EU Mobility and Migration Law Course

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Return Directive 2008/115*

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1. INTRODUCTION

Immigration policy is at the core of both the internal security of the European Union and its' relations to the rest of the world. It has gained increasing importance in the context of the Arab Springs, which were followed by strong migration flows and the so-called refugee crisis of 2015. This emergency situation has led European citizens to perceive immigration as a threat to national security and identity. The EU needs to reconcile this increasing demand for security through the control of external borders with the need to maintain its identity as a democratic power that protects human rights at the international level. The Return Directive 115/2008, which sets the standards for returning illegally staying third-country nationals (TCNs), plays a key role in this context. A legal procedure for returning illegally staying TCNs is considered central for an equal and just immigration policy, as it would allow EU Member states to have adequate resources for refugees and other legal migrants. At the same time, however, the legal procedure must be concerned with respecting the fundamental rights of people who might be staying illegally in the EU, but have every right to be treated with dignity and respect. The aim of this paper is on one hand to present the piece

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of legislation and how it has been applied, and on the other to give the reader the tools to individually assess its implications and controversies.

The paper is structured as follows. The first part outlines the main aspects of the Directive, the logic behind it, the exceptions and in what cases is detention applied and why. The second part shows how the Directive was applied in the *El Dridi, Achughbabian* and *Celaj* cases. The third part provides some data on how and when Member States apply the directive, highlighting a substantial gap between the number of those ordered to leave and those who were effectively returned. The fourth and final part looks at the key changes to the Directive proposed in the 2018 Recast and the logic behind it: amongst the changes, an expansion of the grounds for detention is noted.

2. The EU legal framework

In dealing with the very sensitive topic of migration, and in particular illegal migration, one of the main references is 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", better known as "Return Directive". It was the product of a difficult negotiation process, since it was the first EU instrument in the field of immigration and asylum policy to be adopted following the co-decision procedure (now ordinary legislative procedure), during which two driving forces emerged, giving a twofold soul to the Directive. On one hand, the most important aim and scope, as clearly identifiable from the title of this piece of legislation, is to harmonize the procedures for the returns of Third-country nationals. As stated in the Preamble (§2) the EU aims "for the establishment of an effective removal and repatriation policy, based on common standards, for persons to be returned in a humane manner and with full respect for their fundamental rights and dignity". On the other hand, the protection of fundamental rights is not undermined in the Directive, as evident in Article 1 "in accordance with fundamental rights as general principles of Community law as well as international law, including refugee protection and human rights obligations". Nevertheless, the focus remains

managing of illegal flows of migration and the references to human rights in the text are vague and mostly limited to the introduction. This has led to criticism from NGOs, non-EU States and UN Agencies.

The Directive was formally adopted by the Council on 16 December 2008 and published in the Official Journal of the European Union on 24 December 2008 (L 348/101). It applies to all the Member States except the United Kingdom, Ireland and Denmark, while Iceland, Norway, Switzerland and Liechtenstein are covered, by virtue of their association with the “Schengen acquis”. Member States were required to bring the domestic legislation necessary to comply with the Directive into force by 24 December 2010, except for legislation concerning Article 13(4) on legal assistance and representation, which had to be put in place by 24 December 2011.

Directive 2008/115 applies, as stated in Article 2, to third-country nationals staying illegally on the territory of a Member State, defining “illegal stay” as the presence on the territory of a Member State of a third-country national who does not fulfil, or no longer fulfils, the conditions of entry as set out in Article 5 of the Schengen Borders Code, or other conditions for entry, stay or residence in that Member State. However, this legal tool does not concern all the third-country nationals (TCNs). In fact, Article 2.2 excludes all third-country nationals intercepted while irregularly crossing the external borders of the Member States, those whose entrance was refused according to Article 13 of the Schengen Borders Code and those who are subject to a criminal law sanction of return or extradition procedure. In addition, TCNs who enjoy free movement right as defined in article 2.5 of the Schengen borders Code, i.e. third country nationals who are family members of Union citizens exercising their free movement right, are covered by Directive 2004/38/EC.

The Directive provides a set of common rules on a number of issues relevant to return proceedings, from return decisions (Article 6) to entry bans (Article 11), allowing exceptions to the general rules. In addition, it grants

procedural safeguards to the subject of the return procedure, such as the right of judicial remedy (article 13) and of receiving health care and having access to education while the removal is pending (Article 14). An individualized assessment is always required, as Article 5 affirms: "When implementing this Directive, Member States shall take due account of: (a) the best interests of the child; (b) family life; (c) the state of health of the third-country national concerned, and respect the principle of non-refoulement."

Just as Directive 2004/38, Directive 2008/115 also provides an "ascending scale of protection", from voluntary departure in a time span between seven and thirty days, regulated by Article 7, to "all necessary measures", detailed in Article 8. "Voluntary departure" normally refers to the situation of a person who has freely consented to repatriate, while a mandatory return concerns the case of a person who no longer has the legal basis to remain in the territory and he/she is requested to leave the country. The latter also applies to those who have consented or have been induced to leave by means of threats or sanctions. Finally, a "forced return" describes the return of persons who are required by law to leave but have not consented to do so and therefore may be subject to sanctions or force in order to effect their removal. Nevertheless, in this context the expression "voluntary return" hides a more mandatory dimension, given the scope of the Directive. The obligation is in fact evident from the language used, and the mandatory nature of this duty is confirmed in Article 6 with the requirement to the Member State of an administrative or judicial decision, declaring illegal the stay of a third-country national and imposing an obligation to return.

Exceptions laid down in article 6.3 concern the situation of a person with the right to stay in the territory of another Member State, who would be required to move in that State, or of a person who has requested renewal of his/her residence permit, but the procedure is still pending. In addition to this, the State may decide to grant the TCN a permit or other authorization for compassionate, humanitarian or other reasons. Particular regard shall be had with unaccompanied minors, who are covered by Article 10. In fact, the return decision may only be

issued with the assistance of "appropriate bodies" and giving due consideration to the best interest of the child. However, this rule has been strongly criticized, due to the fact that according to the *UN Convention on the rights of the child*, the best interest of the child should be a "primary concern" (article 3) in all actions concerning children.

As a measure of last resort, i.e. only applicable when no alternative coercive measures are available, the Return Directive envisages detention (article 15). However, it must always comply with the principles of necessity and proportionality, principles guiding most of EU actions, and it has to be considered only if it facilitates the return rather than as a punishment or a measure intended to protect the public order. The directive also establishes that the maximum limit of detention shall be for six months, exceptionally extended to a maximum time-period of 12 months, only if there is a lack of cooperation by the third-country national or a delay in obtaining the necessary documentation. Conditions are expressed in article 16. Among these, the fact that "detention shall take place as a rule in specialised detention facilities" underlines that the main aim of detention is to secure the returns. Moreover, contacts with the outside such as family members and consular authorities must be granted and information explaining the rules applied in the facility and on rights and obligations must be given, which shows the difference between this situation and regular detention. Nonetheless, even though detention should be an exceptional measure, it has become a systematic part of migration management across the European Union and, in the process of transposition of the Return Directive to the national legislation, ten Member States extended the maximum legal time limit of detention in comparison with the antecedent legislation.

3. The main case law of the Court of Justice of the European Union

The Court has ruled many times on this Directive, especially concerning its implications with criminal law. As already stated, the Directive provides an

exception for Member States to not apply the Returns Directive in the cases in which the persons were refused entry in accordance with the Schengen Borders Code, either because they were apprehended during the irregular crossing of an external border and they were not later allowed to stay in that Member State; or in the case in which persons "are subject to a return as a criminal law sanction or as a consequence of a criminal law sanction, according to national law, or who are the subject of extradition procedures". The most relevant cases on the second exception are *El Dridi, Achughbabian and Celaj*.

In *El Dridi*, an Algerian citizen who had entered Italy illegally was ordered to leave the country within five days, as he was found undocumented and the detention centres were at capacity. Since El Dridi did not comply with the order, he was sentenced to one year of imprisonment, according to an Italian law of 2009 relating to the detention, from one to four years, of illegally staying TNC's who refused to leave the country. El Dridi appealed against his prison sentence, and the Appeals Court of Trento turned to the ECJ for a preliminary ruling. The Court confirmed that that Italian provision contradicted the principles of the Directive and posed unproportionate consequences for cases in which indeed the only 'crime' was not to leave the country in such a short time window. Since the ECJ ruling on this matter, an illegally staying third country national can only be detained if his conduct jeopardizes the removal process. Moreover, this ruling clarifies the 'criminal law exception', which in this case does not apply as the issue of the removal order was separate from the criminal offence of irregular entry.

In the *Achughbabian* judgement, the Court ruled more broadly that the exception would not apply in cases in which the criminal penalty was a direct consequence of irregular entry. This clarification derives from a preliminary ruling by the CJEU demanded by French judges in light of the implication of the *El Dridi* ruling. Indeed, the French judges questioned the applicability of the same principle not only for pre-removal detention, but also for pre-return decision

detention. The potentially conflicting law was a French provision that criminalized irregular entry and presence *per se*. In fact, doubts arose to whether illegally staying TCN's could still be subject to police custody after the *El Dridi* judgement. Mr Achugbabian entered France illegally in 2008 and was ordered to voluntarily leave French territory within one month, which he ignored. A new return decision was issued in 2011 ordering deportation instead of voluntary departure and Mr Achugbabian was sentenced to police custody and then detention. He challenged the judgement before the French Court of Appeal, who in turn referred the dispute to the CJEU. Did the Directive preclude national legislation imposing an imprisonment sentence on the sole ground of illegal entry? The Court's answer provides some clarification: it starts by explicitly stating that the Return Directive does not preclude national legislation criminalizing irregular stay and entry and imprisonment of subjects for this offence. National criminal legislation is not applicable only where it jeopardizes the aims and effectiveness of the Return Directive. However, the Court settled that detention is allowed only before the issuing of the return decision; if the illegality of the entry or stay of the person is confirmed, then the removal has to be carried out in the shortest time possible, thus implying that provisions for detention that delay the decision are not to be applied.

The jurisprudence of the CJEU on the Return Directive explains itself further with the *Celaj* case, focusing on imprisonment as a consequence of violation of an entry ban. Celaj was an Albanian national, sentenced to imprisonment for attempted robbery in Italy. Moreover, this sentence provided for removal and a three-year entry ban. He infringed the entry ban and was arrested and sentenced to eight months of imprisonment in 2014, pursuant Article 13(13) of Legislative Decree no 286 of Italian legislation. The proceeding was brought before the District Florence Court, which referred to the CJEU for a preliminary ruling, in order to clarify whether the Returns Directive would preclude national legislation that criminalized the breach of an entry ban. The Court answered that the Return Directive is directed at subjects being removed from the country they

entered illegally, and thus it does not apply to breaches of entry bans. In conclusion, the Directive does not preclude national legislation that criminalizes re-entry and punishes the crime with imprisonment, notwithstanding previous return decisions. It is relevant to note how the case law for the Directive largely reduces the criminalization of irregular entry by Member States and the resulting practice of detention. Moreover, for the cases closed after the deadline for implementing the Directive, such as *Filev and Osmani*, the criminal law exception could not be applied retroactively if it would worsen the situation of the concerned person.

4. Data

In this section, we present some statistics on repatriations implemented in the European Union and Italy in recent years. We rely on the 2019 publication of the European Parliament Data *on Returns of Irregular Migrants* (European Parliament, 2019) and on two reports of 2019 and 2018: *Il Diritto d'Asilo* (Iaria, 2019) and *XXIV rapporto ISMU sulle migrazioni* (ISMU, 2018).

First of all, let us look at the trend in the number of third-country nationals illegally present on the Community territory and detected by the competent authorities between 2008 and 2017. This is displayed in Table 1. Evidently, this figure does not reflect the total number of non-EU nationals staying unlawfully in the EU, as not everyone gets identified. The most interesting fact is the very rapid growth between 2014 and 2015, and an almost equally rapid decline thereafter. 2015 is also the year in which most irregular crossings of the EU's external borders took place. The proportion of minors in the total number of migrants remains fairly stable and follows the general trend. The bar at the bottom shows the main nationalities of illegal immigrants detected in 2017: interestingly, at the top of the ranking is a small and relatively stable country like Albania. Next come Northern African and Middle Eastern nations, many with internal conflicts, as well as a couple of Eastern European countries.

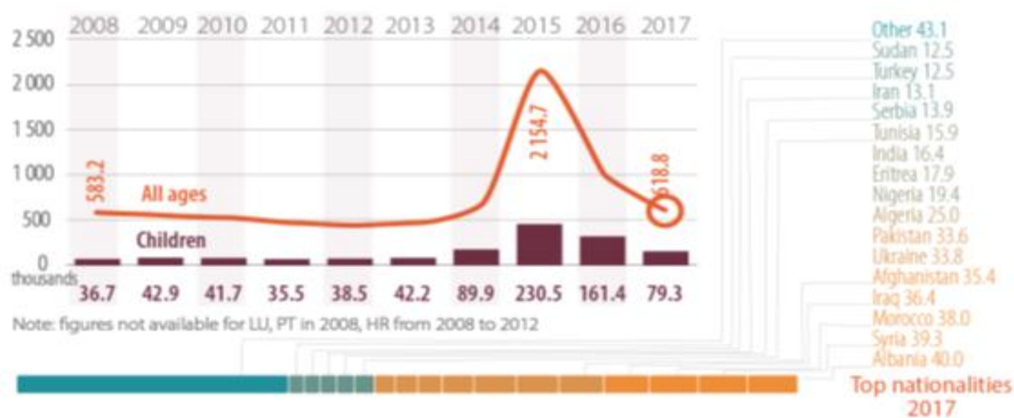
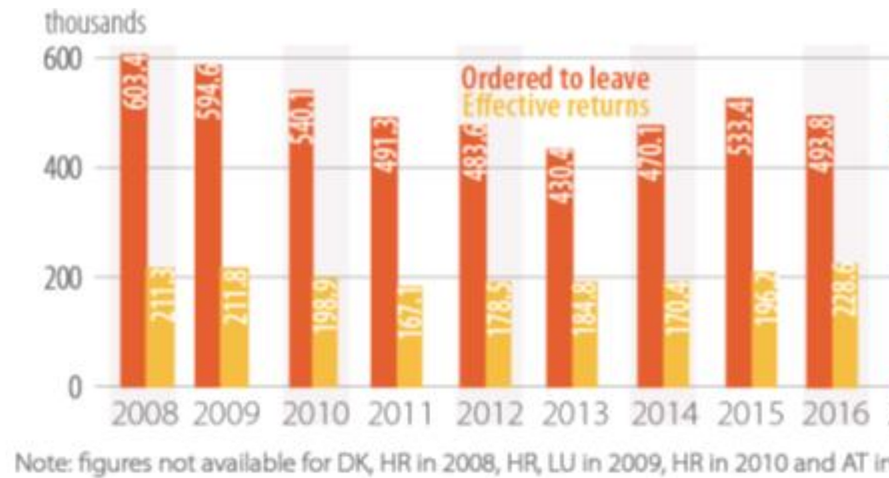


Table 2 shows the substantial gap between the return orders issued each year - from 2008 to 2017 - in the European Union and the number of third-country nationals actually repatriated. This clearly means that, despite the mechanisms and laws in place, national authorities still have several difficulties in effectively

implementing returns. However, both data follow the same trend: a significant decrease between 2008 and 2013 and a subsequent re-increase.



We will not provide data on the return modalities - voluntary or forced, assisted or not - because they are not available for several influential Member States, as Eurostat only collects them since 2014 and on a voluntary basis. The same applies to the information on main countries of destination of third-country nationals actually repatriated from the European Union.

Let us move on to the data on Italy regarding the issue of returns. In 2017, the gap between third-country nationals illegally present on the national territory and repatriations carried out was considerable: only 19.4% of these persons were effectively removed. In this sense, Italy performed 'better' than France, but worse than many other Member States, such as Spain, Germany and the United Kingdom. The highest percentage of returnees were Tunisians, followed by Albanians, Moroccans and Egyptians. In 2018, only 43% of the 4092 migrants detained in the relevant centres, 'Centri di Permanenza per il Rimpatrio', were eventually repatriated.

Finally, we have some information on the application of the Assisted Voluntary Return procedure (AVR) over the last decade. Between June 2009 and June 2014 there were more than 3000 AVRs, which later decreased because national financial resources were allocated to the asylum system. Indeed, of the 7045 repatriations carried out in 2017, 4935 were forced. The AVRs were subsequently boosted thanks to new European funds, and in 2018 1161 procedures were implemented. The situation collapsed again last year, with 5044 forced returns and only 200 AVRs being implemented between 1st January and 22nd September 2019. Such rapid procedural changes are likely to echo the political instability of recent years.

5. Recast Proposal: key changes

In 2018, following a Recommendation of the Commission of September 2017 (European Commission, 2017) that requested the strictest interpretation possible of the 2008 Directive, a recast of the Directive was proposed, which is currently being negotiated with the Parliament and the Council.

The reasons for the proposal, as stated in the Commission's proposal of 12th September 2018 (European Commission, 2018) are:

1. To address the difficulties in successfully reinforcing return decision encountered by Member States, mainly because of "inconsistent definitions and interpretations of the risk of absconding and of the use of detention".

2. To reaffirm the importance of cooperation with the countries of origin and to implement the "several legally non-binding arrangements for return and readmission [that] have been put in place".

At its core, the recast aims to increase the return rate that, as observed in the data presented above, has not substantially increased since the Directive was put in place.

The key changes proposed are:

1. The definition of the risk of absconding is expanded (Article 6). The new definition lays out 16 criteria to establish the risk, including four criteria that create a rebuttable presumption. This means that, if met, the Member states are obliged to imply a risk of absconding. These are the use of false documents, opposing the expulsion violently, non-compliance with a measure such as a reporting requirement, and the violation of an entry ban (Peers, 2018).

2. Introduction of the obligation for the third-country nationals to cooperate with authorities during the return procedures (Article 7).

3. Obligation for Member States to issue a return decision as soon as an asylum request is negated (Article 8).

4. The minimum of seven days for voluntary departure is erased, keeping only the maximum of 30 days specified. The option to refuse a voluntary departure in cases of a) risk of absconding; b) fraudulent application and c) risk to public policy, public security and public health, becomes an obligation to refuse the voluntary departure.

5. Entry bans may be imposed even without a return decision if the irregular migrant is detected whilst leaving the EU (Article 13).

6. Member States are required to set up a national Return Management system (Article 14).

7. Changes to remedies and appeals (Article 16) include shorter time limits within which to appeal a return decision and the limit to one instance of appeal. In case of concerns regarding *refoulement*, the first appeal has suspensory effect on the removal from the Member State.

8. Expansion of the grounds for detention, to include, in addition to risk of absconding and hampering the preparation of return, also posing a risk to

public policy, national and public security. Furthermore, the list would become non-exhaustive, removing the word 'only' (Article 18).

9. Setting a special border procedure for third-country nationals who applied for asylum and were rejected, at a member state's borders. This special procedure would entail no voluntary departure unless there is a valid travel document, set a maximum time limit of 48 hours to make an appeal and allow detention for 4 months (which can be extended to facilitate the return).

The European Parliament's committee on civil liberties (LIBE), as well as NGOs such as Statewatch (Kilpatrick, 2019), and scholars such as Peers (2018) have condemned the proposed recast arguing that it is merely concerned with increasing the expulsion of third country nationals and detaining them to do so, and would likely cause breaches of fundamental rights.

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