduce the punitive logic of detention when applied without sensitivity to gender, age, or trauma. For example, surrendering identity documents can heighten vulnerability to exploitation, especially for women with insecure housing or social support. Obligations to report regularly can create unmanageable burdens for women caring for children, while financial guarantees are discriminatory toward individuals without independent economic resources, most often women.

To truly fulfil the protective purpose of alternatives to detention, the framework should explicitly include community-based, supportive, and rights-based measures that account for the lived realities of vulnerable groups. A shift in emphasis is required from control to care, from standardisation to individualisation, and from a compliance to protection. Therefore, it is important to introduce gender- and age-sensitive alternatives, such as case management programs, open and safe accommodation tailored for women and children, community-based sponsorship mechanisms, and referral to specialised support services.

ECRE recommends the following amendments to Article 31**:**

Article 31
Alternatives to detention

Article 31(1):

Member States shall provide for alternative measures to detention in national law. Such measures shall be ~~**ordered**~~ ***considered prior to ordering detention,*** taking into account the individual circumstances of the third-country national concerned, including any ***gender-, LGBT-, age-, and trauma-related*** vulnerabilities, and be proportionate to the objectives of the measure. ~~**to the level of the risk of absconding assessed in accordance with Article 30**~~. ***If a decision is taken to order detention rather than an alternative to detention, the third-country national shall be informed of the reasons in writing.***

Article 31(2): add the following to the list of measures:

f.Referral to individualised case management programmes that provide free legal, psychosocial,

medical, and housing support tailored to the needs of vulnerable individuals, including women and children.

g.Placement in community-based accommodation with gender/LGBT-appropriate safeguards and access to essential services.

h.Supervision by community-based sponsors or civil society organisations, particularly those focused on supporting women, children, LGBT individuals, or victims of trafficking in human beings or of torture.

i.Conditional release where that is necessary for family unity and to ensure that parents, especially single mothers, are not separated from their children.

j.Referral to protection services for survivors of gender-based violence, trafficking, or torture, unaccompanied children, or persons with special needs as an alternative to custodial arrangements.

Article 32: Detention period

The proposed Regulation includes a detention period not exceeding 12 months in a given Member State. Detention may be extended for a period not exceeding a further 12 months in the given Member State where the return procedure is likely to last longer owing to a lack of cooperation by the third-country national concerned, or to delays in obtaining the necessary documentation from third countries.

ECRE strongly opposes allowing a period of detention of up to two years, especially when due to circumstances beyond the person's control. This time period is unlikely to meet the condition for the use of detention because it will usually exceed the time necessary to prepare the return or carry out the removal. In practice, lengthy periods of detention indicate that the authorities are no longer preparing for removal, usually occurring when removal is not possible.

In addition, Article 32(3) states that when detention ceases to be justified the third-country national shall be released but that release shall not preclude the application of measures to prevent the risk of absconding in accordance with Article 31. As such, it indicates that detention on the grounds of a pending return could then be substituted by detention based on a risk of absconding.

Deprivation of liberty constitutes an extreme sanction for people who have committed no crime and therefore should be used only as a last resort and for the shortest period possible.[73] ECRE has serious concerns about the lengths of time that people can be detained and maintains its position that the maximum time periods of detention allowed under the current Return Directive are already excessive. Any further extension of the maximum time period of detention must be strongly resisted. Therefore, ECRE calls for the deletion of the proposed extension.

ECRE recommends the following amendments to Article 32:

Article 32
Detention period

Article 32 (2) When it appears that the conditions laid down in Article 29 are no longer fulfilled, detention shall cease to be justified and the third-country national shall be released. ~~**Such release shall not preclude the application of measures to prevent the risk of absconding in accordance with Article 31.**~~

(3) The detention shall not exceed ***6*** months **[deleted text]**.

73. The CJEU and ECtHR have both emphasized that detention of asylum seekers or migrants must be strictly limited in duration and justified by legitimate purposes. In J.N. (C601/15 PPU), the CJEU stated that detention is only lawful if it respects the guarantees of Article 5(1) ECHR, including that it be "proportionate in relation to the ground relied on" and devoid of bad faith or arbitrariness. CJEU, Judgment of 15 February 2016, J.N. v Staatssecretaris van Veiligheid en Justitie, C601/15 PPU, ECLI:EU:C:2016:84, paras. 78, 81. In M.K. v. Hungary, the ECtHR held that detention exceeding what is "reasonably required for the purpose pursued" violates Article 5 § 1(f), finding that continued detention after an asylum application becomes arguable fails the standard of lawful and non-arbitrary deprivation of liberty. ECtHR, Judgment of 9 June 2020, M.K. v. Hungary, Application no. 46783/14, paras. 20–21.

~~(4) The expiry of the maximum detention period in accordance with paragraph 3 does not preclude the application of measures in accordance with Article 31.~~

Article 33: Review of detention orders

Article 33 (3)(b) states that "the third-country national concerned be granted the right to initiate proceedings by means of which the lawfulness of detention is subject to judicial review, to be concluded as speedily as possible after the launch of the relevant proceedings, and no later than 15 days thereafter."

The right to review a detention order is established in EU and international law. In practice, it may be affected by the absence of suspensive effect of the appeal against the return decision. In addition, the burden on the courts and the third-country national is significant. The person may be launching up to five appeals at the same time before different judicial instances in a two-week period.

For example, if the asylum decision and return decision are issued at the same time, they will need to be appealed at the same time. The person may also have to review the use of detention. They have to request the suspension of the effects of the decisions, and they may also have to appeal an entry ban or removal decision. Provisions for expanding judicial capacity will be required, including allocation of EU funding. ECRE proposes reinstating the automatic suspensive effect of appeals in order to limit the burden on the judiciary, as described above.

Article 34: Detention conditions

Article 34 provides minimum standards for the conditions in which third-country nationals are detained, establishing the need for specialised facilities, access to legal and family contact, and provision of health care and essential services. While it represents a baseline effort to develop dignity in detention settings, the Article remains largely generic and insufficiently tailored to address the lived experiences and risks faced by particularly vulnerable groups, including women, girls, children, survivors of trauma or violence, LGBT+ individuals, persons with disabilities, and the elderly. To ensure respect for EU and international law when establishing detention conditions, Member States should be guided by the case law of the European courts and highest national courts on the topic.[74]

For women and girls in particular, detention settings frequently pose elevated risks. These include exposure to gender-based violence**,** re-traumatisation**,** lack of gender-appropriate healthcare, inadequate protection against exploitation or harassment, and lack of health and hygiene support.

ECRE recommends the following amendments to Article 34:

Article 34
Detention conditions

34 (1)

Detention shall take place, as a rule, in specialised facilities, including those ~~**in dedicated branches of other facilities**~~ ***adapted to meet the gender-specific, age-appropriate, and vulnerability-related needs of detained third-country nationals***. Where a Member State cannot provide for detention in such facilities and is obliged to resort to prison accommodation, the third-country nationals shall be kept separated from ordinary prisoners ***and housed in conditions appropriate to their status and needs***.

34 (4)

Particular attention shall be paid to, and special accommodation provided for, the ~~**special**~~ ***gender-specific, age-related, medical, psychological, and protection*** needs of detained vulnerable persons. ***Upon admission to detention, all individuals shall be screened by qualified personnel to identify such vulnerabilities.*** Emergency health care and essential treatment of illness ***-including access to sexual and reproductive health services, mental health care, and hygiene products appropriate to sex and age-*** shall be provided to detained third-country nationals.

74. See: ECRE comments on the Directive (EU) 2024/1346 of the European Parliament and of the Council of 14 May 2024 laying down standards for the reception of applicants for international protection (recast), September 2024, p. 9-14.

Article 35: Conditions for detention of minors and families

Article 35 sets out the parameters and conditions for detention of children and families. It stipulates that unaccompanied children and families with children shall only be detained as a measure of last resort and for the shortest appropriate period of time and taking into account the best interests of the child.

Article 35 also sets out that families and unaccompanied children detained in preparation for return shall be provided with separate accommodation guaranteeing adequate privacy. Personnel shall be adequately trained, and facilities adapted to take into account the needs of the people concerned. Children in detention shall have access to leisure activities and education.

ECRE rejects the notion that the detention of children can ever be in the best interest of the child. The best interests of the child principle militates strongly against any resort to detention, whatever the context. The ECtHR's rulings in *A.B. v France* and related cases have confirmed that the conditions inherent in detention facilities are a source of anxiety and exacerbate the vulnerability of children, leading to a violation of Article 3 ECHR.[75] This applies for unaccompanied children and children with families alike.

ECRE recommends the following amendments to Article 35:

Article 35
Conditions for detention of minors and families

Article 35: ~~**Conditions for**~~ detention of minors and families

1.Unaccompanied minors and families with minors shall ***not be detained***. ~~**only be detained as a measure of last resort and for the shortest appropriate period of time and taking into account the best interests of the child.**~~ ***Instead provisions set out in Article 23 should be applied***.

CHAPTER VI: READMISSION

Article 36: Readmission procedure

Article 36 outlines the procedure for readmission that must be followed when TCNs are issued with an enforceable return decision.

The Article does not address scenarios where a third country fails to respond to a readmission request or is reluctant to cooperate in re-admitting its citizens. This lack of clarity raises concerns about prolonged legal uncertainty and the potential for arbitrary detention.

In ECRE's view, Member States should establish a clear time limit for third countries to respond to formal readmission requests. If a third country fails to respond or rejects the request within the specified period, the competent authorities should explore alternative solutions, such as granting residence permits, in order to prevent individuals from being left in a prolonged legal limbo without status or protection. While Article 14 provides measures for the postponement of return decisions and grants certain rights during this period, it lacks clarity on whether Member States can offer dignified and stable residence permits as an alternative, leaving individuals in an uncertain and vulnerable situation.

ECRE proposes the following addition to Article 36:

Article 36
Readmission procedure

New (8) If a formal readmission request is either formally rejected by the country of origin or receives no response, an alternative solution, such as granting a residence permit, should be considered.

75. ECtHR, A.B. v France, Application No 11593/12, Judgment of 12 July 2016. See EDAL case summaries at: http://goo.gl/rW2hTh.

Article 37: Communication with non-recognised third-country entities

Article 37 provides that Member States "may communicate, as necessary, with non-recognised third-country entities responsible for one or more steps in the readmission process. Such communication shall be limited to what is necessary for carrying out the readmission procedure and shall not amount to diplomatic recognition of the entities concerned."

The provision is likely to have been included as a response to Member States' and EU institutions' concerns about the diplomatic implications of cooperating with de facto authorities in particular countries. The Taliban in Afghanistan is a case in point, given that Member States may wish to resume deportations to Afghanistan but do not want such cooperation to be interpreted as legitimising or recognising the Taliban regime.

While Article 37(2) states that such communication does not constitute diplomatic recognition, the core concern lies not in the recognition itself, but in the act of cooperating with non-recognised entities, particularly those with documented records of human rights violations.

ECRE expresses deep concern about the implications of engaging with such entities. The very term "non-recognised entities" highlights the nature of these states, as their lack of recognition or sanctions by the international community including the EU and its Member States often stems from serious governance failures, human rights abuses, or even the presence of ICC arrest warrants against their leaders, as seen in the case of Afghanistan. A lack of recognition may alternatively stem from other violations of international law, such as a breach of territorial integrity or the crime of aggression, underlying the creation of the entity.

Furthermore, readmission is not merely a matter of returning individuals; it is also about ensuring that returnees are treated with dignity and are not subjected to degrading or inhumane treatment. Without a structured monitoring system or a legally binding agreement, it is impossible to guarantee their safety and well-being upon return, making engagement with such entities highly concerning. By definition, non-recognised entities are not sovereign states and in many circumstances are not bound by international law and not party to monitoring and enforcement standards relating to respect for international standards.

From a diplomatic perspective, even when communication and cooperation is framed as not amounting to official recognition, it could still undermine EU foreign policy by indirectly legitimising entities that violate international law.

ECRE recommends deleting Article 37.

CHAPTER VII: SHARING AND TRANSFER OF PERSONAL DATA

Sharing personal data in EU return procedures must adhere to data protection principles, which require a basis in law for data processing, transparency about the data held, and the principle of minimisation of the data held. Research shows that Member States do not always inform third-country nationals in a transparent, intelligible and easily understandable manner that their personal is data being processed. FRA found that third-country nationals are often not fully informed of all aspects of data processing and may have difficulties understanding the information they receive.[76]

In general, sharing information raises concerns about the rights to respect for private life and the right to personal data protection, enshrined in Articles 7 and 8 of the EU Charter.[77] The principle of purpose limitation

76. FRA, FRA Opinions Biometrics, https://fra.europa.eu/en/content/fra-opinions-biometrics.

77. The CJEU confirmed that any interference with the rights to privacy and data protection under Articles 7 and 8 of the Charter must be strictly necessary, proportionate, and clearly defined by law. In Tele2 Sverige AB, the Court held that data retention must be limited to what is strictly necessary for combating serious crime, with access based on objective criteria.CJEU, Judgment of 21 December 2016, Joined Cases C-203/15 and C-698/15, ECLI:EU:C:2016:970, paras. 102, 119. In C-178/22, the Court confirmed that only objectives such as combating serious crime or preventing serious public threats can justify serious interference with these rights. CJEU, Judgment of 30 April 2024, Finanzamt R v. A, Case C-178/22, ECLI:EU:C:2024:371, para. 36.

may also be at risk[78] and with the rapid expansion of EU interactive databases in the field of migration, data quality and oversight are also concerns.[79]

In addition, in return procedures the information to be shared with other Member States and with third countries, is "particularly sensitive data," also known as "special categories of personal data," that includes information revealing racial or ethnic origin, biometric data, health data.[80] ECRE argues that this category also applies for information on whether an individual has applied for asylum, which should not be shared with a third country of return or deportation.

Article 39: Transfer of data to third countries relating to third-country nationals for the purposes of readmission and reintegration

Article 39 regulates which kind of data may be shared by Member State authorities or Frontex with third countries. When sharing data with third countries, the third countries will most probably not have an adequacy decision allowing the transfer of data, which has a legal basis in Article 45 of GDPR,[81] so additional care should be taken.

FRA has emphasised that EU Member States must take all necessary measures to prevent the information that a third-country national has lodged a claim for international protection from being shared with third countries. In particular, EU Member States should only share personal data with third-country authorities for the purpose of return when the claim has been rejected at final instance.[82]

ECRE proposes the following amendments to Article 39:

Article 39
Transfer of data to third countries relating to third-country nationals for the purposes of readmission and reintegration

Article 39(1) Without prejudice to Articles 40 and 41, data referred to in Article 38(6), points (a) to (h) may be processed and transferred by a competent authority and, where applicable, Frontex to a third country's competent authority where the third-country national whose personal data is transferred has been informed that his or her personal data may be shared with the authorities of a third country ***in a transparent, intelligible and easily understandable manner and in a language they understand or could be reasonably expected to understand.*** ~~**provided I**~~ It should also be ~~**is**~~ ***adequate, relevant, accurate, limited to what is*** necessary for the purposes of carrying out the readmission procedure.

CHAPTER VIII: COMMON SYSTEM FOR RETURNS

Article 42: Components of a common system for returns

The proposed Article highlights the six core components that constitute the common system for returns as follows:

a) a common procedure for the return of third-country nationals with no right to stay in the Union, including a common procedure for readmission as an integral part thereof;

b) a system of recognition and enforcement of return decisions among Member States;

c) the necessary resources and sufficient competent personnel in Member States for the implementation of this Regulation, including for detention;

d) digital systems for managing the return, readmission and reintegration of third-country nationals;

78. Under Article 5(1) (b) of the GDPR, this principle requires that personal data be collected for specified purpose and not further processed in a manner that is incompatible with that purpose.

79. Statewatch, Italian police are "misleading" people about Schengen entry bans, says internal EU report, https://www.statewatch.org/news/2025/february/italian-police-are-misleading-people-about-schengen-entry-bans-says-internal-eu-report/, 24 February 2025.

80. In C-548/21, the CJEU emphasized that processing sensitive data requires heightened safeguards, strict necessity, and rigorous assessment, and highlighted the importance of legal certainty. CJEU, Judgment of 4 October 2024, Case C-548/21, X v. Staatsanwaltschaft Z, ECLI:EU:C:2024:830, paras. 73, 85, 89–90, 95, 107–108.

81. Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data

82. FRA, FRA Opinions Biometrics, https://fra.europa.eu/en/content/fra-opinions-biometrics

e) cooperation between Member States;

f) Union bodies, offices and agencies supporting pursuant to Article 43(4) and in line with their respective mandates.

In ECRE's view, the elements constituting a common system for returns must be interpreted as including not only the procedural and institutional components, but also the fundamental safeguards necessary to ensure compliance with EU primary law and international human rights obligations. These include, *inter alia*, the respect for fundamental rights in accordance with Article 5 of the proposal, the establishment of independent monitoring and accountability mechanisms pursuant to Article 15, and the guarantee of the right to an effective remedy and access to judicial review, which must be regarded as indispensable pillars of any lawful and rights-compliant return framework.

ECRE proposes the following additions to Article 42:

Article 42
Components of a common system for returns

1. A common system for returns pursuant to this Regulation shall consist of:

a.a common procedure for the return of third-country nationals with no right to stay in the Union, including a common procedure for readmission as an integral part thereof;

b.a system of recognition and enforcement of return decisions among Member States;

c.the necessary resources and sufficient competent personnel in Member States for the implementation of this Regulation, including for detention;

d.digital systems for managing the return, readmission and reintegration of third-country nationals;

e.cooperation between Member States;

f.Union bodies, offices and agencies supporting pursuant to Article 43(4) and in line with their respective mandates.

g.full compliance with relevant Union law, including the Charter, with relevant international law, with the obligations related to access to international protection, in particular the principle of non-refoulement, and with fundamental rights, including the right to an effective remedy

h.an effective and independent monitoring mechanism.

Article 45: Frontex support

Article 45 sets out the measures governing Frontex's support to Member States during return and readmission procedures, as follows:

1. Member States may request that their competent authorities be assisted by experts deployed or supported by Frontex, including return liaison officers and other liaison officers, in accordance with Regulation (EU) 2019/1896.
2. Member States shall provide relevant information to Frontex with regard to planned needs for Frontex support for the purpose of the necessary planning of the Agency's support in line with the Union priorities in the area of return, readmission and reintegration, the implementation of the return border procedure pursuant to Regulation (EU) 2024/1349, the European Asylum and Migration Strategy pursuant to Article 8 of Regulation (EU) 2024/1351 and the priorities in the context of the regular assessment of readmission cooperation pursuant to Article 25a of Regulation (EC) 810/2009.

The proposed Article does not include any reference to the essential role of Frontex's Fundamental Rights Officer (FRO) in ensuring that the Agency's support to Member States in return and border procedures is carried out in full compliance with EU and international human rights obligations. In particular, the FRO is responsible for overseeing the respect for fundamental rights during Frontex-supported return operations, including the handling and independent investigation of complaints submitted by TCNs, their legal representatives or relevant civil society actors.

Furthermore, the Article fails to acknowledge the mandatory deployment of Fundamental Rights Monitors (FRMs) during return operations and joint return operations, as required by Regulation (EU) 2019/1896. The involvement of FRMs is critical to ensuring that return procedures are implemented in a manner that is fair, humane, and respectful of human dignity. Individuals subject to a return procedure with the involvement of Frontex should be clearly informed about the complaints mechanism against the actions of Frontex and the procedure to submit a complaint, in a language they understand or could be reasonably expected to.

ECRE proposes the following amendments to Article 45:

Article 45
Frontex support

1. Member States may request that their competent authorities be assisted by experts deployed or supported by Frontex, including ***Frontex Fundamental Rights Officer, Frontex Fundamental Rights Monitors***, return liaison officers and other liaison officers, in accordance with Regulation (EU) 2019/1896.

2. Member States shall provide relevant information ***and in full compliance with the GDPR rules*** to Frontex with regard to planned needs for Frontex support for the purpose of the necessary planning of the Agency's support in line with the Union priorities in the area of return, readmission and reintegration, the implementation of the return border procedure pursuant to Regulation (EU) 2024/1349, the European Asylum and Migration Strategy pursuant to Article 8 of Regulation (EU) 2024/1351 and the priorities in the context of the regular assessment of readmission cooperation pursuant to Article 25a of Regulation (EC) 810/2009.

Article 46: Support for return and reintegration

Article 46 provides that ''Member States shall establish return and reintegration counselling structures" and that Member States shall establish national programmes for supporting return and reintegration and that they "shall, as a general rule, make use of the programmes provided by the Union".

ECRE welcomes the requirement that Member States establish return counselling and national programmes, but underlines that such counselling should be provided by an impartial[83] and independent body, and that tailored counselling should be provided to different nationalities of TCNs, taking into account their individual profiles and needs.

The Article also requires that the Member States adjust the programmes to "reflect the level of cooperation and compliance of the third-country national" and provides that the support may "decrease over time."

Paragraph 5 set out a list of criteria to take into account when "determining the kind and extent" of the support:

a) The cooperation of the TCN concerned during the return and readmission procedure, as provided for in Article 21;

b) whether the TCN is returning voluntarily or is subject to removal;

c) whether the TCN is a national of a Third country listed in Annex II to Regulation (EU)2018/1806;

d) whether the TCN has been convicted of a criminal offence;

e) whether a TCN has specific needs because of being a vulnerable person, minor, unaccompanied minor or part of a family''.

ECRE considers it counter-productive to apply conditionality to return support or to use adjustments in support as a punitive measure, including in relation to the level of cooperation, type of return, or background of the person. Credible evidence[84] suggest that meaningful reintegration support increases the chance of sustainable return. In contrast, those who are do not have the possibility to engage in a return programme and or to benefit from reintegration support often find themselves in more vulnerable situations and are unprepared for reintegration.

Reintegration support remains essential and should be provided equally to all TCNs, regardless of their level of cooperation or the nature of their return. Moreover, reducing benefits solely based on an individual's past

83. DRC, policy brief on return counselling, February 2019, available here

84. For example see OECD, return, reintegration and re-migration, 2024, available here

behaviour or prior offences – especially when they have already undergone legal consequences – is both unethical and disproportionate.

ECRE welcomes the provision of establishing return and reintegration counselling and proposes to the following changes to Article 46:

Article 46
Support for return and reintegration

Member States shall establish ***independent and impartial*** return and reintegration counselling structures.

~~**The assistance provided through the programmes for return and reintegration shall reflect the level of cooperation and compliance of the third-country national and may decrease over time. The following criteria shall be taken into account when determining the kind and extent of the return and reintegration assistance where applicable:**~~ ***The assistance provided through the programmes for return and reintegration should consider:***

whether the third-country national has specific needs by reason of being a vulnerable person, minor, unaccompanied minor, or a part of a family or lone girls or women.

CHAPTER IX: FINAL PROVISIONS

Article 47: Emergency situations

Article 47 introduces measures that allow Member States to derogate from certain obligations in the specific situation where "an exceptionally large number of third-country nationals to be returned places an unforeseen heavy burden on the capacity of the detention facilities of a Member State or on its administrative or judicial staff…"

Derogations are allowed from certain provisions under Article 33 on the review of detention orders, Article 34 on detention conditions, and Article 35 on the conditions for the detention of minors and families. Specifically, for as long as the exceptional situation persists, Member States may extend the period for judicial review of detention and may take urgent measures that derogate from the conditions of detention required by Articles 34(1) and 35(2), primarily removing the requirement to use specialised facilities separate from other detainees and reducing the requirements relating to staff training. Recital (34) notes that detention should "as a rule" take place in specialised facilities but that "Prison accommodation may be resorted to when a Member State cannot provide for such facility keeping the third country nationals separate from ordinary prisoners."

ECRE has a number of concerns about the proposed measures. First, the Article fails to clearly define what constitutes an emergency situation, referring to numbers that create an "unforeseen heavy burden". The ambiguity leaves the term open to misinterpretation by Member States and undermines the proposal's aim of ensuring uniform application across Member States. In addition, the absence of a clear time limit for the use of emergency measures may result in their prolonged application, potentially infringing on the rights of those in the return procedure, including vulnerable individuals like minors and families.

Finally, ECRE questions the necessity and proportionality of these derogations. The EU Pact on Migration and Asylum already includes provisions for addressing emergency scenarios, and introducing additional derogations may prove redundant and unnecessarily restrictive. Housing returnees in prison with the general incarcerated population furthers contributes to the blurring of the distinction between immigration law and criminal law, whereby legal principles, tools, standards and practices from the criminal justice system are applied in immigration cases – often without the protections that exist in criminal law.

ECRE proposes deleting Article 47.

Should Article 47 be retained, ECRE recommends the following amendments:

Article 47
Emergency situations

1. In situations where an exceptionally large number of third-country nationals to be returned places an unforeseen heavy burden on the capacity of the detention facilities of a Member State or on its administrative or judicial staff, such a Member State may, as long as the exceptional situation persists, decide to allow for periods for judicial review longer than those provided for in Article 33(3) and to take urgent measures in respect of the conditions of detention derogating from those set out in Articles 34(1) and 35(2).

2. When resorting to such exceptional measures, the Member State concerned shall inform the Commission without delay. ***The Commission shall then assess the situation to determine whether it meets the threshold for an emergency***. It shall also inform the Commission as soon as the reasons for applying these exceptional measures have ceased to exist.

New 2a. Any derogations from the obligations under Articles 33, 34, and 35 shall be time-limited, proportionate, and subject to review, and shall not extend beyond the period strictly necessary to address the exceptional situation. Independent monitoring bodies shall be granted access to detention facilities to ensure compliance with fundamental rights standards.

3. Nothing in this Article shall be interpreted as allowing Member States to derogate from their general obligation to take all appropriate measures, whether general or particular, to ensure fulfilment of their obligations under this Regulation.

Article 48: Statistics

ECRE welcomes the improvement of data on returns, which will provide a clearer evidence base for policy making and information to support impact assessments of return measures. In particular, Article 48(1) provides for statistics on the number of TCNs subject to (alternatives to) detention disaggregated by age, sex and citizenship.

It is also necessary to provide statistics on the length of detention measures and other restrictions of liberty. Statistics could include the average length of detention, as well as the numbers of individuals held for the longest periods permitted. Information should also be provided as to the number of people who are returned compared to the length of the detention period. If this is not possible as regular statistics, it should be one component of reporting according to Article 50.

ECRE proposes the following amendments to Article 48:

Article 48
Statistics

Article 1:

New d. average length of detention and number of individuals held for the longest period permitted.

Article 50: Reporting

ECRE welcomes the requirement for reporting every 5 years on the application of the Regulation. According to the 2018 Return Directive Article 19, the Commission should report every three years to the European Parliament and the Council on the application of the Directive by Member States. In 2014 an evaluation took place, followed by a Commission Communication on EU Return Policy. Since then, there has been no formal evaluation of the application of the Directive, despite a proposed recast of the Return Directive in 2018 and the current proposal for a Regulation in 2025. It was left to the European Parliament to conduct a substitute impact assessment in 2019 and a report on the implementation of the Directive in 2020.

In ECRE's view, this is not a justifiable way to produce policy that has such serious implications for the fundamental rights of individuals subject to return procedures. It is essential that the Commission respects its own commitments on evaluating the implementation of EU law, particularly given the ongoing challenge of non-compliance by Member States.

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