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The Return Directive: A Cause for Shame or an Unexpectedly Protective Framework?

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Abstract: This chapter analyses the key instrument of the EU's return policy - the Return Directive (2008/115/EC). Although initially labelled as the "Shameful Directive", due to arguably diluting human rights and procedural guarantees for third-country nationals, the Return Directive has, since, proved its added value for the protection of migrants in an irregular situation. From the "Directive of Shame", the Return Directive has become a positive normative example for legal orders around the globe. European and national courts have gradually reinforced its 'protective' potential, acting as gatekeepers for human rights protection and effective implementation of the Directive. This chapter will explain the rationale, main purposes and specific terminology introduced by the Return Directive. It will continue with analysing the main procedures, legal safeguards and rights introduced by the Return Directive as interpreted by the CJEU, ECtHR and key domestic judgments. It will highlight the persistent shortcomings in the Directive's implementation, and their possible causes. In conclusion, the chapter explores the future of the Return Directive in light of the 2018 European Commission's proposal for reforming the Directive, and the 2020 Pact on Asylum and Migration.

I. Introduction

The Return Directive is the key instrument of the EU's internal dimension of the return policy.[1] This instrument has governed the procedure for returning third country nationals ('TCNs') who are illegal staying in the Member States since the end of 2010.[2] The Return Directive has been one of the longest negotiated,[3] most criticised,[4] and litigated EU instruments of migration management.[5] It followed a different adoption path than that of the EU asylum *acquis*, being adopted only 10 years after the EU gained the required competence to legislate,[6] and introducing directly maximum harmonisation norms. Therefore, although the Member States retained the power to adopt more

[1] Directive 2008/115/EC of the European Parliament and the Council, of 16 December 2008, on common standards and procedures in Member States for returning illegally staying third-country nationals (OJ L 348 of 24.12.2008) ('RD').
[2] The Directive entered into force on 2 December 2010.
[3] See Fabian Lutz, Sergo Mananashvili, Madalina Moraru, 'Return Directive 2008/115/EC', *EU Immigration and Asylum Law A commentary* (Kay Hailbronner Daniel Thym, CH BECK, Hart, Nomos 2022, third edition) 692-804.
[4] Diego Acosta Arcarazo, 'The Returns Directive: Possible Limits and Interpretation' in Karin Zwaan (ed.), *The Returns Directive: Central Themes, Problem Issues, and Implementation in Selected Member States* (Wolf Legal Publishers, Nijmegen, 2011) 7-24; Valsamis Mitsilegas, *The criminalisation of migration in Europe: challenges to human rights and the rule of law* (Springer, London 2015), 93–107.
[5] On litigation at both EU and national level, see Madalina Moraru, Galina Cornelisse and Philippe de Bruycker, *Law and Judicial Dialogue on the Return of Irregular Migrants from the European Union* (Hart 2020).
[6] With the entry into force of the Amsterdam Treaty, see Article 63(3)(b) TEC.

favorable measures on return proceedings,[7] these must not undermine the harmonising value of the common return standards. Labelled as the "Shameful Directive",[8] due to arguably diluting human rights and procedural guarantees for TCNs, the Return Directive has, since, proved its added value for the protection of TCNs in an irregular situation. From the "Directive of Shame", the Return Directive has become a positive normative example for legal orders around the globe,[9] due to its unexpected protective effect for irregular TCNs in practice, materialised in the form of prioritisation of voluntary departure, overall reduction of pre-removal detention and a driver of enhancing the rule of law.[10] Their task has not been easy, as it involves balancing between effective returns, which is associated with the Member States' exclusive competence over border control and national security, and protection of TCNs' human rights. After a gradual enhancement of the Directive's protective function and overall positive public perception, the European Commission proposal for the Recast of the Return Directive has brought back the 'Directive of Shame' campaign, this time raising more serious fundamental rights and policymaking design concerns.[11]

This Chapter analyses the main procedures and rights introduced by the Return Directive as interpreted by the CJEU, ECtHR and key domestic judgments. It highlights the persistent shortcomings in the Directive's implementation, and their possible causes. In conclusion, the chapter explores the future of the Return Directive in light of the 2018 European Commission's proposal for reforming the Directive, and the 2020 Pact on Asylum and Migration. It concludes by underlining that certain key principles and human rights should be safeguarded regardless of the political priorities, causes for urgent policymaking or political pressures.

II. The Scope of Application of the Return Directive and its Specific Terminology

The Return Directive touches on key State exclusive competences such as border control, national security and criminal law. Demarcating between the mandatory application of the Return Directive and the Member States' reserved competences has been the subject of a persistent debate and litigation before the CJEU. Member States have attempted to preserve their decision-making over return procedures by widely interpreting derogations permitted under the Directive or preserving national terminology in detriment of the clearer and more specific EU law terminology introduced by the Directive.

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[7] Article 4 RD.

[8] Valsamis Mitsilegas, 'Immigration Detention, Risk and Human Rights in the Law of the European Union. Lessons from the Returns Directive', *Immigration Detention, Risk and Human Rights* (Springer 2016), 27.

[9] See Commission Communication, Evaluation of the implemenation of the Return Directive COM(2014) 199; Michael J. Flynn, 'Conclusion: the many sides to challenging immigration detention' in Michael J. Flynn and Matthew B. Flynn (eds) *Challenging Immigration Detention Academics, Activists and Policy-makers* (Elgar 2017).

[10] On the RD as a driver for the rule of law, see Galina Cornelisse, Madalina Moraru, 'Judicial Interactions on the European Return Directive:Shifting Borders and the Constitutionalisation of Irregular Migration Governance' in *Special Issue of European Papers* 'Migration and EU Borders: Foundations, Policy Change, and Administrative Governance', co-edited by Andrea Ott, Lilian Tsourdi and Zvezda Vankova (forthcoming 2022).

[11] For a critical evaluation of the Proposal and its relation with the 2020 Pact on Asylum and Migration, see Madalina Moraru, 'The future architecture of the EU's return system following the Pact on Asylum and Migration: added value and shortcomings', in Daniel Thym and Odysseus Academic Network (eds.), *Reforming the Common European Asylum System. Opportunities, Pitfalls, and Downsides of the Commission Proposals for a New 'Pact' on Migration and Asylum* (Nomos, 2022).

The Return Directive introduced a salient reform of domestic immigration terminology with the aim of unifying different notions previously used at domestic, EU,[12] and international levels. Terms such as 'repatriation', 'deportation'[13] or 'expulsion' were replaced with the neutral notion of 'return', applied to the 'process of a TCN going back voluntarily or forced to a third country'.[14] Similarly, 'public custody'[15] was replaced with a more honest 'pre-removal detention', which reflects the deprivation of liberty actually entailed. Nevertheless, several Member States have preserved their pre-Directive terminology.[16] These preferences for domestic legal terminology have led to confusing and divergent Member State practices, as well as erroneous derogation from the Directive's application.[17]

The Return Directive introduces common standards on return procedures which aim at harmonising the mosaic of domestic return procedures and it builds on the Schengen acquis. For this reason it has a wide geographical and material scope of application. Namely, it applies to all the Member States (except Ireland), and to the associated Schengen countries (Norway, Iceland, Switzerland and Liechtenstein). It should be noted that Member States cannot avoid the application of the Directive by excluding certain parts of their territory from its application (e.g. airport transit zones).[18]

The Directive has a broad material scope of application, covering any TCN staying illegally on the territory of a Member State. By 'TCN', the Directive clarifies that 'any person who is not a citizen of the Union' and 'who is not a person enjoying the right of free movement under Union law, as defined in Article 2(5) of the Schengen Borders Code'[19] falls under its scope.[20] For instance, TCNs with free movement rights under EU or other international treaties,[21] family members of EU citizens[22] do not fall within the personal scope of application of the Directive.

'Illegal stay' results when a TCN is present on the territory of a Member State without fulfilling the conditions for entry, stay or residence, and by this mere fact, his/her staying is illegal.[23] Illegal stay can result from irregular border crossing or breaching the conditions of stay (such as overstaying

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[12] See Article 79(2)(c) TFEU refers to terms such as 'removal', and 'repatriation'.
[13] Used, for instance, in Spanish immigration legislation, see Philippe de Bruycker; Madalina Moraru, Geraldine Renaudiere, 'European Synthesis Report on the Termination of Illegal Stay', *MPC ReDial Research Report 2016/01,* 28.
[14] See Article 3(3) RD.
[15] 'Public custody' is used, for instance in France and Romania, to conceal the negative effects inherent in the pre-removal 'detention' measure. Although 'public custody' has the same effects as pre-removal detention, it has incorrectly been interpreted by certain supreme and constitutional courts as only a limitation of freedom of movement and not of the right to liberty, see Constitutional Court of Romania, Decision No. 419/14.10.2004 and Lithuanian Supreme Administrative Court, Case No. N858-90/2014 of 15 September 2014.
[16] For instance, 'expulsion' is still commonly used by several Member States instead of 'return' (see Austria and Spain). 'Public custody' is still favoured by several Member States to 'pre-removal detention' (see France and Romania). See *ReDial Research Report 2016/01* (n 15).
[17] *Zaizoune*, ECLI:EU:C:2015:260; C-568/19, *Subdelegación del Gobierno en Toledo*, ECLI:EU:C:2020:807. For a commentary of the Spanish saga avoiding to issue return decisions in favour of issuing fines, see Cristina G. Rotaeche, 'Return Decisions and Domestic Judicial Practices: Is Spain Different?' in Moraru, Cornelisse and de Bruycker (n 5).
[18] See Commission, *Return Handbook* (Commission Recommendation C(2017) 6505) ('Commission, Return Handbook'), 7.
[19] See Article 3(2) RD.
[20] Stateless persons also fall under the scope of the Return Directive.
[21] For instance free movement rights resulting from the Treaty on the European Economic Area (1992) as regards nationals from Norway, Iceland and Lichtenstein, or on the basis of the bilateral agreement between the EU and Switzerland. The association agreement concluded by the EU with Turkey does not fall under this category.
[22] See Article 2(2) of Directive 2004/38.
[23] Case C-181/16, *Gnandi*, ECLI:EU:C:2018:465 [62].

a visa or rejected applicants for asylum applications).[24] Moreover, a TCN may be considered as illegally staying in one Member State even though he holds a valid residence permit in another Member State.[25] The borderline between legal and illegal stay has become more and more difficult to establish in the aftermath of the so-called refugee crisis due the evolving patterns of migration, and Member States expanding the notion of 'illegality' to asylum procedures.[26] The Member States have increasingly considered first instance rejected asylum seekers as falling within the scope of application of the Return Directive, leading to a confusing practice where return and appeal asylum procedures were running in parallel.[27] In *Gnandi*,[28] the CJEU clarified that the stay of a rejected asylum applicant by the administrative authority under Article 7(1) of the former Asylum Procedures Directive 2005/85/EC can be considered 'illegal stay'.[29] Although Member States are required to issue a return decision, this is deprived of all legal effects until the expiry of the deadline for appeal or the delivery of a final judgment in the appeal asylum procedure. The CJEU's pragmatic solution is arguably not squarely in line with recital 9 of the Return Directive preamble, which appears to exclude from the personal scope of application of the Directive both 'asylum seekers against whom there is no negative decision on the application', and 'those against whom a decision ending his or her right of stay as asylum seeker has not entered into force'.[30] Consequently, some domestic supreme courts do not share the CJEU's broad interpretation of 'illegality', preferring the apply to CJEU stricter definition of illegal stay from the *Arslan* judgment, which excluded asylum seekers whose procedure is pending before courts.[31]

Member States are allowed to derogate from the application of the Directive in two exhaustive categories of cases: border and criminal law related ones.[32] If a Member State decides to use one of these options, it can apply national law with the condition that the derogation is clearly stipulated in the national legislation,[33] otherwise TCNs should be considered as falling under the scope of the Return Directive.[34] During the so-called refugee crisis, Member States have temporarily reintroduced internal border controls within the Schengen area, and used this shift of internal to external border as justification for derogating from the application of the Directive. In *Affum* and *Arib*,[35] the CJEU held that the border control exception in the RD relates exclusively to the crossing of a Member State's

[24] Commission, *Return Handbook.*
[25] Case C-673/19, *M and others*, ECLI:EU:C:2021:127 [30].
[26] This trend continued also under the 2020 Pact on Asylum and Migration (European Commission, "A New Pact on Migration and Asylum", COM(2020)609 final of 23 Sept. 2020); see also Moraru (n 13).
[27] See Katharina Eisele, Izabella Majcher and Mark Provera, Directive 2008/115/EC – European Implementation Assessment (European Parliamentary Research Service June 2020) ('EP Implementation Study 2020').
[28] Case C-181/16, *Gnandi*, ECLI:EU:C:2018:465.
[29] This applies only to those Member States that chose to issue the return decision together with the rejection of asylum application in accordance with Article 6(6) RD.
[30] For a similar interpretation see AG Mengozzi, Opinion of 22nd of February 2018, case C-181/16, ECLI:EU:C:2018:90, and Opinion Mengozzi of 15 June 2017, case C-181/16, EU:C:2017:467.
[31] See, for instance, the Italian Supreme Court, case *Mena Calderin Dianelys c. Italian Interior Ministry*, Judgment No. 19819 of 26 July 2018. For a commentary of the *Gnandi* case and its follow-up, see Galina Cornelisse, 'The Scope of the Return Directive: How much Space is left for National Procedural Law on Irregular Migration?' in Moraru, Cornelisse and de Bruycker (n 5).
[32] See Article 2(2)(a) and (b) RD.
[33] Case C-61/11 PPU, *El Dridi*, EU:C:2011:268 [52].
[34] Case C-297/12, *Filev and Osmani*, EU:C:2013:569 [50]-[51]; Case C-546/19, *Westerwaldkreis*, ECLI:EU:C:2021:432, [46].
[35] Case C-47/15, *Affum*, ECLI:EU:C:2016:408 ; Case C-444/17, *Arib*, ECLI:EU:C:2019:220.

external border, as defined in Article 2(2) of the Schengen Borders Code.[36] Therefore, Member States cannot exclude from the scope of the Directive persons crossing *internal* borders, even when border controls have been reintroduced. The Court then logically ruled that these persons could not be imprisoned on the basis of national criminal law merely on account of irregular entry across an internal border, if the return procedure had not been applied.[37]

Although the CJEU has confirmed that Member States are free to lay down penal sanctions, including imprisonment,[38] in relation to infringements of migration rules, nevertheless, it provided that such measures should not compromise the application of the Return Directive. In a consistent line of jurisprudence (*El Dridi*[39], *Achughbabian*[40], *Sagor*[41]) the Court prohibited the Member States from imposing criminal sanctions on the sole grounds of illegal stay before or while carrying out return procedures since this would delay the return. The Court confirmed that Member States may adopt national criminal law aimed *inter alia* at dissuading those nationals from remaining illegally or re-entering in breach of previously legally imposed entry bans.[42] Home arrest is also precluded, if the national legislation does not provide for the immediate release of the TCN as soon as the physical transportation (return) becomes possible. A proportionate fine, as a criminal penalty, is acceptable only if it is not used as an alternative to removal and it does not impede return.[43]

In reaction to this jurisprudence, several Member States have decriminalised mere illegal entry or stay, reserving criminal imprisonment for illegal TCNs who were uncooperative within their return procedures or had committed other criminal offences.[44] It could be argued that the CJEU rulings have paved the way for decriminalisation of irregular TCNs. Thus, the Return Directive, highly criticised for its weakly and thinly phrased human rights standards, turned out with the CJEU's interpretative help to have a substantial protective function. Notwithstanding, the protective potential of the Directive has been considerably limited by the CJEU judgment in the *Zaizoune* case. There, the Court equally prohibited restrictive and more favorable[45] domestic immigration provisions in so far as they hinder the *effect utile* of the Directive. Nevertheless, the CJEU prohibits the direct application of the Directive in cases where the Member States fail to properly transpose it, if this would lead to detrimental effects for the person concerned.[46]

III. Underlying Principles and Mandatory Stages in the EU Return Procedure: from Theory to Practice

The second chapter of the Return Directive, 'Termination of Illegal Stay', sets out EU specific standards for how the return procedure should be carried out. The procedure takes the form of a

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[36] Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code) OJ L 77, 23.3.2016, p. 1–52 (consolidated version in 2019).
[37] *Affum* cit, [93]. See Moraru and Cornelisse (n 10).
[38] See Article 2(2)(b) RD.
[39] *El Dridi*, cit.
[40] Case C-329/11, *Achughbabian*, EU:C:2011:807.
[41] Case C-430/11, *Sagor*, EU:C:2012:777.
[42] Case C-290/14, *Celaj*, ECLI:EU:C2015:640.
[43] Madalina Moraru and Geraldine Renaudiere, 'European Synthesis Report on the Judicial Implementation of Chapter IV of the Return Directive Pre-Removal Detention', *REDIAL Research Report 2016/05*, pp.8-9.
[44] Such changes were reported to have occurred in the Czech Republic, and to a certain extent in France. See more in *ReDial Research Report 2016/01* (n 15), 31.
[45] See Article 4(3) RD.
[46] *Subdelegación del Gobierno en Toledo*, cit.

sliding scale of measures starting from: issue of return decision;[47] conferral of voluntary departure;[48] removal;[49] entry ban;[50] and ending with the most constraining measure, pre-removal detention.[51] The CJEU formulated the general rule that the Return Directive establishes a complete system of return measures which must be applied in a precise and mandatory temporal order starting from the less restrictive measure – voluntary departure – to the most restrictive one – pre-removal detention.[52]

Fundamental rights play a cardinal role in the interpretation and implementation of the RD. The Directive explicitly requires compliance with the key instruments governing human rights at regional and global level: EU Charter of Fundamental Rights (recital 24); European Convention of Human Rights (recital 22, Article 5(b)); UN Convention on the Rights of the Child (Article 5(a), recital 22), the Refugee Convention (recital 23).[53] As long as an illegally staying TCN is present in a Member State, he/she remains covered by the safeguards of the Directive, notably its Article 5 (respect of principle of non-refoulement), Article 9 (postponement of removal), Article 14 (safeguards pending return) and Article 15(6) (right not to be detained for return related purposes for more than 18 months).

1. The Return Decision

Once the applicability of the Directive is established, the Member States have a straightforward obligation to issue a return decision to every TCN who is caught entering or staying illegally on their territories.[54] Upon apprehension, the Member States must regularise the stay of the TCN or issue him a return decision.[55] The issue of the return decision is the first step of the return procedure, triggering with it the procedural safeguards set out by the RD. It should be noted that the return decision produces only national effects, nevertheless it can be accompanied by an entry ban which produces EU wide effects.

The return decision is commonly issued by administrative authorities,[56] and should include at least two essential elements: a statement concerning the illegality of the stay; and the obligation to return to the third country of origin, or a third country of transit in accordance with a bilateral readmission agreement or another arrangement.[57] It is possible to return a TCN to another third country only if he or she decides to voluntarily return and in which he or she will be accepted.[58] If the administrative authorities amend the country of return set out in the initial return decision, this amendment is so substantial that it must be considered as a new return decision.[59] Moreover, the

[47] Article 6 RD.
[48] Article 7 RD.
[49] Article 8 RD.
[50] Article 11 RD.
[51] This last resort measure is regulated in Chapter IV – Pre-removal detention.
[52] See *Celaj*, cit, and *El Dridi*, cit.
[53] For an indepth analysis, see Támas Molnár, *The Interplay between the EU's Return Acquis and International Law* (Edward Elgar Publishing 2021).
[54] See Article 6(1) RD.
[55] Ibid.
[56] The Member States have the procedural freedom to decide whether administrative or judicial authorities have this competence, according to Articles 3(4) and 6(6) RD.
[57] See Article 3 (3) and (4) RD; C-924/19 PPU and C-925/19 PPU, *FMS and others*, ECLI:EU:C:2020:367 [115].
[58] Fabian Lutz, Sergo Mananashvili, Madalina Moraru, (n 3), 712. However the issue of a lack of free choice in voluntary returns has been acknowledged in *N.A. v. Finland App* no 25244/18 (ECHR 14 November 2019) [58]-[60].
[59] *FMS and others*, cit, para. 116.

CJEU clarified that transfers of illegally staying TCNs between the Member States do not fall within the scope of the Directive, but remain covered by national law.[60]

The decision can include further elements depending on whether the return of the migrant is voluntary or forced, and on whether the implementing Member State has a one- or two-step return procedure.[61] Additional obligations need to be fulfilled as regards the return of an unaccompanied minor (UAM). In particular, Article 10(2) requires the Member States to ensure that the UAM will be returned to a member of his or her family, a nominated guardian or adequate reception facilities in the State of return. Should adequate reception facilities not be available in the country of return, then Member States cannot issue a return decision.[62] Article 6 allows for an exhaustive list of derogations from the obligation to issue a return decision based on regularisation of stay due to, *inter alia*, humanitarian reasons;[63] situations where the TCN is in possession of a valid permit to stay in another Member State[64] or in a pending procedure for renewing the residence permit;[65] or in cases of bilateral readmission agreements or arrangements between Member States in place on the date of entry into force of the Directive. Additional derogations from the mandatory obligation to issue a return decision have been developed as soft law guidelines.[66]

The return decision can be issued as a self-standing act or together with another decision, such as a removal order or a decision ending legal stay (e.g. administrative rejection of asylum application).[67] The later, one-step, procedure (or merged asylum and return procedure) has been criticised for leading to 'the reduction of safeguards which are necessary to ensure that Articles 18 and 19 of the EU Charter are not circumvented'.[68] The major issue of the one-step procedure is, first, an increased risk of violation of the principle of *non-refoulement* due to the fact that administrative authorities do not always conduct an *ex officio* assessment of the risk of *refoulement* outside the asylum related *non-refoulement* grounds at the moment of adopting the combined decision,[69] although return is prohibited in additional circumstances.[70] Second, other human rights such as private and family life risk to be violated as the asylum related hearing does not necessarily address these return related aspects.[71] Despite these shortcomings, more Member States[72] have adopted the one-step procedure for asylum and return proceedings, following the recommendation of the

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[60] *M and others*, cit, para. 45.
[61] Article 6(6) RD allows this procedural freedom to the Member States.
[62] Case C-441/19, *TQ*, ECLI:EU:C:2021:9.
[63] See Article 6(4) RD. The issue of regularisation has so far been considered as falling outside the scope of EU law (Jean Baptiste Farcy, 'Unremovability under the Return Directive: An Empty Protection, in Moraru, Cornelisse and de Bruycker (n 5), p. 448), for a different view, see Diego Acosta, 'The Charter, detention and possible regularization of migrants in an irregular situation', *(2015) CML Rev.* 52 1361, 1376. For an in depth analysis of selected Member States' regularisation practices see Kevin Hinterberger, *Regularisierungen irregulär aufhältiger Migrantinnen und Migranten. Deutschland, Österreich und Spanien im Rechtsvergleich* (Nomos 2020).
[64] See Article 6(2) RD.
[65] Article 6(5) RD. In this situation, the Member State of apprehension can return the TCN to the Member State with whom it has a bilateral agreement. Nevertheless, the Member State of return has the obligation to issue the return decision, see *Affum*, cit.
[66] See 2014 FRA Report on Criminalisation of migrants in an irregular situation and of persons engaging with them, 6; 'Apprehension of migrants in an irregular situation – fundamental rights considerations' (Council document 13847/12).
[67] See Article 6(6) RD.
[68] FRA Opinion – 1/2019 [Return], Vienna, 10 January 2019, 'The recast Return Directive and its fundamental rights implications', 32.
[69] See more in EP Study 2020 (n 29), pp. 50-53.
[70] See Case C-249/13 *Boudjlida* ECLI:EU:C:2014:2431 [68]; Case C-562/13, *Abdida*, EU:C:2014:2453.
[71] See, Opinion of AG Bot in Case C-277/11 *M.M. (1)* ECLI:EU:C:2012:253 [43]; Case Opinion of AG Mengozzi in C-560/14 *M.M. (2)* ECLI:EU:C:2016:320, [58]-[60].
[72] See the 2017 EMN Report on Effective Returns, section 6.4.

European Commission,[73] based on the consideration that multiple hearings are merely delaying or even jeopardising the finalisation of procedures.[74] Although the CJEU confirmed the compatibility of the one-step procedure with EU law, it recognised a clear obligation on the Member States to suspend all the effects of the return decision 'until a final decision is adopted in relation to [the asylum] application'.[75] While the 2020 Pact on Asylum and Migration proposed the combined asylum and return procedures to become the default European model, it did not also codified the CJEU safeguards set out in *Gnandi*.[76]

Once the return decision is issued, the Return Directive establishes four main stages within the return proceeding, ranging from the least restrictive to the TCN's freedom (voluntary departure),[77] followed by physical enforcement of the return (removal)[78], issue of entry ban[79], and in the last resort, pre-removal detention.[80] This mandatory sliding scale of return measures allows only step by step intensification of coercion. The CJEU based this 'gradation' on the EU law principle of proportionality, which governs the entire return procedure.[81] Administrative and judicial authorities should thus always consider and prefer the least coercive measure available in each individual case, not least during the removal process.

2. Voluntary Departure

The prioritisation of voluntary departure over forced return is an overarching mandatory obligation imposed by the Return Directive.[82] National authorities must consider granting a voluntary departure period as a first step for the enforcement of the return decision. In these circumstances, the returnee would independently organise his departure, and voluntarily return to his country of origin or another country of return of his or her choosing, which is willing to accept him or her. Voluntary departure is automatically considered by the competent authorities in the majority of Member States, only a few Member States took advantage of the Directive's option to subject conferral of voluntary departure to an individual application.[83] Member States that opt for the individual application are however obliged to inform the TCN of the possibility of submitting such an application. The timeframe for the application, the criteria for granting and rejecting an application for voluntary departure, and the TCN's possibility of appealing this decision are subject to domestic regulation.[84]

The Member States also enjoy discretionary powers in establishing the precise period of voluntary departure, which may range between seven and a maximum of thirty days. Further criteria to determine the precise voluntary departure period were developed in domestic jurisprudence, and include elements such as: previous return or removal attempts; the presence of relatives; the duration

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[73] See Recommendation 12(a) of the European Commission Recommendation of 7.3.2017 on making returns more effective when implementing the Directive 2008/115/EC of the European Parliament and of the Council COM(2017) 1600 final.
[74] See the Governments' observations made in *Boudjlida*, cit; and *Gnandi*, cit.
[75] See *Gnandi*, cit, para. 63.
[76] For a detailed analysis, see Moraru (n 13).
[77] See Article 7 RD.
[78] Article 8 RD.
[79] Article 11 RD.
[80] See, in particular, Article 15 RD.
[81] Cases: *Celaj cit*; *Sagor*, cit; *Achughbabian* cit; *El Dridi*, cit, [41].
[82] See Article 7(1) RD, recital 10 of the RD preamable, and *El Dridi*, cit.
[83] See Article 7(1) RD. See, for instance, Italy and Hungary, see *ReDial Research Report 2016/01* (n 15) 11.
[84] On the drawbacks of the this procedure, see Alessia di Pascale, 'Can a Justice of Peace be a Good Detention Judge? The Case of Italy' in Moraru, Cornelisse and de Bruycker (n 5), 301-317.

of the period of stay of the TCN; and private and family life related aspects. Family related aspects are considered occasionally in setting the initial period of voluntary departure, but more often in the context of the prolongation of the voluntary departure period.[85] In practice, several Member States favour the conferral of a voluntary departure period closer to the maximum, especially if the individual is genuinely engaging in the departure process.[86]

The Return Directive allows the Member States to extend the voluntary departure period beyond the 30 days limit up to a limit which is left to the Member States to decide.[87] The majority of Member States provide for the possibility of extending the voluntary departure period, which is commonly done by way of individual application,[88] and exceptionally can automatically be considered by the public authorities. The reasons for prolonging the voluntary departure period have been jurisprudentially enlarged, so as to cover not only reasons emanating from the life of the returnee in a Member State, but also reasons existing in the third country of return.[89] National courts have also included Article 8 ECHR related considerations among the mandatory grounds of prolongation.[90]

The principle of voluntarism is further reinforced by the Member States' obligation to prioritize voluntary departure even when there is a risk that the migrant might abscond from the return proceedings. Should such a risk be established, then Article 7 requires a gradation of measures. First, the Member States can consider, single handedly or cumulatively, requirements to report regularly to the authorities; deposit an adequate financial guarantee; submit documents; or stay at a certain place.[91] Should the TCN fail to fulfil the imposed obligations or fail to cooperate to ensure assisted voluntary departure or should there be a higher risk of absconding, which cannot be effectively minimised, the national authorities can shorten the seven days minimum period or as a last solution, refuse the voluntary departure measure.[92] These two measures can be taken by the Member States only due to a risk of absconding; or if an application for a legal stay has been dismissed as manifestly unfounded or fraudulent; or if the migrant poses a threat to public policy, public security or national security.

While the overall text of the Return Directive strongly encourages the prioritisation of voluntary departure, Member States have taken advantage of the lack of definition of 'public security' and the broad definition of the 'risk of absconding' to evade this obligation.[93] The CJEU has compensated for lack of clarity by providing a set of standards of interpretation of a risk to public policy. In *Zh and O.*, the Court required the Member States to first avoid automatic findings of the 'risk to public policy' solely on the basis of criminal offence or past suspicion of criminal offence.[94] Member States are required to carry out a case by case analysis of the personal conduct of the migrant, and determine whether this conduct 'poses a genuine, present and sufficiently serious threat affecting one

[85] A helpful analysis of national practices in the field of voluntary departure can be found in Ulrike Brandl, 'Voluntary Departure as a Priority: Challenges and Best Practices' in Moraru, Cornelisse and de Bruycker (n 5), 83-105.
[86] According to the 2017 EMN Report on effective return, 73.
[87] Article 7(2) RD sets out a non-exhaustive list of circumstances: length of stay; children attending school; and other family and social links.
[88] In some Member States prolongation is possible only through an application, e.g. Cyprus, Italy and the Netherlands.
[89] See in particular the case law of the Austrian High Administrative Court, discussed in *ReDial Research Report 2016/01* (n 15) 15-16.
[90] Ibid.
[91] The obligations set out in Article 7(3) RD are not exhaustive.
[92] See Article 7(4) RD.
[93] See Brandl (n 87), and Madalina Moraru, 'Making sense of the 'risk of absconding' in return proceedings: judicial dialogue in action' in Moraru, Cornelisse and de Bruycker (n 5) 125-149.
[94] C-554/13, *Zh. and O.*, ECLI:EU:C:2015:377.

of the fundamental interests of society, in addition to the perturbation of the social order which any infringement of the law involves'.[95] As part of the individual assessment, the Court included aspects such as: the nature and seriousness of that act; the time elapsed since a criminal offence was committed; and any matter which relates to the reliability of the suspicion that the TCN committed a crime.[96] In a subsequent judgment, the Court added that 'in the absence of a conviction, the competent authorities can invoke a threat to public policy only if there is consistent, objective and specific evidence that provides grounds for suspecting that that TCN has committed such an offence.[97] Nevertheless, in spite of the growing European and domestic jurisprudence confirming the primacy of the principle of voluntarism, the principle is far from being a present day reality in the EU.[98]

3. Removal Order

Only if voluntary departure is not possible or if it is unsuccessful can domestic authorities enforce the obligation of return by way of a removal order, that is the physical transportation out of the Member State.[99] The Return Directive does not exhaustively provide for concrete measures to enforce removal. It only provides for the possibility of 'coercive measures' and 'removal by air'.[100] In carrying out removal operations, the Member States can choose to be helped by the European Border and Coast Guard,[101] which can help with coordinating joint return flights.[102] A removal order may be issued together with a return decision (one-step procedure) or separately (two-step procedure). If the later procedure is followed, the administrative act must clarify that removal will only take place if the obligation to return within the period for voluntary departure has not been complied.

The prioritisation of voluntary departure applies also during the removal phase. Notably, if a returnee, who is subject to removal, changes his or her attitude and shows willingness to cooperate and to depart voluntarily, than Member States are encouraged to show flexibility, for instance by considering subsequent voluntary travelling without physical force.[103] This exception from the mandatory order of return stages does not extend beyond the prioritisation of voluntary departure. Namely, breach of the voluntary departure period cannot be followed by an administrative fine as substitute for a removal order.[104]

In order to prevent the arbitrary use of 'coercive measures', safeguards are stipulated by the Return Directive, and further clarified by the CJEU.[105] In particular, the dignity, physical integrity and generally the fundamental rights of TCNs must be ensured throughout the procedure.[106] Furthermore, the Directive requires the Member States to set up 'effective forced-return monitoring

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[95] Ibid, [50], [60].
[96] Ibid, [65].
[97] Case C-380/18, *E.P.*, ECLI:EU:C:2019:1071 [30]-[31].
[98] EP Implementation Study 2020, Section 2.2.
[99] See Article 8 RD.
[100] See Article 8(5) RD and Common Guidelines on security provisions for joint removals by air laid down in the Annex to Decision 2004/573/EC.
[101] See Articles 50 and 51, Regulation (EU) 2019/1896 on the European Border and Coast Guard.
[102] Fabian Lutz (n 3), 736-7.
[103] For a concrete example, see the judgment of the Bulgarian Supreme Administrative Court in case *Suzana Azatovna Minasyan*, Judgment of 13 June 2012.
[104] See *Zaizoune*, cit.
[105] See C-329/11, *Achughbabian*, ECLI:EU:C: 2011:807 [36].
[106] Ibid.

system' to ensure respect of these safeguards.[107] The protection of returnees' fundamental rights is further ensured by providing a set of mandatory circumstances for postponing the removal[108] and another optional one.[109] The mandatory cases exhaustively include those where the removal would violate the principle of *non-refoulement*,[110] and suspension of removal triggered by appeals in accordance with Article 13(2) RD. The catalogue of optional causes for postponement is open and allows Member States to react flexibility to practical situation.[111] An additional cause for the postponement of removal is the lodging of an asylum application which suspends the removal until a decision on the application is taken.[112]

Notably, a cause for optional postponement may turn into a mandatory one if the threshold for violation of *non-refoulement* is reached. For instance, in *Abdida* and *CPAS*[113], the CJEU held that should a returnee's state of health deteriorate to such a degree that requires urgent specific medical treatment or hospitalisation, and this is not ensured in his country of return, then the removal should be postponed. In addition, public authorities are required to ensure emergency health care and the essential treatment of any illnesses to the TCN during the postponement of removal.[114] In order to avoid absconding, the Member States may impose similar obligations as those applicable during voluntary departure.[115] The limit of the RD protective function lies in the fact that the postponement of removal does not regularise the stay of the TCN.[116]

4. Entry Ban

In cases of forced return,[117] Member States are required to issue an entry ban.[118] Nevertheless, they have discretion to apply entry bans also in other situations, including voluntary departure, depending on the circumstances of the individual case.[119] Should they make use of this discretion, two overarching principles must be respected. First, Member States should comply with the principle of prioritisation of voluntary departure as set out by the Return Directive and CJEU case law.[120] In practice, this would require the Member States to consider the consequences of a policy of automatically issuing entry bans with all return related decisions. Such a policy could deter TCNs from declaring their irregular presence, and thus hinder the objective of the Directive to effect returns. Second, adoption of entry bans should respect the principle of individualisation. They should not be issued automatically with every return decision, but individual circumstances should be taken into consideration.[121] These principles are not fully followed in practice, since several Member States

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[107] Concrete standards to be followed when setting up monitoring bodies are provided by the Commission Return Handbook, and refer mainly to ensuring the independence of the monitoring body from the administration in charge of carrying out the return/removal, see pp. 38-47.
[108] Article 9(1) RD.
[109] Article 9(2) RD.
[110] For an indepth analysis of this role of the principle of *non-refoulement*, see Izabella Majcher, *The European Union Returns Directive and Its Compatibility with International Human Rights Law* (Brill 2019) Chapter 2.
[111] For such a list consult Fabian Lutz (n 3), 739.
[112] See case C-601/15 PPU, *J.N.*, ECLI:EU:C:2016:84 [75]-[76], [80].
[113] *Abdida*, cit, [57-59] ; C-402/19, *CPAS de Seraing*, ECLI:EU:C:2020:759 [30].
[114] Articles 5, 13, 14(1)(b) RD and Articles 19(2) and 47 of the EU Charter.
[115] See Articles 8(3) and 7(3) RD.
[116] On the rights and status of unremovables, see Farcy (n 65).
[117] If no period for voluntary departure has been granted (Article 7(4)), or if the obligation to return has not been complied with within the period for voluntary departure granted in accordance with (Article 7(1) RD).
[118] Article 11(1) RD.
[119] The Member States have retained power to adopt entry bans under other legal frameworks, for instance in cases of serious criminal offences. See Article 24(2) SIS II Regulation (EU) 2018/1861.
[120] See recital 10 RD preamble; *El Dridi*, cit.
[121] See recitals 6, 13 RD preamble and Article 11(3) RD.

continue to impose entry bans automatically in all cases where a return decision is issued,[122] or in other cases than those provided by the Directive.[123]

Unlike the return decision or removal order, the entry ban produces EU wide effects and prohibits the TCN's entry into all Member States for a period of time of up to five years or exceptionally longer than five years.[124] The CJEU further clarified that all entry bans issued to illegally staying TCNs should be covered by the scope of the Directive, without differentiating between those imposed as migration rules or designed to protect public policy and security.[125]

As with other Return Directive provisions, those on entry bans introduced new rules that challenged previous practices of the Member States. For instance, Article 11(2) establishes a general length of an entry ban for up to five years and, only exceptionally to extend it to longer than five years.[126] Some Member States continued a practice of entry bans longer than five years, even after the entry into force of the Return Directive. After several years of such practices, the CJEU finally clarified in *Filev and Osmani*,[127] that historic entry bans must be brought in line with the standards fixed by Article 11 - maximum of five years and subject to an individual assessment,[128] if they were still applicable after 24th of December 2010, and if they were not in line with the safeguards of Article 11.[129]

Another controversial practice concerned the starting point of entry bans, which in certain Member States produced effects immediately when issued together with the return decision. The CJEU clarified in the *Ouhrami* case, that the return decision and entry ban are separate decisions,[130] even if often issued as part of the same act. For this reason, the entry ban starts to produce effects only after the person leaves the territory of the EU.[131]

In addition to Article 11 RD, the SIS II Regulation provides for additional norms regulating entry bans. Notably, the Member States have now an obligation to register in the SIS II all entry bans issued under the Directive. As regards those Member States which do not yet have access to SIS, information exchange may be achieved through other channels (e.g. bilateral contacts).[132]

5. Pre-removal Detention and Alternative Measures

The last resort measure that can be adopted for securing an effective return of the irregular TCNs is pre-removal detention.[133] Immigration detention should not be a punitive criminal law sanction,

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[122] Such practices have been reported by the 2017 EMN Report on effectiveness of return for: Croatia; Czech Republic; Estonia; Germany; Italy; and Spain.
[123] Ibid.
[124] See Article 11 RD.
[125] Case C-546/19, *Westerwaldkreis*, ECLI:EU:C:2021:432.
[126] According to Article 11(2) RD 'if the third-country national represents a serious threat to public policy, public security or national security'.
[127] Case C-297/12, *Filev and Osmani*, ECLI:EU:C:2013:569. For a commentary of this case, see REDIAL Electronic Journal on judicial interaction and the EU return policy, Migration Policy Centre *REDIAL RR 2016/02*, 13, available at http://cadmus.eui.eu/bitstream/handle/1814/41207/REDIAL_2016_02_COP.pdf?sequence=1&isAllowed=y (last accessed December 2021).
[128] For a detailed analysis of entry bans, see Aniel Pahladsingh, 'The legal requirements of the entry ban: the role of national courts and dialogue with the Court of Justice of the European Union', in Moraru, Cornelisse and de Bruycker (n 5) 105-125.
[129] *Filev and Osmani* [39]-[41].
[130] Case C-225/16, *Ouhrami*, ECLI:EU:C:2017:590 [50].
[131] For a detailed assessment of this judgment and its follow-up at the national level, Cornelisse (n 33).
[132] See Article 24(1)(b) SIS Regulation (EU) 2018/1861.
[133] See Article 15 RD in Chapter IV – pre-removal detention.

nevertheless it does entail deprivation of liberty, and so is designed to be a measure of last resort.[134] Due to its particularly coercive nature, the pre-removal detention provisions have been the most difficult to transpose, and have fueled most of the European and domestic litigation on the Return Directive. Although harshly criticised,[135] these provisions aimed to harmonise inconsistent domestic practices, and limit systematic and long detention of irregular migrants.[136] For this purpose, Chapter IV of the Return Directive confines the detention powers of the Member States to clear requirements that were previously absent not only from the domestic legal frameworks, but also more widely from the European human rights instruments.[137] The pre-removal detention is analysed at length in a separate chapter, see the contribution of Galina Cornelisse in this volume.

IV. Legal Safeguards – a Court Driven Enhancement

Chapter III of the Return Directive includes several broad procedural safeguards, while general individual rights are also provided in Articles 5, 9 and 10 RD. For instance, Article 5 requires Member States to take 'due account of the best interests of the child, family life and the state of health of the third-country national concerned' when implementing the Directive, as well as 'to respect the principle of *non-refoulement*'. Article 9 obliges Member States to postpone removal if that would violate the principle of *non-refoulement*. The Directive protects core procedural safeguards as well, such as the duty to state reasons and to provide a translation of a return related measures as well as the right to a remedy.[138] Nevertheless, salient procedural rights such as the right to be heard, mandatory judicial review and suspensive effect of appeal were not included in the Directive.[139] These omissions from the Return Directive, and the role of fundamental rights during return proceedings were however gradually clarified by the CJEU and ECtHR.

As part of the obligation to state reasons, the administration is required to translate the main elements of the return related decisions in writing or orally, in a language the returnee is reasonably presumed to understand.[140] In cases of TCNs who have entered illegally or who have not been authorised to stay, Member States can choose to provide decisions in a standard form.[141] Nevertheless, these forms must ensure a minimum of procedural safeguards. Notably, the main elements of the generalized information sheets have to be translated 'in at least five of those languages which are most frequently used or understood by illegal migrants entering the Member State concerned'.[142] The right to be informed in a language the person understands is also reinforced by Article 5(2) ECHR in relation to pre-removal detention orders. Despite these safeguards, the use of standard forms and templates without adequate translation is a common practice in certain

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[134] See the CJEU judgment in *El Dridi* cit, [42].

[135] See Valsamis Mitsilegas, *The Criminalisation of Migration in Europe: Challenges for Human Rights and Rule of Law*, (Springer 2016); ML Basilien-Gainche, '"Immigration Detention under the Return Directive": The Shadowed Lights' (2015) *European Journal of Migration and Law* 17 104; See Diego Acosta, '"The Good, the Bad and the Ugly in EU Migration Law": Is the European Parliament becoming Bad and Ugly? (The Adoption of Directive 2008/15: The Returns Directive)' (2009) *11 European Journal of Migration and Law* 19.

[136] See Fabian Lutz, 'Prologue: The Genesis of the EU's Return Policy' in Moraru, Cornelisse and de Bruycker (n 5).

[137] Such as the ECHR, and globally, see Australia and the USA, which have an unlimited immigration detention policy, according to Flynn (n 9).

[138] Articles 12 and 13 RD.

[139] Article 13 RD provides for a legal remedy before an administrative authority or court. For the reasons of this absence, see Sergo Mananashvili and Madalina Moraru, Article 12 in Lutz, Mananashvili and Moraru (n 3).

[140] See Article 12(2) RD.

[141] See Article 12(3) RD.

[142] For instance, in Italy, the languages are English, French, Spanish and Chinese, see REDIAL Research Report 2016/03, EUI Migration Policy Centre, 25.

Member States, revealing that the true source of the Directive's shortcomings is the domestic implementation rather than its design.[143]

A derogation from the obligation to provide full disclosure of facts is permitted to the Member States 'in particular in order to safeguard national security, defence, public security and for the prevention, investigation, detection and prosecution of criminal offences'.[144] Although all Member States have taken advantage of this derogation in their national laws, their practices differ as regards the extent of access to secret evidence permitted to the parties involved.[145] While most national courts have full access to secret evidence, several Member States still deny the returnee and his lawyer access even to the 'essential evidence' that served as basis for the expulsion order in cases of national security concerns.[146] In free movement of EU citizens and visa policy cases, the CJEU clarified that Article 47 of the Charter requires national authorities to disclose at least the essence of the grounds on which the decision was based, 'as the necessary protection of State security cannot have the effect of denying the person concerned his right to be heard and, therefore, of rendering his right of redress ineffective'.[147]

While the RD provided for a detailed obligation to state reasons, as part of the umbrella principle of good administration, another key component of this principle – the right to be heard - was not codified. The exclusion of the right to be heard from the Directive was remedied by direct judicial interactions between French and Dutch courts and the CJEU.[148] On the basis of the EU general principle of the right of defence, the CJEU deduced a right to be heard for returnees before the administrative authorities can adopt a decision negatively affecting them.[149] The Court held that although, in principle, a TCN should be heard before any individual measure is taken that adversely affects him or her,[150] nevertheless, where national authorities have exercised their margin of discretion allowed by the Return Directive[151] to simultaneously adopt a decision determining a stay to be illegal and a return decision, then 'those authorities need not necessarily hear the person concerned specifically on the return decision'.[152] Nevertheless, the Court developed a clear list of components of the right to be heard: the TCN must be offered the opportunity to express his point of view on the legality of his stay; to correct an error or submit information in favour of the non-adoption of the decision or of its having a specific content;[153] the TCN must be heard in relation to the best interest of the child, family life,[154] state of health, and *non-refoulement*.[155] As long as public

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[143] For national examples, see Pascale (n 86).

[144] See Article 12(1)(2) RD. Although the provision uses 'in particular', the enumerated circumstances should be interpreted restrictively,

[145] See Jacek Chlebny, 'Public Order, National Security and the Rights of Third-Country Nationals in Immigration Cases', *European Journal of Migration and Law* 20 (2018) 128.

[146] See Jacek Białas, 'A lawyer's perspective on access to classified evidence in return cases – a view from Poland', in Moraru, Cornelisse and de Bruycker (n 5).

[147] -300/11 *ZZ v Secretary of State for the Home Departmen*t ECLI:EU:C:2013:363 [63]; Joined Cases C-225/19 and C-226/19 *R.N.N.S and K.A* ECLI:EU:C:2020:951.

[148] C-166/13, *Mukarubega*, EU:C:2014:2336; C-249/13, *Boudjlida*, ECLI:EU:C:2014:2431; C-383/13 PPU, *G&R*, EU:C:2013:533.

[149] *Mukarubega* cit, [44]; *Boudjlida* cit, [32]-[33].

[150] Case C-349/07, *Sopropé,* ECLI:EU:C:2008:746 [49]; *Mukarubega,* cit [46]–[48].

[151] See Article 6(6).

[152] See *Boudjlida*, cit, [54]; *Mukarubega*, cit, [60].

[153] See *G&R*, cit, [32].

[154] See C-82/16, *KA and Others*, ECLI:EU:C:2018:308 [104].

[155] See *Boudjlida,* cit [49]. For a detailed analysis of the right to be heard in return proceedings, see Valeria Ilareva, 'The right to be heard – the underestimated condition for effective returns and human rights consideration', in Moraru, Cornelisse and de Bruycker (n 5).

authorities comply with the substantive content of the right to be heard, its procedural design – whether in the shape of one or multiple hearings – was left to the Member States' decision, just as the Return Directive had envisaged.[156]

Mindful of the objective of the Return Directive, the Court held that the right to be heard should not be used for unduly prolonging return procedures,[157] and that TCNs should be made 'subject to a duty of honest cooperation with the competent national authority'.[158] The Court further underlined the primary objective of effective returns, most notably through the rule that even if the right to be heard had been breached, it would render a return-related decision invalid, 'only insofar as the outcome of the procedure would have been different if the right was respected.'[159] This interpretation seems to support the scholarly view that the CJEU endorses a functionalist approach, whereby return procedural safeguards are prioritized in so far as they do not endanger the effectiveness of return.[160]

Following administrative procedural safeguards, Article 13 RD establishes the system of remedies in return proceedings, which sets out general principles regarding availability of the right to appeal against each decision separately; suspensive effect of appeal; and free legal assistance, and access to linguistic assistance. The specific details of the reviewing authority; the levels of jurisdiction in appeal case;[161] the time limit for seeking a remedy; and the nature of the suspensive effect of appeal are left to the Member States to decide, in line with the principle of procedural autonomy.

Therefore, a comparable dynamic to the judicial development of the right to be heard took place with regard to the ambiguously formulated remedy prescribed by Article 13 of the Directive. In *FMS and others*, the CJEU clarified that courts are the sole authority competent to provide for effective remedies in return proceedings in spite of the more permissive wording of the Return Directive, which also refers to administrative authorities.[162] As long as the later do not fulfill the requirements of independence and impartiality as set out in Article 47 of the Charter, then they cannot ensure an effective remedy within the meaning of Article 13 RD. In an consistent line of judgments,[163] the CJEU clarified that Articles 19(2) and 47 of the Charter require that the remedy set out in Article 13 RD must have automatic suspensive effect in respect of a return decision whose enforcement may expose the TCN concerned to a risk of *refoulement*. For instance, the removal of an illegally staying TCN suffering from a serious illness to a country in which appropriate treatment is not available would violate the principle of *non-refoulement* where there is a serious risk of grave and irreversible deterioration in the state of health of the TCN concerned.[164] In these circumstances,

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[156] Article 6(6) Rd.
[157] *Mukarubega*, cit, [71].
[158] *Boudjlida*, cit, [50].
[159] See *G&R*, cit, [32].
[160] See, in particular, Philippe De Bruycker and Sergo Mananashvili, "Audi alteram partem in immigration detention procedures, between the ECJ, the ECtHR and Member States: G & R", 52 CML Rev. (2015), 569–90; Benedita M. Queiroz, *Illegally Staying in the EU: An Analysis of Illegality in EU Migration Law* (Hart 2018), 44-5; for a holistic analysis of the CJEU jurisprudence of the right to be heard in asylum and immigration, see Madalina Moraru 'The European Court of Justice Shaping the Right to Be Heard for Asylum Seekers, Returnees and Visa Applicants: An Exercise of Judicial Diplomacy' in *European Journal of Legal Studies* (forthcoming February 2022).
[161] According to Article 13(1).
[162] Joined Cases C-924/19 PPU, *FMS and others*, ECLI:EU:C:2020:367 [129]-[130].
[163] See *Abdida*, cit, [45]; Case C-402/19, *LM*, ECLI:EU:C:2020:759; and Case C-233/19, *B*, ECLI:EU:C:2020:757.
[164] See *Abdida* cit.

Article 47 jointly with Article 19(2) of the Charter would require the recognition of an automatic suspensive effect of the appeal in return proceedings.[165]

Another essential guarantee of effectiveness of the legal remedy is the obligation upon Member States to provide for free legal assistance and linguistic assistance during appeal proceedings.[166] However, access to legal aid may be restricted in certain conditions, such as: if the appeal has tangible prospect of success (merit test); access only to specifically designated legal advisors;[167] or only for returnees lacking sufficient resources.[168] Regardless, the Member State has to ensure that legal assistance and representation is not arbitrarily restricted and the applicant's effective access to justice is not hindered by its absence.[169] Various persistent problems of securing effective legal aid exist across the EU, such as difficult access of lawyers to detention centres,[170] lack of adequate training of legal aid lawyers,[171] or unmotivated refusal of legal aid by national bars.[172]

In addition to procedural guarantees, Article 14 RD requires the Member States to secure, as far as possible, that family unity is maintained, emergency health care and essential treatment of illness are provided, access to basic education is granted to minors and the special needs of vulnerable people are taken into consideration when removal is postponed for practical or legal obstacles.[173] Specific procedural safeguards are provided for UAMs,[174] since they are considered as 'vulnerable persons', whose special needs have to be taken into account during all main stages of the return proceedings. The Return Directive allows for the return and removal of an UAM, but subject to specific conditions and guarantees to preserve the best interests of the child, in line with the United Nations Convention on the Rights of the Child. Notably, the UAM should be assisted at the earliest stage possible, even before issuing a return decision.[175] At this point, Member States could decide to regularise the stay of the UAM for humanitarian reasons, under Article 6(4) RD.[176] The 'assistance' required under the Return Directive is broader in scope than the guardianship required under the asylum proceedings. In addition to legal consultation and representation, its scope for UAMs in return proceedings covers any assistance in the 'best interests of the child', such as medical, educational, and family related circumstances. The assistance extends also to the post-return phase.[177] Moreover, the UAM can be returned only to a member of his or her family; a nominated guardian; or adequate reception facilities in the state of return.[178]

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165 *Abdida*, cit, [33] and [48]. Similarly, see *Paposhvili v Belgium* App no 41738/10 (ECHR 13 December 2016).
166 See Article 13(3) RD.
167 Ibid.
168 According to Articles 20 and 21 of Recast Asylum Procedure Directive 2013/32.
169 See Article 20(3)(3) of Directive 2013/32.
170 Madalina Moraru and Linda Janku, 'Czech Litigation on Systematic Detention of Asylum Seekers: Ripple Effects across Europe' (2021) 23 *European Journal of Migration and Law* 284.
171 This was the case, for instance in Estonia, before the decision of the National Union of Bars of providing further training. See more in *ReDial Research Report 2016/03* (n 144).
172 Tribunal of Milan, Decree No. 35445, 28 June 2017.
173 See *Abdida*, cit.
174 See notably Article 3(9) RD. The Return Directive does not define 'unaccompanied minor'. The Return Handbook invites the use of the definition provided by Article 2(e) of the recast Reception Conditions Directive 2013/33/EU. Any TCN who is under eighteen is a 'minor' within the meaning of the RD.
175 See Article 10(2) RD.
176 This is the practice, for instance, in Italy, according to in Alessia Di Pascale, *REDIAL Italian Report*, EUI Migration Policy Centre.
177 As regards bodies that could provide assistance, they should be independent, thus not the authorities enforcing return.
178 See Article 10(1) RD.

In *TQ*, the CJEU clarified what the best interests of the child should require in return proceedings. Notably, a 'general and thorough assessment' of the situation of the UAM must take place, including the age, gender, special vulnerability, physical and mental health, stay with a foster family, level of education and social environment.[179] The Court ruled that before issuing a return decision in respect of an UAM, a Member State must verify that adequate reception facilities are available for the minor in the State of return. If that is not the case, the child cannot be the subject of a return decision. Moreover, if adequate reception facilities are no longer guaranteed at the time of removal, the Member State will not be able to enforce the return decision. According to the Court, the age of the child may play a role, but it is not the only factor in the investigation of whether adequate care is available after return; this should be based on a case-by-case assessment of the situation rather than an automatic assessment based on the sole criterion of age.[180] Underlining the principle of effectiveness, the Court also held that Member States cannot refrain from enforcing a return decision which has been taken after it has been established that adequate reception is available. It therewith essentially precluded the grey status of 'tolerated stay' of UAMs.[181]

V. Conclusion – What Future of the Return Directive?

This Chapter explored how the Return Directive has risen above the initial critiques of diluting human rights and procedural safeguards. The Directive has proved in time to be a uniquely protective instrument for irregular TCNs compared to other international, regional and domestic legal frameworks. As pointed out by the European Commission in 2014, the Return Directive has contributed to lowering pre-removal detention periods in some EU countries, restricting the use of detention, and enhancing the application of alternatives.[182] The CJEU further reinforced its protective potential, triggering a process of decriminalisation of irregular entry and stay, and prioritisation of the application of the Directive and its procedural safeguards. Additional human rights were injected into return proceedings on the basis of the general principle of EU law of rights of defence – the right to be heard,[183] and the Article 47 of the Charter right to an effective legal remedy – automatic suspensive effect of appeal in cases of potential violation of the principle of *non-refoulement*.[184] Domestic courts have further consolidated the Directive's underlying principles of primacy of voluntary departure, pre-removal detention as a last resort, individual assessment and respect for *non-refoulement*, the best interests of the child, and family life. This jurisprudentially reinforced protective function has not, however, eliminated shortcomings of implementation, such as prioritisation of pre-removal detention over voluntary departure; limitations on the right to be heard; lack of alternatives to detention; and stereotyped motivations of return related measures. These are mostly the effects of persistent tensions between the Member States' legitimate interests to remove migrants who are in an irregular situation and the fundamental rights of the people concerned; and of the Member States' resistance to EU's harmonisation, and the increased need for common rules on return proceedings.

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[179] Case C-441/19, *TQ*, ECLI:EU:C:2021:9 [47].
[180] *TQ*, cit, [67].
[181] Cornelisse and Moraru (n 10).F
[182] See the 2014 EC Evaluation Report, 15-17, 21-22.
[183] See *Boudjlida* and *Mukarubega*.
[184] See *Abdida*.

The progress achieved on gap filling of fundamental rights, clarity, transparency, proportionality in the Return Directive via European and domestic litigation are at risk following the 2018 Commission's proposal for recasting the Directive and the 2020 Pact on Asylum and Migration.[185] The Commission targeted proposal put forward controversial changes such as: eliminating the minimum period of voluntary departure; eliminating the option of shortening the voluntary departure period; increase of grounds for pre-removal detention from two to sixteen; issuing entry ban in the absence of a return decision and a mandatory return border procedure endangering effective judicial remedy.[186] The negative repercussions of these proposed changes on both ensuring effective returns and protection of human rights have been eloquently demonstrated in an impact assessment carried out by the European Parliament.[187] While the 2020 Pact on Asylum and Migration remedies to a certain extent the fundamental rights shortcomings of the Commission proposal for a mandatory return border procedure, the Pact expands the scope of application of return in detriment to asylum rights.[188] The faith of the Recast of the Return Directive and the asylum legislative package of the 2020 Pact are unsure given the lack of agreement at EU level but most prominently due to a lack of solidarity and common migration visions among the Member States.[189]

[185] For an indepth analysis, see Moraru (n 13).
[186] European Commission, Proposal for a Directive of the European Parliament and of the Council on Common Standards and Procedures in Member States for Returning Illegally Staying Third-Country Nationals (Recast), COM(2018) 634, 12 September 2018.
[187] EPRS, Substitute Impact Assessment on the Proposed Return Directive (Recast), PE 631.727, February 2019, 9–14; see also, Izabella Majcher and Tineke Strik, 'Legislating without Evidence: The Recast of the EU Return Directive' (2021) 23 European Journal of Migration and Law 103.
[188] Izabella Majcher, 'The EU Return System under the Pact on Migration and Asylum: A Case of Tipped Interinstitutional Balance?' (2020) 26 *European Law Journal* 199.
[189] Daniel Thym and Evangelia Tsourdi, 'Searching for Solidarity in the EU Asylum and Border Policies: Constitutional and Operational Dimensions' (2017) 24 *Maastricht Journal of European and Comparative Law* 605.