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**NOTE**

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From:	Presidency
To:	Permanent Representatives Committee/Council
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Subject:	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) - Policy debate

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The Return Directive [2008/115/EC of 18.12.2008] was established to set common standards and procedures in Member States for returning illegally staying third-country nationals while respecting their fundamental rights and the principle of *non-refoulement*. Effective returns are crucial for an efficient and holistic migration management policy. Since the adoption of the Return Directive in 2008, the challenges in EU return policy have considerably changed and increased. Return of third country nationals staying illegally in the EU is one of the priorities of the Union's migration policy. While the Commission, Members States and the agencies have already undertaken significant endeavours, the overall number of returns is still not satisfactory and needs to be significantly increased.

The migratory pressure in 2015/2016 led to increased challenges for Member States also in the field of return. Persons who do not qualify for international protection and whose applications have been rejected have to return to their countries of origin, preferably on a voluntary basis. In case of non-compliance, however, with legally binding return-decisions, such persons will have to be returned because they have no legal right to stay on the territory of Member States. The Commission estimates that as many as 1.5 million people will need to be returned from EU Member States in the near future, which requires a significant strengthening of Member States' capacities and the European return framework.

On 12 September 2018 the Commission tabled a proposal for a revised Return Directive (recast). It includes a number of targeted amendments while not affecting the scope of the original Return Directive. The proposed changes aim to address some of the legal and practical challenges and issues, sometimes arising from different interpretation of the provisions of the current Return Directive. This should maximise the effectiveness of the EU return rules and ensure their more consistent application across Member States, whilst safeguarding fundamental rights and the principle of *non-refoulement*.

The proposed changes to the EU Return Directive include: accelerated border procedures, clearer and faster procedures for issuing return decisions, including the obligation to issue a return decision in connection with the termination of the legal stay, streamlined appeal procedures, an obligation to cooperate for persons subject to a return procedure, a stricter approach to voluntary departures, clear rules on detention, a common, non-exhaustive list of objective criteria to determine the risk of absconding, a return management system and the possibility to issue an entry ban during border checks at exit.

At the informal SCIFA meeting on 20-21 September 2018 in Vienna, where the first discussion on the Commission's proposal was held, Member States reaction were generally positive and there was broad support for quickly proceeding with the work on the proposal with a view to achieve clearer and more efficient return procedures. At the same time Member States pointed out a few additional elements which would further help to increase the efficiency of the EU return policy, such as the possibility to return a third country national (TCN) to any third country which would accept TCNs, and the mutual recognition of return decisions. Member States were also concerned about avoiding delays in return due to the submission of last minute applications and the lack of penal provisions.

As demonstrated by the SCIFA discussion, one of the crucial elements of the proposal is the obligation to make use of the border procedure in a limited number of cases. This procedure will enable the rapid return of applicants for international protection, whose application was rejected *following an asylum border procedure* provided in the Article 41 of the *Asylum Procedure Regulation*, in order to prevent gaps between the procedures and ensure complementarity. The Commission proposes for this procedure that:

- no voluntary departure would be foreseen, except if the TCN holds a valid travel document and cooperates with the national authorities;
- shorter time-limit would be set for lodging an appeal;
- automatic suspensive effect in case of the first appeal against a return decision would only apply in case where there is a risk of breach of the principle of non-refoulement and where either new circumstances arose or the rejection of the asylum application was not subject to an effective judicial review. The second and further appeal would have no suspensive effect, unless the court decides so;

- a TCN who was already detained during the examination of his or her application for international protection as part of the asylum border procedure may be held in detention for a maximum period of 4 months under the border procedure for return. Where it is not possible to enforce the return in this period, further detention of the TCN may be ordered under another provision of this directive.

During the discussions on the proposal for an Asylum Procedure Regulation, Article 41 regarding the border procedure proved challenging in various respects, such as the deadline for keeping persons at the border, or the possibility to use such a procedure also in proximity to the external border or transit zone or, in case of disproportionate numbers of arrivals, other locations under the same regime as the external border or the transit zones. However, the most difficult and divisive question is whether the application of the border procedure should be optional or mandatory. The Presidency is ready to explore options for how the border procedure could be mandatory in certain specific cases. The latest version of the text (11872/18) provides that the application of the border procedure is mandatory only in a limited number of cases, namely when the applicant

- is a danger to the national security or the public order of the Member State;
- presented facts which are not relevant for examining whether he/she would qualify for international protection, in order to substantiate his/her application or
- made inconsistent, contradictory or false representations which contradict country of origin information.

The proposed revised Return Directive will be further discussed within the IMEX working party, including at its meeting on 9 October 2018. The next meeting on a technical level on the Asylum Procedure Regulation will take place on the 16 October 2018. The Presidency will ensure the necessary coordination at technical level when examining the two instruments to maintain a coherent approach on the border procedure taken as a whole.

**With a view to giving guidance to the work of the experts, Ministers are invited to confirm their readiness to quickly advance the work on this recast as one important element of the comprehensive approach pursued and address the following more specific questions:**

- **Can you support the above-outlined border procedure for returns or point out how this procedure could be further improved?**
- **Under which conditions can you support a mandatory application of the border procedure under the Asylum Procedure Regulation?**

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