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CCBE comments on the Commission proposal for a Directive on common standards and procedures in Member States for returning illegally staying third-country nationals (recast)

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The Council of Bars and Law Societies of Europe (CCBE) represents the bars and law societies of 45 countries, and through them more than 1 million European lawyers. The CCBE regularly responds on behalf of its members to consultations on policy issues which affect European citizens and lawyers.

On 12 September 2018, the Commission published its proposal for a recasting of Directive 2008/115/EC on common standards and procedures in Member States for returning illegally staying third-country nationals. This proposal is part of a package of measures proposed by the Commission as a follow up to the European Council of 28 June 2018 and aims at ensuring the effective return of third-country nationals who do not have a right to stay in the EU. This constitutes one of the key objectives of European Union's migration policy.

The principal modifications proposed by the Commission as part of this targeted revision of the Return Directive concern the determination of the risk of absconding (Article 6); the obligation to cooperate for third country nationals (Article 7); the issuing of a return decision in connection with the termination of illegal stay (Article 8); the diminution of the timeframe for voluntary departure (Article 9); the possibility for Member States to issue entry bans during border check at exit, without issuing a return decision (Article 13); the introduction of national return management systems (Article 14); the remedies (appeals or reviews) (Article 16); the introduction of new grounds for detention (Article 18); the introduction of a simplified return procedure for third-country nationals who are refused asylum (Article 22).

The CCBE considers that several aspects of the proposals are problematic and should be reconsidered so as to guarantee fundamental rights safeguards.

It indeed appears that the reform is entirely aimed at facilitating the expulsion of irregular migrants. Under the proposal, judicial proceedings would be accelerated, with time limits below the standard set out by the CJEU, and the use of detention would be facilitated.

The CCBE considers that, as pointed out by Judith Sargentini MEP, Rapporteur for the European Parliament's LIBE Committee (hereafter the Rapporteur), any revision of the return *acquis* must "*ensure that the steps taken in that direction are accompanied by unambiguous and enforceable fundamental rights safeguards*".

1) LACK OF IMPACT ASSESSMENT

The CCBE regrets that the proposed revision of the Return Directive was not accompanied by any impact assessment from the Commission.

According to the explanatory memorandum of the Commission, this targeted revision of the Return Directive was necessary to address the key challenges to ensure effective returns and notably to "*reduce the length of return procedures, secure a better link between asylum and return procedures and ensure a more effective use of measures to prevent absconding*". This argument relies principally on the little progress made in terms of increasing the effectiveness of returns. However, to measure effectiveness of returns, the Commission primarily based itself on the absolute number of return decisions enforced by Member States. Other types of data such as the number of forced and voluntary returns and qualitative data on the sustainability of returns are therefore often disregarded. As regards the necessity of an impact assessment, the Commission concluded the following:

"*Taking into account that an in-depth assessment of the key issues in the field of return has been accomplished, the urgency in which legislative proposals need to be tabled and also acknowledging that the revision of the existing Directive is the most appropriate option both in terms of substance and timing, an Impact Assessment on this proposal is not deemed necessary*."

In this context, the CCBE welcomes the targeted substitute impact assessment (available here) made by the European Parliamentary Research Service (EPRS) at the request of the LIBE Committee**.**

Firstly, this substitute impact assessment rightly points out the lack of persuasiveness of the Commission's decision not to issue an impact assessment. It underlines the necessity of having an impact assessment whenever a Commission initiative is likely to have significant economic, environmental or social impacts and that nothing in the rules of procedure provide for any exception regarding the urgency of the reform. The CCBE considers therefore that an impact assessment should have been issued by the Commission as the proposed reform of the Return Directive meets those requirements and has major impacts on fundamental rights safeguards both at EU level and at national level.

It also reveals a number of key issues which were not properly taken into consideration and should have been examined in more detail in the Commission's proposal, such as the lack of clear evidence supporting the Commission's claim that its proposal would lead to more effective returns of irregular migrants; the lack of compliance of the Commission's proposal with the proportionality principle; the impact of the Commission's proposal on a number of social and human rights of irregular migrants, including likely breaches of fundamental rights, as safeguarded under international and EU law, in particular the EU Charter of Fundamental Rights; and substantial additional costs that will be generated for Member States and the EU.

2) ACCESS TO JUSTICE - ADEQUATE PROCEDURAL SAFEGUARDS SHOULD BE GUARANTEED

Access to justice is essential to achieve a sustainable and humane return policy and is of paramount importance in a European Union governed by the Rule of Law. Accordingly, legal aid and interpretation must be provided for third-country nationals at any stage of the procedure. Besides, effective remedies by way of appeal or review should be ensured.

Access to legal advice

As regards Article 7 of the Commission's proposal, the CCBE supports the Rapporteur's proposal to provide migrants "*access to timely, unbiased and reliable information allowing them to make an informed decision and fosters preparedness for return and ownership of the return process, thereby*

enhancing prospects for sustainable reintegration", instead of imposing an obligation for them to cooperate with the competent authorities which may not be effective in practice.

Remedies (Appeals and reviews)

Regarding Article 16, the CCBE considers that:

- appeals should not be restricted to a single level of jurisdiction, thus allowing Member States to apply higher levels of protection by virtue of their constitutions;
- an appeal against a return decision should always have a suspensive effect or otherwise the applicant would lack an effective remedy;
- the maximum time limit of five days to lodge an appeal, where the return decision is the consequence of a decision rejecting an asylum application, should be removed given that such a short time limit would in practice undermine the effectiveness of the appeal notably in the context of multiple asylum applications. This measure does not take into account positive decisions in the context of multiple asylum applications. Besides, this time limit is too short for practitioners to provide adequate legal advice and representation.

3) THE USE OF DETENTION SHOULD BE STRICTLY LIMITED

The Commission's proposal provides for the use of detention for a minimum period of 3 months and a maximum period of 6 months in cases of (a) a risk of absconding, (b) the third-country national avoids or hampers the preparation of return and (c) a threat to public order or national security.

This minimum period of detention is not compatible with the requirement of applying detention only for as short a period as possible.

As pointed out by the Rapporteur in her report, available data have shown that there exists no clear correlation between longer period of detention and the effectiveness of return. Lengthy detentions may even be counterproductive and not encourage voluntary returns.

The CCBE considers that the following provisions of the Commission are also problematic and should be reviewed:

Threat to public order or national security (Article 18)

There is no exact definition of these risks. This can lead to arbitrary decisions. It is of the upmost importance that clear boundaries are set.

Risk of absconding (Article 6):

Article 6 provides for a long non-exhaustive list of very broad criteria to assess the risk of absconding which may capture almost all irregularly staying third-country nationals. This definition will make it easier to refuse the prospect of voluntary departure and easier to justify detention.

- (b) & (c) Lack of residence, fixed abode or reliable address & lack of financial resources: this criterion is very vague.
- (d) Illegal entry into the territory of the Member State: this criterion would without justification concern almost every former asylum seeker.

- (i) Non-compliance with the requirement of article 8(2) to go immediately to the territory of another Member State that granted a valid residence permit or other authorization offering a right to stay: this criterion is too wide and would include too many persons.

As the Rapporteur rightly explained in her report, this way of assessing the risk of absconding "*may therefore result in extended and automatic use of detention or deprive large numbers of third country nationals from a period of voluntary departure, thereby undermining key principles of proportionality and necessity. At the same time, the non-exhaustive character of the list allows Member States to adopt supplementary objective criteria, and, therefore, further expand the notion of the risk of absconding, contrary to the aim of defining and harmonizing the definition of the risk of absconding.*"

Border procedure (Article 22)

The Commission's proposal introduces specific simplified rules applicable to third-country nationals who were subject to asylum border procedures: issuance of a decision by a simplified form, no period for voluntary return granted as a rule (except if the third-country nationals holds a valid travel document and cooperates with the national authorities), and a shorter time-limit for lodging an appeal, dedicated ground for detention.

A third-country national who was already detained during the examination of his or her application for international protection as part of the asylum border procedure may be maintained in detention for a maximum period of 4 months under the border procedure for return. If the return decision is not enforced during that period, the third-country national may be further detained if one of the conditions set out in the provisions relating to the general rules on detention is fulfilled and for the period in detention set in accordance with article 18.

As a result, the maximum term of 6 months can be exceeded.

The CCBE agrees with the substitute targeted impact assessment which underlines that "*the lack of clarity as to the procedural guarantees that will be available under the proposed Asylum Procedure Regulation makes it difficult to foresee the potential impact of the proposed border procedure (Article 22) on fundamental rights, although some of the relevant provisions, are prima facie problematic*", such as the detention period exceeding 6 months or reduced procedural safeguards undermining effective access to justice.

Detention of minors (Article 20)

Article 20 provides for the possibility to detain minors with their families. This provision appears to contradict Article 37 of the United Nations Convention on the Rights of the Child (UNCRC) (right to liberty) read in conjunction with article 3 (principle of the best interest of the child) and is not in accordance with the Joint General Comment nº 4 (2017)[1] (para.5) which says that "Every child, at all times, has a fundamental right to liberty and freedom from immigration detention". The Committee on the Rights of the Child has asserted that the detention of any child because of their or their parents' migration status constitutes a child rights violation and contravenes the principle of the best interests of the child. In this light, both Committees (the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and the Committee on the Rights of the Child) have repeatedly affirmed that children should never be detained for reasons related to their or their parents' migration status and States should expeditiously and completely cease or eradicate the immigration detention of children. Any kind of child immigration detention should be forbidden by law

[1] Joint general comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23 (2017) of the Committee on the Rights of the Child on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return*

and such prohibition should be fully implemented in practice. Immigration detention is never in the best interest of the child. The UNHCR's position is that children should not be detained for immigration related purposes, irrespective of their legal/migratory status or that of their parents, and detention is never in their best interests.[2]

It is also contrary to the Resolution 2020 (2014) of the Parliamentary Assembly of the Council of Europe that considers that unaccompanied children should never be detained and that the detention of children on the basis of their or their parents' immigration status is contrary to the best interests of the child and constitutes a child rights violation. PACE has called on the member States to: introduce legislation prohibiting the detention of children for immigration reasons and ensure its full implementation in practice.

Indeed, according to Article 3 in conjunction with Article 22 UNCRC the best interests of the child shall be a primary consideration in all actions affecting children, including asylum-seeking and refugee children. In that regard, the Rapporteur notes that the detention of minors is never in their best interests and that family unity should never be used to justify the decision to detain accompanied minors. Moreover, no discrimination should be made between unaccompanied and separated children and children within families.

[2] UNHCR's position regarding the detention of refugee and migrant children in the migration context.January 2017