

TOWARDS A POINT OF NO RETURN FOR FUNDAMENTAL RIGHTS? THE EC'S PROPOSAL FOR A RETURN REGULATION

A SUMMARY OF ECRE'S COMMENTS ON THE PROPOSED REGULATION ESTABLISHING A COMMON SYSTEM FOR THE RETURN OF THIRD-COUNTRY NATIONALS STAYING ILLEGALLY IN THE UNION (RETURN REGULATION).

I. INTRODUCTION

The European Commission's 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 Return Directive) and aims to establish a Common European System for Returns with "swifter, simpler and more effective return procedures across the EU." This includes support for EU Member States (MS) to harmonise return policies and increase the so-called return rate – the percentage of third-country nationals issued with a return decision who ultimately return to their country of origin or are deported to a third country.

This policy note summarises ECRE's analysis of key provisions in the proposal and recommendations to the European Parliament and EU MS. ECRE's analysis indicates that the Proposal falls short of achieving the objectives set out by the European Commission and risks creating a system in which an increasing number of Third Country Nationals (TCNs) are left in legal limbo without access basic rights and essential services. While the Regulation introduces a few safeguards such as the reiteration of the principle of non-refoulement, there are serious concerns regarding its implications for fundamental rights, the erosion of procedural guarantees, its complexity and measures aimed at outsourcing responsibilities. Moreover, the proposal restricts the possibility of voluntary return by expanding the range of circumstances in which voluntary departure is not available. For a more detailed analysis, please refer to [ECRE's Comments on the Return Regulation proposal](#).

II. ANALYSIS

Countries of return and return hubs (Articles 4 and 17)

The proposal suggests a significant expansion of countries to which third-country nationals (TCNs) can be transferred against their will. This goes far beyond the 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 Asylum Procedures Regulation, and countries with which there is an agreement or arrangement – even where non-binding. ECRE has grave concerns about the expansion of countries people can be deported to and of using non-binding agreements or arrangements as the basis for return procedures.

ECRE believes the “return hub” concept outsources the EU’s fundamental rights responsibilities to third countries with no clear safeguards for the individual concerned, i.e. potentially no decision in writing establishing the return hub as a destination, or appeal before a judicial authority. There is no information on how the EU will judge whether international human rights standards are respected in the third country; which independent body or mechanism will monitor this; and any powers in case of violations of rights. The monitoring body or mechanism also only monitors the application of the agreement not its impact on individual rights.

Return decisions (Article 7, 9 and 14)

There is a blanket obligation to issue return decisions, whether or not the decision is enforceable at that time, for that individual or to that country. The proposal also suggests that where the country of return cannot be determined at the time of issuing the return decision, one or more countries of return may be indicated. ECRE is against the mandatory issuance of return decision as it will result in more people being issued a return decision who cannot return, leaving them in a situation of limbo. It will also negatively impact the return rate, a key indicator for the European Commission on returns. Similarly, in ECRE’s view, if a Member State cannot determine the country of return or deportation, then a return decision should not be issued.

ECRE welcomes the provision on the possibility for Member States to grant a residence permit, long-stay visa, other authorisation or right to stay at any time for compassionate, humanitarian or other reasons to a third-country national staying illegally on their territory and encourages states to use these options. The issued return decision should also be withdrawn where a visa settles the legal stay of the individual. Where return is postponed, if return is not possible after a maximum of two reviews, the return decision should be withdrawn and long-term residence provided.

The mutual recognition of return decisions is proposed as a mandatory measure from July 2027, despite diverging return systems and recognition rates for asylum applications across the EU. Enforcing MS will potentially be allowed to change the return country, which could have a profound effect on individual’s rights. For these reasons, ECRE recommends that mutual recognition is not mandatory.

Voluntary vs enforced return (Articles 12 and 13)

In the past, ECRE has [raised concerns](#) about harsh policies limiting options and coercing people to choose ‘voluntary’ return. Overall, provisions on voluntary return are weaker in the new proposal than in the [existing law](#). Voluntary return would apply “when the third-country national is not subject to forcible removal”, covering everything from genuinely voluntary return to situations of voluntary departure - when an individual voluntarily complies with a return order – what ECRE terms ‘mandatory return’. This blurs the distinction between mandatory and voluntary return and further weakens the concept of ‘voluntary’. Whilst ECRE welcomes the inclusion of a 30-day period for voluntary compliance with the obligation to return, there is no minimum period included. This means in theory that Member States could set very short time limits for voluntary departure, such as two or three days. The proposal introduces a wide range of circumstances in which voluntary return is not available, linking it with the wide-ranging obligation to cooperate. On forcible removal, one positive development is the obligation for authorities to assess compliance with non-refoulement by reference to the country of return and examine changes in circumstances and new elements before return. The Member State may also 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.

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

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. However, ECRE has significant concerns that no minimum time limit is given and that the suspensive effect of the appeal is not automatic but needs to be applied for within this short time limit. 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. This will also ensure conformity with case law of the European courts and reduce the burden on national courts.

It is worrying that the proposal suggests that Member States may exclude the provision of free legal assistance and representation in four situations, including where an appeal has “no tangible prospect of success” or is classed as “abusive.” Considering how broadly terms like ‘abuse’ could be defined, this may be an obstacle to accessing an effective remedy.

Obligation to cooperate and consequences of non-compliance (Articles 21 and 22)

The obligation to cooperate is broad, subjective and places an excessive burden of proof to demonstrate cooperation on the individual. It is therefore very difficult to meet and could seriously limit the option of voluntary departure. Provisions may result in discriminatory measures and being classified as non-cooperative during the return procedure even where that is not intended. Non-compliance leads to disproportionate penalties and sanctions on the TCNs. ECRE recommends that the list of sanctions in case of non-compliance be deleted as it is impractical and difficult to assess compliance in the return context, may lead to arbitrariness and adds to the complexity of the procedure.

Availability for the return process (Article 23)

The proposal states that third-country nationals should be subject to certain measures that 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 before imposing any such measures and that alternative measures under Article 23 should always be preferred to detention.

Preventing absconding and increasing detention (Article 29,30 and 31)

Detention is no longer explicitly ‘a last resort’ in the proposal. The 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. Some of the grounds such as the risk of absconding and determining or verifying identity are extremely broad and could in practice lead to systematic use of detention. This risks violating the principle of necessity and proportionality, and in ECRE’s view 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. ECRE believes a case-by-case assessment of the risk of absconding should be required. The current list of criteria risk being a ‘catch-all’ provision: as the list stands, there are few people who would not fulfil at least one of the criteria.

Whilst welcoming the obligation to provide alternatives to detention, the framework should explicitly include community-based, supportive, rights-based measures that account for the lived realities of vulnerable groups.

Derogations (Articles 3 and 47)

The derogations for groups of people to whom the Regulation should not apply could capture a large number of people. For this group, only limited safeguards would apply, increasing the risk of violations of fundamental rights. The derogations undermine the Regulation’s objective of creating a common system.

Measures allow additional derogations in emergency situations where an exceptionally large number of TCNs need to be returned. No clear definition of “emergency situation” leaves the term open to misinterpretation, whilst the [Pact on Migration and Asylum](#) (the Pact) already includes provisions for emergencies. In ECRE’s view introducing additional derogations may be unnecessary, disproportionate, and contributes to de-harmonisation.

Readmission procedure (Article 36)

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, ECRE recommends that the competent authorities explore alternative solutions, such as granting residence permits, to prevent individuals from being left in a prolonged legal limbo without status or protection.

Monitoring (Article 15), Statistics (Article 48) and Reporting (Article 50)

The proposal introduces an independent monitoring mechanism with clear criteria and safeguards. However,

to be effective, monitoring should cover all stages of the return process, from pre-return to the final handover of third-country nationals to the receiving state's authorities. Improvement of data on returns as proposed is welcome as it will provide a clearer evidence base for policy making and impact assessments of return measures. ECRE proposes that statistics on restrictions of liberty such as the average length of detention and the number of individuals held for the longest periods permitted are included.

ECRE welcomes the provision on reporting every 5 years on the application of the Regulation. 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.

In conclusion

The proposal falls short of its objectives, introducing a return procedure that is more complex, costly and bureaucratic than the current one and one that also carries significant risks to the fundamental rights of people in return procedures. Moreover, a number of its provisions undermine its aim of establishing a common system by allowing MS to revert to national legal frameworks in specific cases. Another approach is possible, including reducing the pool of people to return through ensuring that asylum systems function effectively in granting protection, that only enforceable return decisions are issued, through expanded use of national legal statuses – protection and non-protection related – and withdrawing return decisions where a visa settles the legal stay of the individual, or where return is postponed at least twice after review. This is much more in the interests of individuals, MS and the EU than a wholesale expansion of the detention and deportation apparatus and would also promote the core European values of fundamental rights.

III. RECOMMENDATIONS

(More detailed recommendations can be found in ECRE's full [comments](#) on the Return Regulation)

For the European Parliament and Member States:

- » Issuing any return decision and the mutual recognition of return decisions should not be mandatory. Should a MS recognise a return decision issued by another MS, the TCN should have access to legal remedies and safeguards equivalent to those in the [mutual recognition of criminal matters](#).
- » There should be a clear distinction between voluntary departure and voluntary return; voluntary departure should be preferred over enforced return; and there should be at least 7 days to prepare for voluntary departure.
- » If a Member State cannot determine the country of return or deportation at the moment the return decision is taken, then it should not be issued
- » Return should only take place to countries of origin or formal habitual residence; other countries should only be considered if the person concerned decides to return there voluntarily; non-binding agreements or arrangements should not be the basis for return to a third country.
- » The suspensive effect of 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.
- » Detention should be maintained as a measure of last resort and should be kept as short as possible.
- » Detention periods should not be increased from those in current legislation, and unaccompanied children and families with minors should never be detained.
- » 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, which is overly broad, punitive and risks limiting the use of alternatives.
- » The obligation to cooperate and associated punitive measures should be deleted as they are difficult to assess in return procedures and may lead to arbitrariness and overly complicate the process.
- » Monitoring by an independent body should cover all stages of the return process, from pre-return to the final handover of third-country nationals to the receiving state's authorities and monitoring of agreements with third countries. It should include the impact on the fundamental rights of individuals.