

# The Future Architecture of the EU's Return System Following the Pact on Asylum and Migration: Added Value and Shortcomings

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## 1. Introduction – The Evolution of the EU's Return System Reform

This chapter analyses the implications of the Pact on Asylum and Migration<sup>1</sup> and the proposal for recasting the Return Directive<sup>2</sup> on the future of the EU's return system and the right to asylum. Returns do not feature in the Pact's title, nevertheless they are a redline running across all of the Pact's five legislative acts, and two non-binding proposals. These proposals are said to increase effective returns of irregularly staying third-country nationals from the EU by way of: introducing a mandatory, expedited return border procedure that could become the new regular return procedure; creating an EU Return Coordinator position to increase coordination among domestic return practices; increasing the links between asylum and return policies into a single integrated migration procedure; and introducing return sponsorship as a form of solidarity cooperation among the Member States. This chapter argues that while the Pact has remedied some of the shortcomings in the 2018 Commission proposal for the Recast of the Return Directive ('2018 Proposal'), in particular a more humane return border procedure, the improvements are not sufficient given the low bar set by the 2018 Proposal. Moreover, the diminished judicial control, weakened right to asylum, policy fragmentation and questionable efficiency of

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1 European Commission, New Pact on Migration and Asylum, COM(2020) 609, 23 September 2020.

2 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; and Council of the European Union, 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): Partial General Approach, 10, 144/19, 13 June 2019.

the return system, as envisaged by the Pact, are challenges that need to be addressed.

The implications of the Pact on Asylum and Migration on the future architecture of the EU's return system need to be assessed jointly with the Return Directive,<sup>3</sup> as currently in force, as well as in light of the proposal for recasting the Return Directive. The Commission has started the process of reforming the EU's return system in 2015, first by way of soft law acts. Up until March 2017, the Commission's solution for reforming the EU's return system was to adopt bi-annual, non-binding acts putting forward concrete recommendations for how the Member States could improve domestic implementation of the Return Directive (see the Return Action Plans from 2015<sup>4</sup> and 2017,<sup>5</sup> and the 2017 Return Handbook<sup>6</sup>). This Directive was already widely considered a normative example of returns for legal orders around the globe.<sup>7</sup> It was thus thought that, unlike the Common European Asylum System (CEAS) instruments, there was no need for reforming it via legislative means. The advantage of this soft law approach was flexibility in providing guidelines for effective implementation and time efficiency in delivering potential policy solutions to the Member States. However, this soft law reform also came with less transparency and accountability safeguards.<sup>8</sup> The Commission's approach changed in 2018, when it tabled with urgency a proposal amending the Return Directive.<sup>9</sup>

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- 3 Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on Common Standards and Procedures in Member States for Returning Illegally Staying Third-Country Nationals, OJ 2008 L 348/98, 24 December 2008.
  - 4 European Commission, Communication from the Commission to the European Parliament and the Council: EU Action Plan on Return, COM(2015) 453, 9 September 2015, 2.
  - 5 European Commission, Communication from the Commission to the European Parliament and the Council on a More Effective Return Policy in the European Union: A Renewed Action Plan, COM(2017) 200, 2 March 2017, 2.
  - 6 European Commission, Commission Recommendation (EU) 2017/2338 of 16 November 2017, Establishing a Common "Return Handbook" to Be Used by Member States' Competent Authorities When Carrying out Return-Related Tasks, OJ 2017 L 339/83, 19 December 2017.
  - 7 European Commission, Communication from the Commission to the Council and the European Parliament on EU Return Policy, COM(2014) 199, 28 March 2014.
  - 8 Peter Slominski and Florian Trauner, 'Reforming Me Softly – How Soft Law Has Changed EU Return Policy since the Migration Crisis' [2020] *West European Politics* 1.
  - 9 See (n 2).

The Commission did not conduct an impact assessment, nor an updated evaluation of the Directive implementation, although this was required by both Article 19 of the Return Directive, as well as by the Better Regulation Guidelines.<sup>10</sup> Nevertheless, both a substitute impact assessment<sup>11</sup> and an evaluation of domestic implementation<sup>12</sup> were done by the European Parliament.<sup>13</sup> These assessments, so important for ensuring the reliability of proposed amendments, came only after the Council had already delivered its partial agreement on the Commission's proposal<sup>14</sup> (see the timeline in Figure 1 below). Currently, the negotiations on the recast of the Return Directive are stuck in the Parliament, where the amendments tabled by the Rapporteur, Tineke Strik, are under discussion. Although the Draft Report was finalised in February 2020,<sup>15</sup> it has not yet been adopted in the plenary, at least at the moment of writing this chapter.<sup>16</sup>

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- 10 European Commission, 'Better Regulation Guidelines', 2017, c III, 15.
  - 11 'Substitute Impact Assessment on the Proposed Return Directive (Recast)', European Parliamentary Research Service PE 631.727, February 2019, 9–14.
  - 12 European Parliament, European Parliament Resolution on the Implementation of the Return Directive (2019/2208(INI)), P9\_TA(2020)0362, 17 December 2020.
  - 13 Izabella Majcher and Tineke Strik, 'Legislating without Evidence: The Recast of the EU Return Directive' (2021) 23 European Journal of Migration and Law 103.
  - 14 Council of the European Union, partial agreement (n 2).
  - 15 Draft Report on the 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)0634 – C8-0407/2018 – 2018/0329(COD)), 21 February 2020.
  - 16 Maria Diaz Crego, 'Recasting the Return Directive', European Parliamentary Research Service PE 637.901, March 2021.

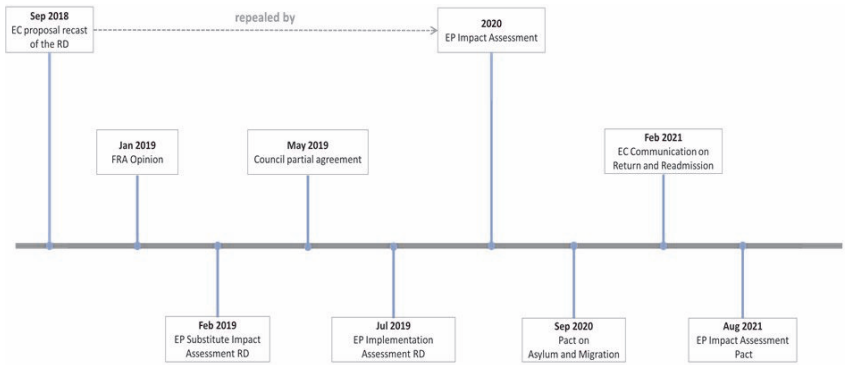


Figure 1: Timeline of the EU’s return system reform (up until September 2021)

The 2018 Proposal on recasting the Return Directive put forward a new mandatory return border procedure, and linked return policies to asylum by requiring the issuing of a common administrative decision for both the rejection of an asylum claim and return decision. These two proposals are taken up by the Pact and substantially amended. The Pact enlarges the scope of application of return border procedure, increases the links between asylum and return policies so much so that return related provisions are inserted in all the new or amended legislative acts proposals on asylum: Asylum and Migration Management Regulation;<sup>17</sup> Screening Regulation;<sup>18</sup> amended Asylum Procedures Regulation;<sup>19</sup> amended Eurodac;<sup>20</sup> and the

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- 17 European Commission, Proposal for a Regulation of the European Parliament and of the Council on Asylum and Migration Management and Amending Council Directive (EC) 2003/109 and the Proposed Regulation (EU) [Asylum and Migration Fund], COM(2020) 610, 23 September 2020 (‘Asylum and Migration Management Regulation’).
  - 18 European Commission, Proposal for a Regulation of the European Parliament and of the Council Introducing a Screening of Third Country Nationals at the External Borders and Amending Regulations (EC) No 767/2008, (EU) 2017/2226, (EU) 2018/1240 and (EU) 2019/817, COM(2020) 612, 23 September 2020.
  - 19 European Commission, Amended Proposal for a Regulation of the European Parliament and of the Council Establishing a Common Procedure for International Protection in the Union and Repealing Directive 2013/32/EU, COM(2020) 611, 23 September 2020 (‘Asylum Procedure Regulation’).
  - 20 European Commission, Amended proposal for a Regulation of the European Parliament and of the Council on the establishment of “Eurodac” for the comparison of biometric data for the effective application of Regulation (EU) XXX/XXX [Regulation on Asylum and Migration Management] and of Regulation (EU)

Regulation addressing situations of crisis and force majeure.<sup>21</sup> While the Pact ensures an accurate cross-referencing between the proposed acts, nevertheless, the return legal framework will be made up of numerous new provisions that are scattered across six different legislative acts (those of the Pact and the Recast Return Directive), and additional cooperation agreements with third countries.<sup>22</sup> This fragmented legal framework will further complicate an already dense return regulatory framework made up of norms pertaining to the global, regional (both Council of Europe and EU), and domestic legal orders.<sup>23</sup>

In the following sections, the chapter will focus on: why returns feature so centrally in the Pact; how the Pact proposes to reform the EU policy design on returns, compared to the 2018 Proposal to Recast the Return Directive and the currently in force Return Directive; and what could be the future challenges for the EU system of returns as envisaged by the Pact.

## 2. 'Effective' Returns as the Main Driving Force for the Reform of the Common European Asylum System (CEAS)

The reform of the CEAS has been stalled for more than four years mainly due to a lack of consensus among the Member States on the implementation of the principle of solidarity (Article 80 TFEU). During this period, reform discussions have taken a turn towards returns as the preferred solution to deal with (future) migration crises.<sup>24</sup> The 'fight against irregu-

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XXX/XXX [Resettlement Regulation], for identifying an illegally staying third-country national or stateless person and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes and amending Regulations (EU) 2018/1240 and (EU) 2019/818, COM(2020) 614 final ('2020 Eurodac Proposal').

- 21 European Commission, Proposal for a Regulation of the European Parliament and of the Council Addressing Situations of Crisis and Force Majeure in the Field of Migration and Asylum, COM(2020) 613, 23 September 2020.
- 22 See Paula García Andrade's chapter in this collection.
- 23 Evangelia (Lilian) Tsoardi, 'Alternatives to Immigration Detention in International and EU Law: Control Standards and Judicial Interaction in a Heterarchy' in Madalina Moraru, Galina Cornelisse and Philippe de Bruycker (eds), *Law and Judicial Dialogue on the Return of Irregular Migrants from the European Union* (Hart 2020) ch 7.
- 24 See, Jessica Schulz, 'The end of protection? Cessation and the "return turn" in refugee law' (EU Migration Law Blog, 31 January 2020) <<https://eumigrationlawblog.eu/the-end-of-protection-cessation-and-the-return-turn-in-refugee-law/>> accessed 17 November 2021.

lar migration' has become a key objective of the CEAS, overshadowing the international obligation of the Member States to protect refugees.<sup>25</sup> Prioritising returns appears to gather more consensus among Member States than the implementation of the international obligation to protect refugees.<sup>26</sup> Building on this consensus, the Commission has made effective returns a core aim of the asylum reform as envisaged in the Pact on Asylum and Migration.

As justification for making returns an integrated part of the CEAS reform, the Pact refers to: the persistently low return rates, which seem to not match the Commission's unrealistically high return rates (70% for 2020);<sup>27</sup> changes in the migration flows, 'as the arrival of third-country nationals with clear international protection needs in 2015-2016 has been partly replaced by mixed arrivals of persons of nationalities with more divergent recognition rates'; the high proportion of rejected asylum seekers in the percentage of returnees (namely 80%).<sup>28</sup>

The Pact identifies various challenges to effectiveness of returns: procedural loopholes and guarantees in the EU asylum and return systems, which are 'abused' by third-country nationals to prolong their stay in the EU; inefficiencies in the national return system, and lack of harmonisation at EU level; and insufficient cooperation of third countries on readmission.<sup>29</sup> These causes overlap to a certain extent with the shortcomings identified by scholars and practitioners. The recent jurisprudence of the Court of Justice of the European Union (CJEU) confirms the still persistent deficient transposition of the Return Directive, ten years

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25 Council Conclusions, 'Migration policy: Council agrees partial negotiating position on return directive', 7 June 2019.

26 Remarks by Commissioner Dimitris Avramopoulos following the Home Affairs Council meeting of December 2018 <[https://ec.europa.eu/commission/presscorner/detail/en/SPEECH\\_18\\_6706](https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_18_6706)> accessed 17 November 2021.

27 Sergo Mananashvili,<sup>3</sup> 'EU Return Rates, COVID-19, and the Future of Return Policies and Partnerships' (ICMPD Policy Brief, May 2020).

28 See European Commission, Proposal for a Regulation of the European Parliament and of the Council on a common procedure for international protection in the Union and repealing Directive 2013/32/EU COM/2020/611 final, 23 September 2020, 2.

29 Commission Staff Working Document Accompanying the document Proposal for a regulation of the European Parliament and the Council on asylum and migration management and amending Council Directive (EC)2003/109 and the proposed Regulation (EU)XXX/XXX [Asylum and Migration Fund] SWD/2020/207 final, 41 and 88.

since the entry into force of this instrument.<sup>30</sup> Member States' practices still diverge on: who should be returned;<sup>31</sup> how the return should take place;<sup>32</sup> and where to return safely.<sup>33</sup> However the Commission's narrow understanding of 'effectiveness' of returns as increasing the number of returns has attracted harsh criticism given, *inter alia*, the unreliability of return date at the EU level.<sup>34</sup> Notably, Member States legal definition and methods of calculation of returns and reporting style vary significantly, to the point of impairing the reliability of return data on the basis of which the Commission relies on.<sup>35</sup> Furthermore, it is difficult to evaluate if the Commission proposals for increasing effectiveness actually ensure both effectiveness and human rights protection, when none of them was preceded by an implementation and impact assessment reports.<sup>36</sup> In fact one of the Commission's assumptions that increased formal and informal readmission agreements will increase effectiveness of returns, in its narrow understanding, has been demonstrated to be false.<sup>37</sup>

It remains to be seen whether the Parliament's draft tabled amendments, which understand effectiveness as referring also to sustainability of returns and implementation of fundamental rights safeguards and procedural guarantees, will pass the vote in the plenary and be taken on board by the Council and the Commission

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- 30 ECJ 8 October 2020, Case C-568/19, *MO (Zaizoune II)*, ECLI:EU:C:2020:807; ECJ 17 September 2020, Case C-806/18, *JZ*, ECLI:EU:C:2020:724.
- 31 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 (eds), *Law and Judicial Dialogue on the Return of Irregular Migrants from the EU* (n 23) ch 1.
- 32 See the chapters in Part III of Moraru, Cornelisse and de Bruycker (eds), *Law and Judicial Dialogue on the Return of Irregular Migrants from the EU* (n 23).
- 33 Olivia Sundberg Diez, 'Diminishing safeguards, increasing returns: Non-refoulement gaps in the EU return and readmission system' (EPC Discussion Paper 2019).
- 34 Philipp Stutz and Florian Trauner, 'The EU's "Return Rate" with Third Countries: Why EU Readmission Agreements Do Not Make Much Difference' [2021] *International Migration*; Sergio Carrera and Jennifer Allsopp, 'The Irregular Immigration Policy Conundrum: Problematizing "Effectiveness" as a Frame for EU Criminalization and Expulsion Policies' in Ariadna Ripoll Servent and Florian Trauner, *The Routledge Handbook of Justice and Home Affairs Research* (Routledge 2017) ch 7.
- 35 Stutz and Trauner (n 34).
- 36 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.
- 37 Stutz and Trauner (n 34).

### 3. *The Pact's New Architecture of the EU's Return System*

The main changes proposed by the Pact aim to reform the EU's current return system by including: a reinforced EU's returns coordination; extended links between asylum and returns policies; accelerated mandatory border return procedure; the introduction of return sponsorship as a new form of solidarity; and the promotion of assisted voluntary return programmes.

#### a) *Reinforcing the EU's Role on Returns Coordination*

The amended Asylum Procedure Regulation proposal mentions that 'effective return of those who are not in need of protection, should not have to be dealt with by individual Member States alone, but by the EU as a whole'.<sup>38</sup> The Pact thus proposes a more EU-coordinated approach to returns by introducing a new position, that of an EU Return Coordinator, inside the European Commission, supported by a Deputy Executive Director for Return within Frontex and a network of high-level representatives. This should contribute to a 'common strategic and coordinated approach on return and readmission among the Member States, the Commission and Union agencies'.<sup>39</sup> While enhanced coordination, cooperation and consistent return processes are paramount, the legal act appointing the EU Return Coordinator in 2021 should also provide for clear monitoring tasks. The Coordinator should thus ensure that Member States provide an accessible appeals mechanism, free legal advice, special protection for vulnerable groups and independent monitoring mechanism in both border and ordinary return procedures, as well as monitoring Frontex extended operational powers on returns. Although we are approaching the end of 2021, the EU Return Coordinator has not been nominated. His powers are also limited as they depend on the willingness of Member States to cooperate. The push back situation at the border between Poland and Belarus has shown the limits of Frontex intervention, which in the absence of Poland request for assistance, it has its hands tight.<sup>40</sup>

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38 European Commission, Proposal for [an Asylum Procedures Regulation], COM(2016) 467, 13 July 2016 and Amended proposal, COM(2020) 611, 23 September 2020, 1.

39 Ibid.

40 Anne Applebaum, 'A Dictator Is Exploiting These Human Beings' (*The Atlantic*, 13 November 2021) <[www.theatlantic.com/ideas/archive/2021/11/belarus-eu-poland-migrants-refugees-border/620700/](http://www.theatlantic.com/ideas/archive/2021/11/belarus-eu-poland-migrants-refugees-border/620700/)> accessed 17 November 2021.



b) *Extending the Links between Asylum and Returns Policies*

One of the main novelties introduced by the Pact is the creation of a 'seamless link' between asylum and return policies, which promises to contribute to a 'quicker return of third-country nationals without a right to remain in the Union'.<sup>41</sup> This linkage between asylum and return procedures is aimed to address the issue of 'Member States' asylum and return systems operat[ing] mostly separately, creating inefficiencies and encouraging the movement of migrants across Europe'.<sup>42</sup> The Pact identified various loopholes in asylum and return procedures, notably, 'return and negative asylum decisions being issued separately, inefficient rules in case of subsequent asylum applications or of applications submitted during the last stages of return are argued to facilitate absconding and unauthorised movement of migrants across the EU, hamper returns and put a heavy burden on national administrative and judicial systems'<sup>43</sup> The Pact thus proposes to link asylum and return procedures in three main ways, introducing a single and indivisible procedure where asylum and return would be carried out in a single thread.

First, an asylum application rejection should be issued within the same administrative act with a return decision, or if issued separately, then at least 'at the same time and together'.<sup>44</sup> This combined administrative procedure endorses a procedural model which appears to be followed by a minority of Member States.<sup>45</sup> The rationale behind this policy approach is that multiple hearings are merely delaying or even jeopardising effective returns.<sup>46</sup> While the CJEU found this compressed model permissible under the Return Directive,<sup>47</sup> its implementation has been found to fall short of good administration obligations, rights of defence and *non-refoulement* guarantees.<sup>48</sup> Among the reasons for this deficient play-out of the com-

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41 Pact (n 1), 3.

42 European Commission, New Pact on Asylum and Migration, COM(2020) 609, 23 September 2020, 4.

43 Commission Staff Working Document (n 29), 5.

44 See Article 35a of the Asylum Procedure Regulation (n 19).

45 See 2017 European Migration Network Report on Effective Returns.

46 See the Governments' observations in ECJ 19 June 2018, Case C-181/16, *Gnandi*, ECLI:EU:C:2018:465.

47 *Ibid.*

48 See Valeria Ilareva, 'The Right to be Heard: The Underestimated Condition for Effective Returns and Human Rights Consideration' in Moraru, Cornelisse and de Bruycker (eds), *Law and Judicial Dialogue on the Return of Irregular Migrants from the EU* (n 23) ch 15; and Serge Slama, 'Duality of Jurisdiction in the Con-

bined model, the European Parliament study referred to ‘risk of *refoulement* which is not systematically assessed by the authorities on their own initiative when contemplating the issuing of a return decision’.<sup>49</sup> It should be noted that the asylum procedure assesses violation of the principle of *non-refoulement* only on limited grounds, eluding a full assessment of the risk of refoulement in compliance with Articles 2, 3 ECHR, Article 19 of the Charter and Article 5 of the Return Directive.

An added value of the 2020 Asylum Procedure Regulation compared to the 2018 Recast Return Directive proposal is that the former clearly codifies the fundamental rights safeguards developed by the CJEU in *Gnandi*, whereas these are absent from both Articles 6 and 16 of the 2018 Proposal. Notably, Article 54(1) provides that ‘the effects of a return decision shall be automatically suspended for as long as an applicant has a right to remain or is allowed to remain’. Nevertheless, the proposal should prevent situations of poor transpositions as identified by the Parliament’s report on the implementation of the Return Directive, and codify in clearer terms the obligation to individually assess additional grounds for *non-refoulement* outside the protective grounds for refugee or subsidiary protection (as set out in Articles 10 and 15 Qualification Directive<sup>50</sup>). In *Mukarubega*<sup>51</sup> and *Boudjlida*<sup>52</sup> judgments, the CJEU held that a third-country national ‘must be able to express his/her point of view on the legality of his or her stay; facts that could justify the authorities to refrain from adopting a particular return related decision; facts that justify exception(s) to the expulsion; social circumstances of the irregular migrant, including the best interests of the child, family life and the state of health of the third-country national concerned and risks of *non-refoulement*.’ These requirements should be respected by both the future Recast Return Directive and the amended Asylum Procedure Regulation.

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trol of Immigration Detention: The Case of France/Trois Hautes Juridictions Nationales pour une Directive: Une Interaction Judiciaire en Trompe l'oeil’ in Moraru, Cornelisse and de Bruycker (eds), *Law and Judicial Dialogue on the Return of Irregular Migrants from the EU* (n 23) ch 14.

49 European Parliament Resolution on the Implementation of the Return Directive (n 12), 30.

50 Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on Standards for the Qualification of Third-Country Nationals or Stateless Persons as Beneficiaries of International Protection, for a Uniform Status for Refugees or for Persons Eligible for Subsidiary Protection, and for the Content of the Protection Granted (Recast), OJ 2011 L 337/9, 20 December 2011.

51 ECJ 5 November 2014, Case C-166/13, *Mukarubega*, ECLI:EU:C:2014:2336.

52 ECJ 11 December 2014, Case C-249/13, *Boudjlida*, ECLI:EU:C:2014:2431.

Second, the Asylum Procedure Regulation merges the appeal procedure for asylum and return decisions within the border procedure within one single procedure. Following the Pact's approach that procedural rights serve mostly for prolonging rejected asylum seekers' stay in the EU, the Asylum Procedure Regulation limits the levels of appeal to one, and turns automatic suspensive effect of appeals into an exception in border procedures.<sup>53</sup> However, this theoretical model of swifter procedures has shown its shortcomings in the Greek practice. Notably, the limited one level of judicial appeal, brevity of judicial reasoning, and lack of automatic suspensive effect of appeal have not contributed to swifter asylum and return procedures, but to a series of fundamental rights violations found by the European Court of Human Rights against Greece.<sup>54</sup> While the suspensive effect of the joined appeal can be granted either *ex officio* or by individual application, the Italian practice illustrates the practical difficulties in applying such a system.<sup>55</sup> Nevertheless, similar domestic legal procedures can lead to different results in practice, depending on various factors at play, such as: the legal system, culture, and type of competent courts to review the executive.<sup>56</sup> Therefore, the EU procedural model should leave more space for accommodation to the national legal specificities, since transplanting one procedural model that works in one jurisdiction to another might not lead to the same favourable results. In the absence of effective legal aid, it will be extremely cumbersome to motivate an appeal that will have to address both the asylum and return related legal and factual considerations during only one week. Considering that in many Member States, national funds for legal aid provided by NGOs are cut, the single right to appeal proposed by the Asylum Procedure Regulation lacks the guarantees required under Article 47 of the Charter.<sup>57</sup>

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53 See Articles 53 and 54 of Asylum Procedure Regulation.

54 Angeliki Papapanagiotou-Leza and Stergios Kofinis, 'Can the Return Directive Contribute to Protection for Rejected Asylum Seekers and Irregular Migrants in Detention? The Case of Greece' in Moraru, Cornelisse and de Bruycker (eds), *Law and Judicial Dialogue on the Return of Irregular Migrants from the EU* (n 23) ch 12.

55 Alessia di Pascale, 'Can a Justice of the Peace be a Good Detention Judge? The Case of Italy' in Moraru, Cornelisse and de Bruycker (eds), *Law and Judicial Dialogue on the Return of Irregular Migrants from the EU* (n 23) ch 13.

56 For a comparison between the Greek and German return system, see Papapanagiotou-Leza and Kofinis (n 54); and Jonas Bornemann and Harald Dorig, 'The Civil Judge as Administrator of Return Detention: The Case of Germany' in Moraru, Cornelisse and de Bruycker (eds), *Law and Judicial Dialogue on the Return of Irregular Migrants from the EU* (n 23) ch 9.

57 See, in particular, Czech Republic, Hungary and Poland.

Third, the Asylum Procedure Regulation links the detention of asylum seekers to pre-removal detention during border procedures. According to recital 40(i) and Art. 41a(5) of Asylum Procedure Regulation asylum seekers who have been detained during the border procedure ‘and who no longer have a right to remain and are not allowed to remain may continue to be detained for the purpose of preventing entry into the territory of the Member State, preparing the return or carrying out the removal process.’ Without effective legal aid this theoretical presumption of pre-removal detention risks becoming an irrebuttable presumption in practice.

The increased links between asylum and return procedures proposed by the Pact are making asylum seekers to be considered returnees as soon as administrative authorities have rejected their application, a compressed model which will entail systemic changes for many of the administrative and judicial systems, which treat the two procedures separately.<sup>58</sup> Both the 2018 Recast Return Directive and the amended Asylum Procedure Regulation proposals should better address the shortcomings identified by the EU Fundamental Rights Agency and the European Parliament in the implementation of the merged asylum and return procedure, which was found to lead in practice to ‘the reduction of safeguards which are necessary to ensure that Articles 18 and 19 of the EU Charter are not circumvented’.<sup>59</sup> As highlighted by Mouzourakis, the 2020 Pact replaces the EU law view of asylum seekers as a single, indivisible category of protected persons with a fragmented “asylum seeker” status that will cast greater complexity and uncertainty for those seeking refuge in Europe and the authorities responsible for assessing their claims.<sup>60</sup>

### *c) Accelerating Returns: Mandatory Border Procedure as the New ‘Normal’*

In order to prevent unauthorised entry into the EU and accelerate returns, the Pact introduces a novel screening procedure and a mandatory return border procedure.<sup>61</sup> The Pact’s version of the return border procedure is a compromise between the 2018 Proposal to Recast the Return Directive,

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58 According to the 2017 European Migration Network Report on Effective Returns.

59 See, FRA Opinion, ‘The recast Return Directive and its fundamental rights implications’ (17 January 2019), 32.

60 Minos Mouzourakis, ‘More Laws, Less Law: The European Union’s New Pact on Migration and Asylum and the Fragmentation of “Asylum Seeker” Status’ (2020) 26 European Law Journal 171.

61 Amended Asylum Procedure Regulation (n 19).

which followed restrictive domestic border systems,<sup>62</sup> and the current regular border procedure provided by the Return Directive.

The Pact's streamlined border procedure is based on two pillars: screening procedure<sup>63</sup> and a two-phased border procedure.<sup>64</sup> The screening procedure is applied to both asylum seekers (who request international protection at border crossing points without fulfilling entry conditions) and irregularly entering third-country nationals (i.e. apprehended in connection with unauthorised crossing of external borders, disembarked following search and rescue operations). After the screening procedure, individuals are redirected to the border procedure, consisting of two stages: asylum, followed by an obligatory return border procedure, in case the asylum application is rejected.

The mandatory use of border procedure was one of the issues of dissent between Member States, during the negotiations of the 2016 reform package. The Pact introduces an amended border procedure for carrying out returns,<sup>65</sup> which replaces the model included in the 2018 proposal for a recast Return Directive (see Chapter V). There are two main changes introduced by the Pact to the 2018 model of return border procedure.

First, the Pact significantly changes the personal scope of application of return border procedures. On the one hand, it limits the application by excluding children and vulnerable groups, with the exception of national security cases, and third-country nationals that have no prospect to be removed for various legal or technical reasons.<sup>66</sup> On the other hand, the Pact extends the scope of application of return border procedures to the following categories of third-country nationals: apprehended at the external border and disembarked after the search and rescue operations; relocated from another Member State. Under Chapter V of the 2018 Recast of the Return Directive proposal, the return border procedure was to be applied only to the asylum seekers rejected within border procedure. Following

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62 For instance, by Sweden and Germany, see 2020 European Parliament Implementation Assessment (n 12), 43-45.

63 Proposal for a Regulation of the European Parliament and of the Council introducing a screening of third country nationals at the external borders and amending Regulations (EC) No 767/2008, (EU) 2017/2226, (EU) 2018/1240 and (EU) 2019/817 COM/2020/612 final.

64 The procedures have been described in more detail by *Lyra Jakuleviciene* and *Jens Vedsted-Hansen* in this collection.

65 See Article 41a of the amended Asylum Procedure Regulation (n 19).

66 See Article 41a(5) of the amended Asylum Procedure Regulation (n 19).

these changes, the return border procedure risks becoming the new norm replacing regular return procedures.

Second, the Pact's amended return border procedure comes with guarantees for a fairer procedure compared to the Recast Return Directive proposal of the European Commission. For instance, voluntary return will be mandatory according to Article 41a amended Asylum Procedure Regulation, whereas the 2018 Commission's proposal in the Recast Return Directive eliminated voluntariness from border return procedures. Return decisions have to provide full justification based on individual assessment instead of the brief format provided by Article 22(2) of the 2018. Moreover the Asylum Procedure Regulation provides for a series of changes to the judicial review of return decisions, which will follow the same model as the appeal against the rejection of asylum claims. Namely, the review of return decisions is to be carried out only by a court, excluding administrative authorities, which are allowed under current Art. 13 of the Return Directive.<sup>67</sup> The Pact extends the timeframe for appeal before a court from 48 hours, as proposed by the 2018 Recast the Return Directive proposal, to one week.<sup>68</sup> Judicial scrutiny over returns is extended to both facts and law ensuring thus more effective legal remedies. These proposals might increase the effectiveness of the current judicial review in return procedures. Within the current legal framework, judicial review is limited, in several Member States, to only the challenged return measure without the possibility to review the legality of other related return or asylum decisions (such as return decision, removal order, or pre-removal detention). This fragmented procedural model has contributed to a practice whereby pre-removal detention orders are maintained although the return decision is unlawful.<sup>69</sup>

The Pact's mandatory return border procedure is in certain aspects a step forward for the returnee's rights protection compared to the current situation, such as the more effective judicial review and introduction of voluntary return. In addition, the introduction of a mandatory return border procedure might enhance the fundamental rights' of third-country nationals in certain jurisdictions that do not apply the Return Directive's

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67 See Article 53 of the amended Asylum Procedure Regulation (n 19).

68 See Article 53(7)(a) of the amended Asylum Procedure Regulation (n 19).

69 See Sylvie Sarolea, 'Detention of Migrants in Belgium and the Criminal Judge: A Lewis Carroll World' in Moraru, Cornelisse and de Bruycker (eds), *Law and Judicial Dialogue on the Return of Irregular Migrants from the EU* (n 23) ch 11; and ECJ 30 September 2020, Case C-402/19, *LM*, ECLI:EU:C:2020:759; ECJ 30 September 2020, Case C-233/19, *B*, ECLI:EU:C:2020:757.

guarantees in cases of 'irregular crossings' in border areas. Under current Article 2(2)(a) of the Return Directive, Member States can decide to not apply the Directive in border cases. Although Member States are obliged to ensure the Directive's guarantees even in such cases according to Article 4(4) of the Directive, however this does not always happen in practice.<sup>70</sup>

While the Pact's return border procedure model is, on paper, more humane than the 2018 Commission's proposal due to enhanced fair trial guarantees, its play-out in practice remains challenging for the Member States. Given the extended scope of application of the border procedure, Member States will need to invest in ensuring that monitoring of border activities, and legal complaint mechanisms are effective not only on paper, but also in practice. However, it is unclear if the EU funds can be used for these purposes.<sup>71</sup> The gaps between the effectiveness of complaint mechanisms on paper and practice have been eloquently shown in relation to the current border procedures.<sup>72</sup>

In addition, the Pact's model of accelerating return procedures could further weaken an already weak role of domestic courts in migration decision-making (see Torubarov, Poland<sup>73</sup>). The identification of third-country nationals' legal status is attributed to administrative authorities, instead of being the result of a two-stage procedure where courts have confirmed the legality of administrative decision-making. An individual will be considered already a returnee, immediately after the administrative rejection of an asylum claim. In such circumstances, the added value of judicial dialogue for safeguarding the rule of law and judicial independence in migration decision-making is of outmost importance.<sup>74</sup>

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70 See the 2020 European Parliament Implementation Assessment (n 12), 43-45.

71 See more in the chapter by Iris Goldner in this collection.

72 Madalina Moraru and Felicia Nica, 'A Practical Evaluation of Border Activities in Romania: Control, Surveillance, and Expulsions' in Sergio Carrera and Marco Stefan, *Fundamental Rights Challenges in Border Controls and Expulsion of Irregular Immigrants in the European Union* (Routledge 2020) ch 9.

73 On Hungary, see ECJ 29 July 2019, Case C-556/17, *Torubarov*, ECLI:EU:C:2019:626; on Poland, see Monika Szulecka, 'The undermined role of (national) case law in shaping the practice of admitting asylum seekers in Poland' Special Issue of the European Journal of Legal Studies; Veronica Federico, Madalina Moraru and Paola Pannia (eds), *Migrants and Law. What European Courts Say* (forthcoming in 2022).

74 Moraru, Cornelisse and de Bruycker (eds), *Law and Judicial Dialogue on the Return of Irregular Migrants from the EU* (n 23).



*d) A New Form of Solidarity: Return Sponsorship and Relocation of Returnees/  
Return Sponsorship as Redistribution of Solidarity*

The added value of integrating return policies in the Pact appears to be most significant for the implementation of the solidarity principle. The Pact introduces new possibilities for Member States to provide assistance to each other in carrying out returns, in the form of return sponsorship. The Commission foresees mandatory solidarity contributions but it leaves flexibility to the Member States whether to choose for relocation or return sponsorships. The Pact complements the possibilities for solidarity through relocation of asylum seekers by including 'return sponsorship' schemes, under which a Member State commits to support returns from another one.<sup>75</sup> According to Article 55 of the Asylum and Migration Management Regulation, the return solidary scheme implies logistical, financial and counselling help provided by the supporting Member State. If such efforts prove to be unsuccessful after eight months, the sponsoring Member State must transfer the returnees and continue the efforts to return them in accordance with the Return Directive. The financial contribution for a returnee under a return sponsorship is 10 000 Euros. Moreover, as part of the Solidarity Response Plan, Member States are allowed to choose the nationalities of the irregularly staying third-country nationals that they intend to sponsor.<sup>76</sup> Although the Regulation encourages the mutual recognition of return decisions by the Member State under Directive 2001/40/EC,<sup>77</sup> this principle is not made obligatory, meaning that Member States might continue with the current practice of issuing their own return decisions, even if such decisions were previously issued by other Member States. The fact that the Pact does not force the principle of mutual recognition of return decisions on the Member States is a welcomed policy approach. Thus, it avoids replicating the complex and ineffective functioning of the principle of mutual recognition of asylum decisions within the Dublin transfer system to the returns system.<sup>78</sup>

The return sponsorship builds on bilateral forms of return solidary already followed by some of the Member States.<sup>79</sup> The Pact thus replaces

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75 Article 45(1)(b) Asylum and Migration Management Regulation (n 17).

76 See Article 52(3) of the Asylum and Migration Management Regulation (n 17).

77 Council Directive 2001/40/EC of 28 May 2001 on the mutual recognition of decisions on the expulsion of third country nationals OJ L 149, 2.6.2001, 34–36.

78 On the Dublin system shortcomings, see Francesco Maiani in this collection.

79 For instance, Belgium and France, according to the Director of Operations at the Fedasil in Belgium remarks during the 2020 ICMPD Annual Conference.



the current piecemeal approach to return cooperation based on bilateral agreements with an EU system to be monitored by the Commission. However, this model faces two major challenges. While some Member States have already expressed support for the Pact's new form of solidarity on returns (e.g. Austria), other Member States are strongly opposing this new form of solidarity.<sup>80</sup> In addition, should the return sponsorship proposal pass in its current form, the EU return policy will risk being managed by fewer Member States. Those willing to engage in return sponsorships might be Member States with a track record of human rights violations in return procedures,<sup>81</sup> or Member States that will return on the basis of diplomatic relations they have with certain third countries instead of the ties existent between the returnee and the third country.<sup>82</sup> Given that third countries will face sanctions for lack of cooperation on readmission,<sup>83</sup> some third countries will be accepting returnees even in the absence of any connection between the third country and the returnee.<sup>84</sup>

It is unclear how the return sponsorship programme, which is a procedure autonomously coordinated by the Member States, will work in parallel to the return operations carried out by Frontex.<sup>85</sup> As regards fundamental rights safeguards, even though inadequate, they are at least present

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80 Agence Europe, 'Same divergences persist between Member States on balance between responsibility and solidarity in asylum matters' (Brussels 21 November 2020) <<https://agenceurope.eu/en/bulletin/article/12609/14>> accessed 17 November 2021.

81 Jacek Bialas, 'A Lawyer's Perspective on Access to Classified Evidence in Return Cases: A View from Poland' in Moraru, Cornelisse and de Bruycker (eds), *Law and Judicial Dialogue on the Return of Irregular Migrants from the EU* (n 23) ch 17; ECJ 14 May 2020, Cases C 924/19 and C 925/19 PPU, *FMS and others*, ECLI:EU:C:2020:367.

82 See Elspeth Guild's chapter in this collection.

83 Article 25(a) of Regulation of the European Parliament and of the Council amending Regulation (EC) No 810/2009 establishing a Community Code on Visas (Visa Code), 2018/0061 (COD) 15 May 2019.

84 On the limited effectiveness of such sanctions for certain third countries, see Florian Trauner's presentation at the 2021 Odysseus Conference, 'The New Pact on Asylum and Migration: Dead or Alive?'; for a more detailed commentary of return sponsorship, see Olivia Sundberg Diez, Florian Trauner and Marie De Somer, 'Return Sponsorships in the EU's New Pact on Migration and Asylum: High Stakes, Low Gains' (2021) 23 *European Journal of Migration and Law* 219.

85 See the chapter by Evangelia (Lilian) Tsourdi in this collection.

in Frontex operations, which is less the case for the return sponsorship programme.<sup>86</sup>

e) *The Promotion of Assisted Voluntary Return Programmes: Challenges for Voluntariness and Non-Refoulement*

The 2020 Pact refers to Assisted Voluntary Return as the preferred mode of return, and for this reason it adopted a dedicated Strategy in April 2021.<sup>87</sup> In theory, the promotion of Assisted Voluntary Return and reintegration programmes is the expression of a humane approach to returns. In practice, however, challenges for the protection of *non-refoulement* remain high, as shown by the recent jurisprudence of the European Court of Human Rights (ECtHR). The *N.A. v Finland*<sup>88</sup> case shows that Assisted Voluntary Return programmes implemented by Member States with the help of the International Organisation for Migration are sometimes neither ‘voluntary’, nor humane.

The new EU Strategy on Voluntary Return and Reintegration is another step forward in the creation of a common EU system for returns, one of the key ambitions of the 2020 Pact. The Strategy sets out measures to improve voluntary return mechanisms, from outreach activities to increase migrants’ awareness of the return and reintegration assistance available, to better counselling on their legal options. It also aims to strengthen coordination and exchanges between EU Member States so that they do not duplicate efforts and are able to learn from each other’s experiences with assisted voluntary return and reintegration programs.<sup>89</sup> However, the Strategy on Assisted Voluntary Return programmes does not fully address the shortcomings identified by the aforementioned jurisprudence of the ECtHR, namely the practice of Member States requiring waivers of legal responsibility to be signed by returnees. Furthermore, it should be clarified

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86 Mariana Gkliati, ‘Returns in Core of the EU Pact on Migration and Asylum and the Leading Role of Frontex’ (*Human Rights Here*, 10 January 2021) <[www.humanrightshere.com/post/blog-series-eu-new-pact-on-migration-and-asylum1](http://www.humanrightshere.com/post/blog-series-eu-new-pact-on-migration-and-asylum1)> accessed 17 November 2021.

87 Communication from the Commission to the European Parliament and the Council, The EU strategy on voluntary return and reintegration, COM/2021/120 final, 27 April 2021.

88 ECtHR, 14 November 2019, No. 25244/18, *N.A. v. Finland*.

89 Camille L. Coz, ‘EU Strategy on Voluntary Return and Reintegration’ (Migration Policy Institute Policy Brief, May 2021).

that such programmes are preceded by assessment of *refoulement* risks based on the family, private life, children rights, serious harm to health and life and dignity as developed by the European courts.<sup>90</sup>

#### 4. Conclusion: Diminished Judicial Control, Policy Fragmentation and Questionable Efficiency

While the Pact does remedy some of the shortcomings of the 2018 Recast Return Directive proposal that is in the design of the return border procedure, it also raises several concerns regarding: the measurement of 'effectiveness' of returns; the protection of the right to asylum and principle of *non-refoulement*; policy fragmentation; diminished judicial control; and domestic implementation. For instance, the Commission preserves the controversial metric of increase in absolute numbers as a proxy for the 'effectiveness' of returns, although shortcomings in the collection and reporting of such data have been raised.<sup>91</sup> It also seems to endorse some of the governmental views that procedural rights during asylum and return procedures serve mostly for prolonging rejected asylum seekers' stay in the EU, rather than safeguarding fundamental rights and prohibition of *refoulement*.<sup>92</sup> While it is unclear what data is used to reach this conclusion, European jurisprudence has shown that domestic implementation falls short of effective rights of defence standards in national systems that follow a merged asylum and return procedure.<sup>93</sup> Furthermore, in the absence of impact assessment preceding the Pact, it is unclear whether the shortened return border procedure increases efficiency of returns, when studies regarding the German "Anchor Centers" showed that the return rate is lower in mixed procedure and border centres.<sup>94</sup> Furthermore, the implementation of mandatory return border procedure comes with increased

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90 For a list of these judicial standards, see Jean-Baptiste Farcy, 'Unremovability under the Return Directive: An Empty Protection?' in Moraru, Cornelisse and de Bruycker (eds), *Law and Judicial Dialogue on the Return of Irregular Migrants from the EU* (n 23) ch 19.

91 Stutz and Trauner (n 34).

92 See the 2017 European Migration Network Report on effective returns.

93 See ECJ 16 July 2020, Case C-517/17, *Addis*, ECLI:EU:C:2020:579; ECJ, *LM and B* (n 71).

94 Benjamin Bathke, 'Asylum Procedures Not Substantially Faster at German "Anchor Centers"' (*Info Migrants*, 24 February 2021) <[www.infomigrants.net/en/post/30469/asylum-procedures-not-substantially-faster-at-german-anchor-centers](http://www.infomigrants.net/en/post/30469/asylum-procedures-not-substantially-faster-at-german-anchor-centers)> accessed 17 November 2021. For insight into Anker centres, see ECRE,

costs for frontline Member States (e.g. Italy) which have not applied so far this procedure, while it is unclear which share of the funding would be covered by the EU.<sup>95</sup> It is thus not surprising that several of the frontline Member States have rejected the use of the border procedures so far.<sup>96</sup>

Moreover, by leaving the Member States the option to decide whether to apply the Return Directive instead of the Schengen Border Code in border like cases, the amended Asylum Procedure Regulation risks creating two parallel return procedures – one that applies to the Schengen Associated States while the other one, thus offering different procedural safeguards based on nationality.<sup>97</sup>

The Pact legislative and non-legally binding acts should also pay closer attention to both the CJEU and ECtHR case-law, which has repeatedly held that return procedures must include an individual and separate assessment of the principle of *non-refoulement* from asylum cases (see cases, LM, B ). Closer attention should also be paid to the UN standards. While children's rights are better protected in the Pact compared to the 2018 Proposal, the pre-removal detention of minors is nevertheless maintained, despite the repeated UN's calls for eliminating migrant children detention.<sup>98</sup>

In conclusion, while the focus on returns and border security is important, this should not be prioritised over a rule of law-based EU returns' system. The European Commission's policy consultations should extend beyond governmental proposals, and reconsider how the procedural models it proposes on paper will play-out in a context where the European Parliament, FRA and European and domestic courts have shown a reduction of fundamental rights safeguards for some of the merged asylum and return procedures. Moreover, increasing the administrative decision-making power over judicial ones risks to weaken judicial review in a context where courts at both national and European levels are already facing increasing political pressures when giving effect to fundamental rights in asylum and return cases.<sup>99</sup>

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'The AnkER Centres: Implications for Asylum Procedures, Reception and Return' (2019).

95 See Iris Goldner Lang's chapter in this collection.

96 New Pact on Migration and Asylum: Comments by Greece, Italy, Malta and Spain, November 2020.

97 See Article 41a(8) of the amended Asylum Procedure Regulation (n 19).

98 See the Report of the UN Special Rapporteur on the human rights of migrants A/75/183, 20 July 2020.

99 Serge Bodart, Caroline Fransen and Claude Dubois, 'EU Charter and the dialog of the judges in asylum and immigration cases' (Robert Schuman Centre for Advanced Studies 2020/10) <<https://cadmus.eui.eu/bitstream/handle/1814/66309/>

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RSCAS%202020\_10.pdf?sequence=1&isAllowed=y> accessed 17 November 2021;  
ECtHR, 11 December 2018, No. 59793/17, *M.A. and others v Lithuania*.

