Opinion of the European Economic and Social Committee on '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. A contribution from the European Commission to the Leaders' meeting in Salzburg on 19-20 September 2018'

(COM(2018) 634 final — 2018/0329 COD)

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1. Conclusions and recommendations

1.1. The EESC notes the European Commission's arguments for a recast of the directive on returns ([1]), but reiterates its belief that it is first essential for the EU to have a common policy and legislation for legal migration, as well as on international protection and asylum ([2]).

1.2. The EESC is concerned at the discrepancy between the criteria used by the EU Member States in managing migration, particularly in how irregular migrants are dealt with, giving rise to legal uncertainty and inequality of treatment.

1.3. The EESC believes that the Commission should have launched a process of communication and consultation with governments and civil society on the matter in the new circumstances, as it did at an earlier stage with the green paper ([3]).

1.4. The EESC considers that the Commission should have provided data, or at least estimates, regarding the level of application of Directive 2008/115/EC of the European Parliament and of the Council ([4]) on returns and on its level of applicability, as well as on the degree of monitoring of the effectiveness of its application, the main difficulties arising during the years in which it was in force, and the degree of compliance by the various Member States.

([1]) COM(2018) 634 final.
([2]) OJ C 85, 8.4.2003, p. 51 .
([3]) COM(2002) 175 final.
([4]) 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 L 348, 24.12.2008, p. 98).

1.5. The Commission should exercise a modicum of self-criticism, or at least analysis, in order to explain the low rates of returns carried out by the Member States and clearly identify the reasons for this and/or those responsible; if the Member States have neither applied the Directive nor respected the Commission Recommendation (EU) 2017/432 ([5]) on making returns more effective, then an impact assessment should be drawn up. This study should include an evaluation of how Member States have approached creating operational programmes to provide help and advice in returns and a comparison of the cost-effectiveness of voluntary and forced returns.

1.6. The EESC is aware that a strand of extreme right-wing and nationalist discourse on migration is fuelling xenophobic and intolerant attitudes. The EESC believes that a comprehensive common EU migration policy would be the best argument with which to allay the fears of the people of Europe.

1.7. In line with the EESC's views set out in other opinions ([6]), a different narrative must be developed on migration that fosters a de-dramatised view of it as a normal social and economic factor and enables efforts to educate society on the issue.

1.8. On the other hand, the EESC can support the European Council conclusions of June 2018, which state that a precondition for a functioning EU policy is a comprehensive approach to migration which combines more effective control of the EU's external borders, increased external action and the internal aspects, in line with the principles and values of the EU, and that such efforts must continue in order to avoid humanitarian disasters ([7]).

1.9. Data provided by the European Council of 18 October ([8]) reveals that irregular arrivals in the EU have been brought down by 95 %. At the same time, IOM data from September 2018 ([9]) explains that up to that date, 83 067 people had arrived in the EU by sea, and 1 987 had died.

1.10. The EESC sees an effective returns policy as an integral part of a comprehensive EU immigration and asylum policy; however, such a policy is missing and the Commission should proceed in a consistent and measured way and not adopt a purely security and policing-focused vision of migration as a criminal matter.

1.11. The EESC considers that a comparative study — based on data and visits — of detention centres in the EU, their situation and compliance with human rights inside them needs to be carried out.

1.12. The EESC welcomes the Commission's efforts to speed up decisions on returns and link this with the decision to refuse asylum and the decision to terminate a legal stay, as well as generally making the return procedure quicker and more efficient. Even so, consideration should be given to how realistic the proposed time-scales are and an assessment made of the obstacles that could frustrate this intention.

1.13. At the same time, the EESC sees an effective returns policy as being linked to a process of effective collaboration with third countries and the concluding and implementing of readmission agreements; it calls on the Commission to make further efforts and the Member States to make the most of these arrangements.

1.14. The EESC also considers that mention should be made of the best practices applied in some EU countries to prevent illegally-staying foreign nationals from falling into a chronically irregular situation. Such best practices include granting residence permits on exceptional grounds of strong social, work or family ties (*arraigo*) in Spain or the *Duldung* provision in Germany.

([5]) Commission Recommendation (EU) 2017/432 of 7 March 2017 on making returns more effective when implementing Directive 2008/115/EC of the European Parliament and of the Council (JO L 66 du 11.3.2017, p. 15).

([6]) See EESC opinion on 'The costs of non-immigration and non-integration' (OJ C 110, 22.3.2019, p. 1).

([7]) European Council meeting, 28.6.2018, Conclusions.

([8]) European Council meeting, 18.10.2018, Conclusions.

([9]) IOM — Migration: Flow Monitoring Europe.

2. Background and the Commission proposal

2.1. Since 1999, the EU has been trying to develop a comprehensive approach to migration which covers the harmonisation of readmission conditions, the right of legally staying third-country nationals and the development of legal measures and practical cooperation to prevent irregular migration. The Returns Directive 2008/115/EC aimed to establish an effective removal and repatriation policy based on common standards but the **implementation report** of the Returns Directive published in 2014 showed very slow progress on the improvement of the EU's effective return rate: 2014 — 36,3 %, 2015 — 36,8 %, 2016 — 45,8 %, 2017 — 36,6 %. Nor has any improvement been effected by the Recommendation (EU) 2017/432, which contained a batch of measures Member States ought to take to capitalise fully on the flexibility the directive offers.

2.2. Without changing the scope of the directive or affecting the protection of the rights of the migrants that currently exist, including with regard to the best interests of the child, family life and the state of health, and the principle of *non-refoulement*, the recast directive should make the return process more effective by proposing:

— More coherence and synergies with asylum procedures;

— A new border procedure;

— Clear procedures and rules to prevent abuses;

— Suggestions to promote efficient voluntary returns;

— Clear rules on detention.

3. General comments

3.1. The EESC is concerned at the discrepancy between the criteria used by the EU Member States in managing migration, particularly in how irregular migrants are dealt with, giving rise to legal uncertainty and inequality of treatment.

3.2. The EESC reiterates the recommendations put forward in its opinion on the 2002 Commission Communication on a Community Return Policy on Illegal Residents, as it considers that those were not — or not fully — taken up in the various legislative an policy measures introduced at Union level ever since, in particular as regards the rights of irregular migrants, regularisation, forced return, judicial appeal, the right to family unity, detention, and the need for a truly common legal migration policy ([10]).

3.3. The proclaimed intention of the recast — to make return procedures more efficient, speed up processing and link this directly to the decision to refuse asylum and the decision to terminate a legal stay — is, of course, welcome; Member States have the right to return irregular migrants, provided that fair and efficient asylum systems are in place which fully respect the principle of non-refoulement. However, regarding the stated aims of the proposed changes, the EESC is concerned by what the effect of these will be. The EESC wonders about the efficiency of these changes and is fearful that the only result of the changes could be to make the situation tougher and more punitive. The basic principle underlying the priority of voluntary returns, enshrined back in the original Directive 2008/115/EC, should not be discarded and replaced only with repressive policies.

3.4. The proposal should also be evaluated in terms of the viability of its objectives, especially if it is to remain compatible with human rights. Seeking the blanket removal of all illegally staying third-country nationals on EU territory, as the sole means of restoring them to a state of legality, is simply impossible to implement, in the light of experience over recent years and on account of the disproportionate human, economic and other costs that it would produce.

3.5. Over the last 10 years, there has not been any effective implementation, monitoring and evaluation of a returns policy that, moreover, is still not effectively embedded in a comprehensive and common EU migration policy.

([10]) OJ C 85, 8.4.2003, p. 51 .

3.6. In the proposal, the Commission should have explained why Directive 2008/115/EC has not been properly applied by the Member States, who have also failed to follow Recommendation (EU) 2017/432 that includes guidance on implementing the directive and call on the Member States to take the necessary steps to remove the legal and practical obstacles that make returns difficult.

3.7. Similarly, against a backdrop of rising social confusion, an attempt should be made to publish real data on irregular migration to the EU and to interpret it responsibly so as to avoid fuelling xenophobic and racist discourse that feeds into extreme right-wing positions.

4. Specific comments

4.1. Based on how events have unfolded since 2008, the Commission sees amending the directive as a way to achieve the legitimate objective of restoring legality and making the carrying out of returns more effective. However, that there are many other methods that achieve the same effect but are more effective and less onerous (e.g. voluntary returns, regularisation on an individual basis, etc.). The EESC sees an efficient returns policy as an integral part of a comprehensive EU immigration and asylum policy; however, the lack of such a policy should prompt the Commission to a self-critical, consistent and balanced approach and to avoid taking a purely security and policing-focused vision of migration as a criminal matter ([11]).

4.2. Our previous opinion said: 'The EESC would remind the Commission that various of its opinions have pointed to the need to take action on regularisation' ([12]). Yet, European legislation foresees measures to end a person's irregular status in a reasonable and constructive manner.

4.3. Examples of such measures can be found in Articles 6 — Return decision — and 7 — Voluntary departure — of Directive 2008/115/EC, which have been very little explored and applied by the Member States, particularly in cases where it has been tried to return a person to no avail. In that light, the EESC endorses Recommendation (EU) 2017/432 to create assisted voluntary return operational programmes.

4.4. Moreover, the EESC notes that rules applying to removals of European citizens and their family members on grounds of public policy or public security ([13]) are not applied to irregular migrants. We are referring here to the possibility of asking for a removal order to be lifted due to a change in circumstances after a reasonable period and, when two years have passed since the order was issued, the obligation not to enforce a removal order without assessing the circumstances. It does not seem reasonable that the approach taken to European citizens — i.e. only for being a threat to public policy or public security — cannot be taken in the case of those whose only fault is an issue of documentation if they have experienced significant changes in their circumstances.

4.5. It is imperative that the return procedure comprises mechanisms and effective safeguards — going beyond the simple possibility of recourse or appeal — to protect the rights and interests of third-country nationals subject to proceedings. There needs to be an effective way to exercise these rights with appropriate legal assistance; each procedure should be automatically assigned a specialist lawyer, who has received tailored training, to put forward the case for the defence.

4.6. The policy of persecuting illegal residents must go hand in hand with a sweeping and robust prohibition on identifying people on the basis of their ethnicity and/or religion. The current relaxation of this prohibition makes Europe a territory where racial minorities could be intolerably exposed to the suspicion and control of the authorities. The UN's Human Rights Committee reprimanding Spain in July 2009 ([14]) for detaining a Spanish citizen on suspicion of being an illegal immigrant, simply because she was black, speaks volumes.

4.7. The EESC considers that a comparative study — based on data and visits — of detention centres in the EU, their conditions and compliance with human rights needs to be carried out.

([11]) See the discussion brief by the Research Social Platform on Migration and Asylum, 'Crackdown on NGOs assisting refugees and other migrants'.

([12]) OJ C 85, 8.4.2003, p. 51 .

([13]) Articles 32 and 33 of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (OJ L 158, 30.4.2004, p. 77).

([14]) FF. Communication No. 1493/2006, Williams Lecraft v. Spain

4.8. The EESC also proposes that the Commission continuously examine the approach of the Member States to creating operational programmes to provide better help and advice in returns, including support for reintegration in third countries of return – programmes they ought to have begun setting up back in 2017. This study should include a comparison of the cost-effectiveness of voluntary and forced returns.

4.9. The EESC would like to mention the best practices applied in some EU countries to prevent irregular migrants from falling into a chronically irregular situation. Such best practices include the *arraigo* and *Duldung* arrangements in Spain and Germany respectively, which allow some foreign nationals who have been living on their territory under irregular conditions to obtain – on extraordinary grounds – regular status provided they meet certain requirements; this is granted on an individual and selective basis.

5. **Analysis of the proposed changes**

5.1. The text of the directive is very clear, introducing nine specific changes, which the EESC opinion focuses on.

5.2. There is a need for EU-wide objective criteria to determine the existence or not of a risk of absconding, including unauthorised secondary movements. To prevent diverging or ineffective interpretations, **Article 6** of the proposal sets out a common list of objective criteria to determine if there is a risk of absconding as part of an overall assessment of the specific circumstances of the individual case. The list of criteria is too broad and goes beyond Recommendation (EU) 2017/432. The result is that although the directive provides for two types of return procedures — one emergency and exceptional, without voluntary departure and subject to other encumbrances; the other with safeguards and with the option of voluntary compliance — in practice most irregular migrants will be subject to the procedure that should, in theory, be exceptional.

5.2.1. Only a limited number of the proposed objective criteria in Article 6 — stemming from Recommendation (EU) 2017/432 and corresponding in the amended text to the criteria in (f), (h) and (k) — serve to rigorously define 'risk of absconding'. Point (j) can also be considered a suitable criterion in line with the provisions of Article 7 on the obligation to cooperate.

a) The lack of documentation at the point when proceedings are initiated can, in most cases, be rectified upon request which, if not fulfilled, could lead to point (f).

b) This objective puts the burden of proof on the migrant who will have to demonstrate effective residence, removing a fundamental legal safeguard. The broad difficulties related to accommodation — in particular those that many municipalities cause for foreigners in general and people with an irregular status in particular — lend this point disproportionate magnitude.

c) If we wish to avoid the possibility of ALL irregular migrants being accused of a risk of absconding, meaning that procedures with safeguards will be completely cast aside, the risk of absconding cannot be defined using this kind of parameter. After all, anyone who is deprived of the right to work is obviously also deprived of economic resources and most irregular migrants will therefore suffer from a lack of financial resources.

d) Given the closed border policy applied by the Member States, many irregular (and even legal) migrants will have entered the territory of the Member States illegally.

e) If an irregular migrant moves between Member States this is by default unauthorised, but not necessarily a reason to find there is a risk of absconding.

g) Being subject to a return decision from another Member State. If the directive itself provides for the direct enforcement of that decision by the second state, it makes no sense to set out this possibility.

i) Non-compliance with the requirement to go to another Member State where they are legally resident. In such cases, initiating removal proceedings without voluntary departure to the country of origin is completely disproportionate. What is needed in such cases is some sort of compulsory measure to bring them back to the other Member State, but not removal to the country of origin, much less via the emergency procedure.

5.3. As a preface to the analysis of Articles 7 and 8, and other articles in the proposal, we should clarify the following: the whole text of these changes demonstrates a clear lack of understanding of the legal nature of a return decision, which, once clarified, will underpin the comprehensive challenge raised with regard to paragraph 3, reflected in the directive's new Article 8. A return decision constitutes an executive decision taken by a state that has a direct impact on a human being's personal sphere of rights and interests. Moreover, the justification is usually directly or indirectly related to the fulfilment of obligations or to certain behaviour of which the person is accused, and this person deserves an appropriate process to check the veracity of these allegations, which, in these cases, can no doubt be independently substantiated. All of this is to say that removal is a sanction, a penalty, a punishment of an administrative – not criminal – nature, but is governed by the same constitutional principles and fundamental rights as criminal law.

5.4. With regard to **Article 7** — obligation to cooperate — the EESC notes the Commission's assumption that the obligation of third-country nationals to cooperate with the competent authorities of the Member States at all stages of the return procedure could assist the smooth running and effectiveness of these procedures. It must be noted, however, that this directly infringes the fundamental right of not giving evidence against oneself. The obligations set out in this article can be boiled down to just one: to cooperate and collaborate during a procedure that is directed against oneself. **Article 8** — Return decision — now requires Member States to issue a return decision immediately after the adoption of a decision ending a legal stay of a third-country national, including a decision not to grant refugee status or subsidiary protection status. The EESC thinks that Article 8 should be expanded to include the possibility of third-country nationals being given a reasonable opportunity to comply with the obligation to leave the country on their own or to seek alternative ways to regularise their situation.

5.5. **Article 9** on voluntary departure stipulates that an appropriate period of thirty days must be granted for voluntary departure, annulling the original provision of seven to thirty days. While the maximum period of only thirty days used to be grounds for criticism, the existence of a minimum served as a safeguard. Abolishing this minimum makes it possible for Member States not to allow for a voluntary departure period at all.

5.6. The new measure introduced in **Article 13** allows Member States to impose an entry ban, which does not accompany a return decision, on a third-country national whose illegal stay in the Member States is detected when (voluntarily) leaving the EU. The EESC sees this measure as a penalty imposed on a person who at that very moment is complying with the law, i.e. leaving EU territory and ending their illegal stay. On the other hand, the measure can be seen as an insurance policy against repeated entry into the Member State concerned.

5.7. **Article 14** on Return Management asks each Member State to set up, operate, maintain and further develop a national return management system, which shall process all the necessary information for implementing this Directive. However, technical compatibility must be ensured with the EU's central system. Article 14 also provides for Member States to introduce an operational programme to provide support to those concerned.

5.7.1. The shortcomings of the Schengen Information System (SIS) mean that measures are required to improve coordination between states. It is highly doubtful that specific rules at the level of a directive are needed to deal with what are essentially management issues of a practical nature.

5.7.2. The proposal that Member States establish programmes for providing logistical, financial and other material assistance to support voluntary return, which would include reintegration programmes, comes from Recommendation (EU) 2017/432. The Commission should support, monitor and assess their creation.

5.8. **Article 16** lingers and focuses exclusively on 'the only mandatory case where automatic suspensive effect shall be granted under this proposal', i.e. substantiating the removal of someone whose application for international protection has been rejected. We have nothing to object, save that the EESC sees other cases where the suspension of the removal should be similarly automatic, so as to reinforce the scope of safeguards or guarantees. A non-exhaustive list of these should include:

— cases in which minors are directly or indirectly affected,

— cases in which EU family members are directly or indirectly affected and which therefore does not fall under Directive 2004/38/EC,

— cases in which there is a demonstrable risk to the health or physical integrity of the person concerned,

— when the return is to be to a country identified as unsafe, including countries that do not respect human rights.

5.9. Regarding detention and the establishment of at least three months as a maximum detention period, we must point out that the facts show that a period of less than three months is sufficient for the procedure and steps needed to be able to enforce a removal to a third country, and that almost nothing is achieved by an extension to this period, however long it may be, and even less so by subjecting someone who has not committed any crime to such an extreme measure as depriving them of their liberty.

5.10. We again urge other solutions to be found, such as the German *Duldung* or Spanish *arraigo* mentioned above, which take much less than three months to determine whether a person will be able to be removed or not. Preventive detention is an interim measure, the purpose of which is to make it easier to carry out forced return and prevent absconding. However, its misuse as a disguised form of imprisonment or punishment for irregular immigration must be ruled out. Such imprisonment is explicitly prohibited by the case-law of the Court of Justice of the European Union ([15]).

5.11. Consequently, it should be a requirement under the directive that such detention centres not be comparable to, or worse than, prisons. It should be stipulated that internal surveillance of such centres is never carried out by state security forces, their role being limited to the perimeter, with internal surveillance being the responsibility of another type of state body, and also that there should be a minimum standard of detainees' rights in every respect equal to or better than the legal status of those held in prisons in each Member State.

5.12. The amendment introduced by paragraph 7 of Article 22 is entirely superfluous, as it is already regulated by the Member States' various asylum procedures. In any case, it is disproportionate for a person who can be detained for up to four months for their return as a result of their asylum application being rejected to be then immediately plunged into a new, additional six-month period, with the same aim of repatriating them.

5.13. The EESC agrees with the Commission that the efficiency of the EU's return policy also depends on the cooperation of countries of origin. The EU has achieved already some progress, nevertheless the EESC calls on the Commission to continue its efforts in this area and at the same time to appeal to Member States to capitalise on these results and to make full use of these arrangements.

Brussels, 23 January 2019.

The President
of the European Economic and Social Committee
Luca JAHIER

([15]) Judgments of the Court of Justice of 7 June 2016, *Affum*, C-47/15, ECLI:EU:C:2016:408, and of 28 April 2011, *El Dridi*, C-61/11, ECLI:EU:C:2011:268.