

Diminishing safeguards, increasing returns: Non-refoulement gaps in the EU return and readmission system

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List of abbreviations

CAT	United Nations Convention Against Torture
CEAS	Common European Asylum System
CJEU	Court of Justice of the European Union
EASO	European Asylum Support Office
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
ECRE	European Council on Refugees and Exiles
EMN	European Migration Network
EPRS	European Parliament Research Service
EU	European Union
FRA	European Union Agency for Fundamental Rights
ICCPR	International Covenant for Civil and Political Rights
IOM	International Organisation for Migration
JRC	Joint Readmission Committee
LIBE	Civil Liberties, Justice and Home Affairs (Committee)
MEP	Member of the European Parliament
TFEU	Treaty on the Functioning of the European Union
UNHCR	United Nations High Commissioner for Refugees

Executive summary

Increasing the rate of return of third country nationals without a legal right to remain in the EU was a priority of the 2014-2019 European Commission. In September 2018, the Commission proposed the first recast of the Return Directive since its entry into force in 2010. The European Parliament's draft report and the Council's partial general approach then followed in 2019. While it is still unclear in what form this file will be taken up by the new legislature, return will clearly remain a key policy objective. This will involve both an acceleration of return procedures and an expansion of cooperation with third countries on readmission.

The new legislative cycle provides an opportunity to rethink EU return and readmission policy. In particular, its compliance with international legal obligations, most notably the principle of non-refoulement, merits renewed attention. The EU and its member states have an obligation to ensure that a return order does not lead to refoulement, either directly or indirectly. Nevertheless, several trends are at play that create a growing accountability gap over return and readmission, and amount to structural shortcomings in their efforts to prevent refoulement. This applies across return policy, in particular to the recast Return Directive proposals, and recent readmission agreements.

First, the scrutiny and procedural safeguards involved in returns have been reduced in order to expel individuals faster. Several elements in the Commission's proposal for a recast Return Directive, as well as the Council's position, would significantly weaken procedural safeguards for returnees. These relate, in particular, to the right to appeal and assessments of the risk of refoulement.

Similarly, efforts to accelerate readmission cooperation have led to the proliferation of informal readmission agreements. These arrangements limit democratic scrutiny, since they do not need to be made public nor debated and approved by national or European parliaments. Furthermore, the uncertainty over whether they create legal rights and obligations makes it difficult to exercise judicial scrutiny over their contents. The agreements that have emerged from this accountability gap include several states experiencing ongoing conflict or that are refugee-producing.

Second, the predominant bilateral nature of readmission cooperation has created new challenges. The responsibilities between the EU and member states for specific readmission agreements are increasingly blurred in order to deflect accountability. Several agreements have mobilised EU bodies and resources in their implementation, while avoiding the appropriate institutional scrutiny faced by EU agreements. The difficulty in identifying responsibility in these cases creates a blind spot for democratic accountability and has implications for judicial scrutiny.

At the same time, persistent discrepancies remain between member states' return practices. The lack of

standardised information on returns poses challenges for the public and policymakers to determine who is being returned, how, and to where. More importantly, member states have differing understandings of what constitutes a safe third country. One state may sign a readmission agreement with, and conduct returns to, a country that others would deem unsafe. In the absence of harmonisation, several countries have suspended Dublin transfers to member states where there was a risk of onward deportation to unsafe countries. This diminished interstate trust leads to an ineffective migration policy and puts individuals at risk of refoulement.

Third, no system is in place to track individuals following their expulsion, so member states cannot guarantee their safety. The lack of monitoring mechanisms prevents a comprehensive evaluation of readmission agreements' compliance with non-refoulement. It also hinders the inclusion of suspension clauses or conditions on returnees' protection in readmission agreements. Considerations of the risk of indirect refoulement are strikingly absent. Several partner countries lack functional asylum systems, or have been repeatedly accused of conducting collective expulsions in violation of non-refoulement. Certain harmful practices are sometimes actively promoted: EU member states have frequently encouraged third countries to accelerate returns and establish their own readmission agreements, including with countries that would be considered unsafe.

The recast Return Directive risks further diminishing control over the outcomes post-return. First, it introduces limitations on voluntary departure. Second, the Council's position seeks to introduce a possibility of returning third country nationals to countries other than those of origin or transit. These trends further restrict possibilities for monitoring and increase the risk of indirect refoulement.

The diminishing safeguards in return policy and readmission cooperation should be considered jointly, since they lead to an overall accountability gap over the consequences of return, potentially amounting to violations in international law. Reversing these trends to comply with international law and protect returnees from persecution must become a priority in the EU's next legislative cycle. To that end, the paper's key recommendations include the following:

- ▶ Reconsider the strategy of prioritising informal over formal cooperation in the next legislative cycle.
- ▶ Establish post-return monitoring in their agreements with third countries.
- ▶ Conduct an evaluation of formal and informal readmission agreements at EU and national level that fully reflects their implications, including compliance with non-refoulement.

- ▶ Agreements should not be concluded with countries that are at risk of violating the principle of non-refoulement either directly or indirectly. All agreements should include a suspensive clause.
- ▶ Targeted support towards partner countries' asylum and reception systems should promote fundamental rights compliance in readmission cooperation.
- ▶ The recast Return Directive should recognise the notion of indirect refoulement, and discourage member states from conducting returns to countries where the third country national has no meaningful connection.
- ▶ Efforts should be made to prevent perilous national return practices and readmission agreements.
- ▶ The recast Return Directive must ensure that effective remedies exist, including an appropriate period for appeals in all procedures.
- ▶ Voluntary departure must continue to be prioritised over forced return, including an appropriate period to return.
- ▶ Better public data on return practices is needed from member states.

Introduction

The return and readmission of migrants without a legal right to remain has long been a cornerstone of the European Union's (EU) migration policy. The rhetoric that effective expulsion is a prerequisite for the integrity of an asylum and migration system has been prevalent in EU statements.¹ As political consensus in other areas becomes harder to secure, **return is quickly becoming a political priority for the EU.**

However, like other aspects of migration policy, returns are not without risks. Individuals subject to return decisions may have particular vulnerabilities or be subject to persecution upon their deportation. **The European Commission and member states have the duty to ensure that fundamental rights are fully complied with** within the framework of their international obligations. This includes, particularly, respect for the principle of non-refoulement.

This discussion paper focuses on the **risk of refoulement in return operations and readmission cooperation** with third countries. Whereas return refers to the process governing expulsion from a member state's territory, readmission concerns the act of a third country accepting the (re)entry of that individual. Refoulement is understood as the expulsion of individuals to countries where they may face persecution.

The paper provides a critical analysis of the latest policy developments governing readmission cooperation and return policy, including the recast Return Directive proposal currently under negotiation. It begins by outlining the state of play in return and readmission, as well as member states' legal obligations with respect to the principle of non-refoulement. Sections 2 to 4 then provide a critical examination of the risks involved. On that basis, the paper finds that, as a consequence of the importance increasingly awarded to effective returns, **the Commission and member states' policies are creating a growing accountability gap.** This applies across return policies and readmission practices, and particularly concerns their compliance with the obligation to prevent both direct and indirect

refoulement. This reduced accountability takes several forms, which are discussed in turn in this paper and outlined briefly below.

- ▶ First, **procedural safeguards are increasingly diminished in order to accelerate returns.** Regarding return, increasing attempts to curtail access to effective remedies and existing safeguards within return procedures lead to potential breaches of the non-refoulement principle. Regarding readmission, cooperation with third countries is becoming ever more informal and, consequently, frequently bypasses democratic and judicial scrutiny.
- ▶ Second, **significant divergence remains between member states' return practices.** EU mechanisms are sometimes strategically avoided when pursuing controversial agreements that are EU-wide or involve the Union, leading to a blurring of responsibility over their outcomes. At the same time, problematic bilateral agreements continue to be concluded without EU guidance and with limited data.
- ▶ Third, there is a **lack of suitable monitoring mechanisms within return practices and readmission agreements.** This hinders the EU and member states' ability to guarantee returnees' safety. Rather than addressing this shortcoming, the recast Return Directive proposal further reduces opportunities for monitoring by proposing to restrict voluntary departures, while heightening the risk of indirect refoulement.

These three trends amount to structural shortcomings in EU and member states' efforts to prevent refoulement.

These three trends amount to structural shortcomings in EU and member states' efforts to prevent refoulement. As the emphasis on increasing the rate of returns continues, and as the future of the recast Return Directive in the next legislative cycle becomes clearer, addressing the

system's structural deficiencies will be crucial. This paper seeks to contribute an analysis of the risks at hand so that they can be better addressed in existing and future return and readmission policies.

1. Return, readmission and non-refoulement: State of play

1.1 RETURN AND READMISSION

Return and readmission have become increasingly important tools of migration management for the EU. The prolonged standstill in discussions over the Common European Asylum System (CEAS) reform package, particularly on questions of responsibility-sharing, highlights the challenges to building political consensus on the internal aspect of the EU's migration policies. This deadlock has prompted a greater focus on border management and the external dimension of migration. In this context, **return and readmission are taking centre stage as a policy objective where consensus between member states can be more easily forged.**²

One notable development in EU return and readmission policy is that this priority is echoed across a range of recently adopted instruments. These include the recast of the Visa Code, which enables member states to pressure third countries into cooperating on readmission by using visa policy as leverage,³ and recent changes to the European and Border Coast Guard Regulation, which incorporates an expanded returns mandate for the EU's border agency.⁴ Above all, however, the political importance of returns is most centrally present in the reform of the Return Directive currently under negotiation and, second, in ongoing efforts to secure readmission agreements with third countries concerning the practical operation of these returns. In what follows, this section discusses the relevant recent developments in the EU's return policy and readmission cooperation. Their interaction with the principle of non-refoulement is further explored in the remainder of the paper.

To begin with, **return operations in the EU are guided by the Return Directive (2008/115/EC).**⁵ The Directive was borne out of the culmination of a series of efforts in the early 2000s aimed at harmonising standards and coordinating operations regarding returns, including on the mutual recognition of return decisions and the organisation of joint return flights.⁶ The Directive sets out common standards and procedures for member states to apply when returning third country nationals who do not have a legal right to remain in the EU. These include timeframes for return procedures, procedural safeguards, guidelines on voluntary departure, as well as indications and minimum standards on the use of detention or entry bans.

The Commission has issued several communications on the implementation of the Return Directive in recent years. All of them, most notably the 2017 Renewed Action Plan on a more effective return policy, were aimed at increasing the rate of returns and addressing the consistently large gap between issued return decisions and actually executed returns.⁷ **The rate of effective returns to third countries has remained at 36-37% since 2014** (exceptionally at 45.8% in 2016),⁸ yet drops to a low 27% if returns to the Western Balkans are excluded.⁹ The low rate of returns is largely due to practical challenges, such as in identifying returnees' nationality, and to a lack of cooperation from third countries, such as in issuing travel documents.¹⁰ Return and readmission are therefore closely linked and belong to the same policy framework: for returns of third country nationals to be successfully executed, third countries must be willing to accept them.

The Commission advanced a goal last year of achieving a "return rate of at least 70% by 2020".¹¹ Given the practical limitations outlined above, this would entail a drastic escalation of return efforts. Accordingly, in September 2018, the Commission proposed the **first recast of the Return Directive since its entry into force in 2010.**¹² The proposal identifies as key challenges the inconsistencies in member state practices, a lack of cooperation from third countries, and a lack of cooperation from returnees.¹³ It aims to expedite returns by expanding the grounds for detention, broadening the use of entry bans, expanding returnees' obligations to cooperate, and introducing accelerated return procedures at border posts. The European Parliament issued its draft report in response to the proposal in January 2019,¹⁴ followed by a substitute impact assessment by the European Parliament Research Service (EPRS).¹⁵ The report is generally very critical of the Commission's proposal, particularly as regards detention and safeguards across return procedures. However, the Parliament report was never voted on in the Civil Liberties, Justice and Home Affairs (LIBE) Committee and its rapporteur, Member of the European Parliament (MEP) Judith Sargentini, no longer holds office following the May 2019 elections.¹⁶ The fate of the report and the next steps remain uncertain pending the start of the new Parliament's term. The Council agreed on a partial general approach in June 2019. Several of its changes to the Commission's proposal were aimed at strengthening

the measures to promote return, such as extending entry bans from five to ten years and allowing member states to charge returnees for the cost of their detention and removal.¹⁷ In other respects the Council improves protections, such as in the amended definition of absconding, granting more than one level of appeal, or in additional safeguards for minors and families.¹⁸ This agreement excluded provisions on the accelerated border procedure, since these are linked to the Asylum Procedures Directive, currently under discussion.¹⁹ At the time of writing, it is unclear when, and in what form, the next EU legislature will take up the discussions again. Nevertheless, it is already clear that developing a “more robust system of readmission and return” will remain a priority for the Commission.²⁰

Developing a “more robust system of readmission and return” will remain a priority for the Commission.

A second key element of return policy is cooperation with third countries on readmission. Although bilateral agreements, negotiated by member states with individual third countries, constitute the majority of readmission agreements,²¹ the Commission was granted the competence to negotiate agreements at EU level in 1999. Since then, it has signed 18 formal readmission agreements with the following third countries: Hong Kong, Macao, Sri Lanka, Albania, Russia, Ukraine, Macedonia, Bosnia and Herzegovina, Montenegro, Serbia, Moldova, Pakistan, Georgia, Armenia, Azerbaijan, Turkey, Cape Verde, and Belarus.²²

These agreements assist in operationalising return and readmission processes of third country nationals. They may include a country’s own citizens, those who crossed it in transit, stateless people, or other states’ nationals. While readmission of one’s nationals is arguably an obligation under customary international law, it is not always fulfilled.²³ **Readmitting one’s own nationals is often expensive and politically unpopular, in part because it undermines a long-term source of income through remittances.**²⁴ Citizens abroad may provide remittances even if they are in an irregular situation, and sums can be substantial.²⁵ A public backlash led Mali, for example, to withdraw from an agreement in 2016.²⁶ Furthermore, the vast majority of these agreements also seek to secure commitments to readmit nationals of non-contracting state parties (for example, of neighbouring countries that are unsafe or unwilling to readmit them), and therefore go beyond established international obligations.²⁷ This, too, can be unpopular in third countries and pose barriers in readmission negotiations, particularly since there is no guarantee that their countries of origin would eventually take them back, leading to fears of economic burdens.²⁸

It should be noted, however, that signing a readmission agreement is distinct from actually conducting returns to a country. Readmission agreements by themselves do not obligate expulsion and must be complemented by thorough case-by-case assessments of each returnee’s circumstances.²⁹ In addition, several studies suggest that readmission agreements are not particularly successful tools for expediting returns. For example, funding commitments or the promise of visa liberalisation may insufficiently compensate for the costs of readmission mentioned above, they may fail to account for practical or logistical difficulties, or they could be poorly implemented by EU member states.³⁰

In addition to formal readmission agreements, **the EU and its member states often pursue informal arrangements** or joint statements containing clauses on readmission. These are administrative or political in nature and exist at both EU and national level. They include Joint Migration Declarations, Memoranda of Understanding, Joint Ways Forward, Standard Operating Procedures or Good Practices. Like formal agreements, they affirm states’ commitments to readmitting their nationals (or others) and establish procedures to carry out returns in practice. Since 2016, the EU has reached at least 11 informal agreements (10 operational, since Mali withdrew):

Country	Format of Informal Cooperation	Date
The Gambia ³¹	Good Practices	08/05/2018
Ethiopia ³²	Admission Procedures	05/02/2018
Bangladesh ³³	Standard Operating Procedures	25/09/2017
Guinea ³⁴	Good Practices	24/07/2017
Mali ³⁵ (subsequently withdrew)	Joint Migration Declaration	11/12/2016
Belarus ³⁶	Mobility Partnership	13/10/2016
Afghanistan ³⁷	Joint Way Forward	02/10/2016
Cote d’Ivoire ³⁸	Joint Migration Declaration	16/04/2016
Ghana ³⁹	Joint Migration Declaration	16/04/2016
India ⁴⁰	Common Agenda on Migration and Mobility	29/03/2016
Turkey ⁴¹	Joint Statement	18/03/2016

Source: own compilation based on EU official documents and the “Inventory of European Union Agreements linked to Readmission” created by Jean-Pierre Cassarino.⁴²

The Commission is currently pursuing additional agreements. Its primary focus lies in Africa, where the Migration Partnership Framework provides a format for structured cooperation and where rates of return are currently least effective, reaching a low 15% in Central and Eastern Africa.⁴³ Negotiations on readmission cooperation are ongoing with Morocco, Tunisia, Nigeria and China, and until recently with Algeria and Jordan.⁴⁴ There have also been regular discussions on readmission as part of the Partnership Framework with the

programme's identified priority countries of origin and transit (Niger, Mali, Nigeria, Senegal and Ethiopia).⁴⁵

1.2 NON-REFOULEMENT

The principle of non-refoulement entails the notion that individuals should not be sent back to a country where they may face persecution. It was first recognised by Article 33 of the 1951 UN Convention relating to the Status of Refugees (the Refugee Convention).⁴⁶ Nowadays it is considered to be a core tenet of refugee and human rights law and is firmly enshrined across regional and global conventions, including Article 3 of the UN Convention against Torture (CAT)⁴⁷ and Articles 6 and 7 of the International Covenant on Civil and Political Rights (ICCPR).⁴⁸ The obligation to protect individuals from being sent to countries where they face a risk of persecution is also embedded in regional European legal instruments. Article 3 of the European Convention of Human Rights (ECHR) has been interpreted by the European Court of Human Rights (ECtHR) as encompassing a prohibition of refoulement.⁴⁹ The EU's commitment to non-refoulement is echoed in Article 19 of the EU Charter of Fundamental Rights, Article 78(1) of the Lisbon Treaty (TFEU),⁵⁰ across the relevant Directives,⁵¹ and in agreements with third countries.

The prohibition on non-refoulement applies whether it happens directly or indirectly following a return order.

The existence of an obligation to avoid refoulement for EU member states, therefore, is not controversial. Rather, the **discussion concerns the scope and precise implications that stem from this obligation.** To begin with, the exact circumstances that constitute

refoulement are subject to debate. Taken jointly, the conventions listed above, and to which all member states are party, cover persecution, torture, and inhuman or degrading treatment or punishment.⁵² Jurisprudence by the ECtHR and CJEU has often interpreted the definition of refoulement to include the risk of flagrant denial of justice,⁵³ serious mental or physical illnesses,⁵⁴ or extreme cases of generalised violence.⁵⁵

A related discussion as to the obligations derived from the principle of non-refoulement concerns **indirect or 'chain' refoulement.** Even if, in the context of return operations, member states refrain from returning migrants to countries that may persecute them, a risk remains that returnees are expelled onward to countries where a risk of persecution exists. This domino effect constitutes indirect refoulement. UNHCR advisory opinions⁵⁶ and comments on the implementation of the CAT⁵⁷ have repeatedly stressed that the prohibition on non-refoulement applies whether it happens directly or indirectly following a return order. Similarly, **the ECtHR and CJEU have repeatedly affirmed states' duty to avoid refoulement, even when it happens indirectly through secondary expulsion.**⁵⁸ In their rulings, both courts affirm that the first expelling state is responsible for conducting an assessment of the risks associated with a return decision, and determine that the receiving state will not expose the individual to risk of ill-treatment or refoulement. States fall foul of their obligations if they "knew or ought to have known" such a risk existed.⁵⁹ This assessment must be conducted in consideration of all available evidence on conditions in the country and the quality of asylum processes, including reports from UNHCR, the European Asylum Support Office (EASO) and civil society.⁶⁰ States cannot merely rely on either diplomatic assurances from third countries or their being a signatory to the relevant conventions, but rather are expected to conduct individual assessments.⁶¹ Against this background, the following sections proceed with an assessment of the extent to which the obligations to avoid direct and indirect refoulement have, to date, been duly accounted for in ongoing return policy and readmission cooperation.

2. Evading procedural safeguards

Efforts to accelerate returns have been accompanied by attempts to diminish accountability over how the relevant procedures are conducted. The scrutiny and procedural safeguards involved in returns are being reduced in order to expel individuals faster. First, the drive to reform the Return Directive risks undermining existing safeguards on assessments of refoulement and the right to appeal at national level. At the same time, readmission cooperation is becoming increasingly informal and, consequently, frequently bypasses democratic and judicial scrutiny. Both trends, particularly when taken jointly, increase the risk of individuals being returned to persecution.

2.1 UNDERMINING EFFECTIVE REMEDY IN RETURN PROCEDURES

This section outlines how elements of the Commission's recent recast proposal, as well as the Council's partial general approach, would restrict existing remedies and safeguards for returnees in order to accelerate the rate of returns. This increases the risk of inadequate assessments of the risks involved and therefore of reaching wrong decisions that put individuals in danger. Given the uncertainty around the fate of the Parliament's report on the recast proposal at the time of writing, it is excluded from this analysis.

The proposed recast would worsen procedural safeguards and the access to remedies. To begin with, it must be noted that procedural safeguards are already limited. A recent European Migration Network (EMN) assessment of member state practices notes that the period of appeal is typically pushed to be as short as possible, since the current Return Directive does not specify time limits. Appeal periods are one week in Greece and Latvia, three days in Malta and Slovenia, and even 48 hours in France in certain cases.⁶² A 2013 evaluation of the implementation of the Return Directive similarly found that certain decisions were only reviewed on procedure and not on their merits, information about available remedies was not always communicated to third country nationals, and deficiencies were observed in timely and free legal aid.⁶³

The scrutiny and procedural safeguards involved in returns are being reduced in order to expel individuals faster.

- ▶ First, the Commission's recast proposal would further weaken these safeguards by **establishing a maximum appeal period of five days** when the return decision follows a decision refusing asylum. Member states would be free to establish an even shorter period with no required minimum.⁶⁴ In other cases, where the return decision has not been preceded by a negative asylum decision, member states would be able to establish their own periods of appeal, again without an indicated minimum period, as is the case in the current Return Directive. In its partial general approach, the Council makes modest changes. It would set a maximum period of 14 days for appeals in general.⁶⁵ In the event that the return decision is issued with a rejected asylum application, it deletes the Commission's five-day maximum yet calls on member states to establish "the shortest time limits". Both proposals open the door to unreasonably short periods of appeal that would restrict individuals' ability to obtain legal aid and prepare an effective action.⁶⁶
- ▶ Second, **both proposals would weaken safeguards when the return decision follows an assessment in the context of an asylum procedure.** If the risk of refoulement has already been assessed in a rejected asylum procedure, the **Commission** proposal would **limit the suspensive effect of appeals** based on the risk of refoulement.⁶⁷ Under the **Council's** position, the **risk of refoulement would not be verified again.**⁶⁸ An exception would apply in both cases if findings arise that significantly modify the circumstances of the case. When refoulement has not been previously assessed, the Commission would still treat appeals on the basis of refoulement as automatically suspensive, whereas the Council would allow member states to treat an appeal on

non-refoulement grounds as suspensive, either automatically or *upon request* by the returnee.⁶⁹

Both proposals open the door to unreasonably short periods of appeal.

ECtHR case law has repeatedly emphasised the importance of the suspensive effect of appeals on non-refoulement grounds.⁷⁰ Otherwise, individuals risk being sent to persecution before the extent of the risk has been determined, causing irreversible damage. Furthermore, the effort to link asylum and return procedures⁷¹ is problematic. The assumption that non-refoulement claims must have been thoroughly reviewed during asylum procedures is incorrect, since the object and scope of judicial review in the two cases are not identical. As has been noted by the European Council on Refugees and Exiles (ECRE), the European Union Agency for Fundamental Rights (FRA) and the EPRS among others, the Qualification Directive does not consider all grounds that could amount to refoulement, and individuals who would nevertheless face persecution if returned may be refused international protection on procedural or technical grounds.⁷² This is the case for a non-trivial proportion of rejected applications.⁷³ The asylum and return *acquis* are distinct and should not be conflated.

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- ▶ Third and finally, these **concerns are exacerbated in the case of accelerated procedures at border posts**, which the proposal puts forward and which would be retained by the Council. As per the proposal, individuals who had been rejected in an accelerated asylum procedure as established by the recast Asylum Procedures Regulation (which has not yet been adopted), would go through an accelerated return procedure. Some member states have recently begun using accelerated procedures, but their use remains disparate and is limited in scope.⁷⁴ The Asylum Procedures and Return recast proposals are an attempt to mainstream the practice. The Commission proposes a maximum of 48 hours for an appeal, whereas the Council would extend it to between 48 hours and one week.⁷⁵ A reasoned explanation of the return decision would be replaced with standard 'tick-box' forms, with factsheets explaining their contents

available in as few as five languages.⁷⁶ As such, many third country nationals may not understand the return decision and could struggle to appeal it effectively.⁷⁷

Individuals that are returned following the border procedure would likely face a disproportionate risk of erroneous decisions, potentially amounting to refoulement.

Where accelerated asylum procedures have been employed in the past, they significantly increase the rejection rate to just under 90%, from 61% on average.⁷⁸ This could indicate that stricter standards are being applied than in normal asylum determination processes, or that diminished safeguards are changing the outcomes. ECRE and the Danish Refugee Council, for example, have warned of superficial assessments of claims, poorly conducted interviews, insufficient vulnerability assessments, and excessive weight being given to the applicant's nationality.⁷⁹ Individuals that are returned following the border procedure would likely face a disproportionate risk of erroneous decisions, potentially amounting to refoulement.

2.2 INFORMALISATION OF READMISSION AGREEMENTS

The urgency accorded to increasing returns is not limited to the drive to reform the Return Directive, but also reflected in cooperation with third countries. EU readmission partnerships are increasingly taking on an informal nature. **It is stated policy to prioritise “improving structured practical cooperation” and “not necessarily formal readmission agreements”.**⁸⁰ As such, official readmission agreements are being complemented and replaced by a new generation of agreements that are presented as non-legally binding. Since 2015, there have been over a dozen EU or EU-wide informal partnerships, whereas only one formal agreement has been concluded by the Commission (with Belarus in September 2019).⁸¹

This shift has multiple motivations. A common justification is that third countries are more likely to agree to informal agreements.⁸² Readmission deals are often unpopular in countries of origin, and widely publicised agreements can face public backlash. Informal agreements also allow more flexibility to respond to changing circumstances and reduce the cost of defection.⁸³ Given the historically unequal, donor-recipient footing⁸⁴ on which most negotiations with countries of origin are conducted, EU priorities are also likely to strongly influence the format of negotiations. As noted by Cassarino, in Europe, where increasing the

rate of returns is politically urgent, there is an interest in reducing ratification delays domestically.⁸⁵

This drive for flexibility poses two key challenges:

► First, the **new generation of agreements permits a far lesser degree of democratic scrutiny.** Since the 2007 Lisbon Treaty, the European Parliament must approve the conclusion of international agreements and be informed at all stages of negotiation.⁸⁶ Unlike official readmission agreements, informal partnerships do not need to be debated or approved by the European Parliament or undergo a lengthy process of ratification and oversight. Some efforts have been made to inform the Parliament on the state of negotiations on informal agreements, yet these are sporadic, and MEPs have raised concerns about lacking access to the text of certain agreements and information on their costs or risks.⁸⁷

Informal agreements are generally not publicly available. By contrast, formal readmission agreements must be published in the *Official Journal of the European Union*.⁸⁸ This has implications beyond parliamentary overview. Due to the obscure process of negotiation, any public involvement through media attention or advocacy by civil society organisations is restricted to taking place only after an agreement's conclusion, or not at all where an agreement is not published. The barrier to withdrawing and backtracking from concluded agreements can be expected to be higher than halting or influencing negotiations: this renders democratic scrutiny substantially less effective.

► Second, the **informal nature of the agreements creates substantial legal uncertainty.** These arrangements tend to explicitly state that they do not create rights and obligations for their signatories under international law. Nevertheless the extent to which they can still be legally binding is subject to debate.⁸⁹ Commentators have pointed to the language used (“will”, “agree to”) and detail of the commitments, including specific dates and figures or the creation of monitoring working groups, which often closely resemble international treaties and seem to create legal effects.⁹⁰ Independent of the possible legal effects, it is clear that judicial scrutiny of these agreements is much less straightforward. As noted by Molinari, when agreements are informal, their explicit legal basis does not need to be stated. Unlike official EU agreements, their legality and compliance with the Treaties cannot be reviewed by the CJEU either *ex ante*, before the agreement enters into force, or at a later stage, in the context of a procedure borne out of a specific return action.⁹¹ The lack of clarity as to their legal effects, furthermore, makes it difficult to establish a direct causal link between the agreement and an unlawful return. Overall, this limits returnees' and others' ability to challenge the agreement.

Several recent agreements, such as the **EU-Turkey** Statement of March 2016,⁹² the **Joint Way Forward with Afghanistan** of October 2016,⁹³ the **EU-Bangladesh**

Standard Operating Procedures of September 2017,⁹⁴ and the Admission Procedures agreed with **Ethiopia** in January 2018,⁹⁵ have all bypassed any kind of democratic scrutiny and fall outside of the CJEU's jurisdiction. Other recent arrangements with **Guinea, The Gambia, and Cote d'Ivoire** are not publicly available.⁹⁶ Similarly, at national level, Italy's Memorandum of Understanding with **Sudan** of August 2016⁹⁷ was never ratified by the Italian parliament and only publicised after 48 Sudanese nationals were expelled to Khartoum.⁹⁸ In all cases, key questions were beyond review, including the legality, necessity, effectiveness or potential aftermath of the respective agreements.

The agreements that have emerged from this accountability gap include states that are experiencing ongoing conflict or are refugee-producing.

The agreements that have emerged from this accountability gap have had highly problematic outcomes, since they include states that are experiencing ongoing conflict or are refugee-producing, most notably **Sudan** (which had a 55% recognition rate

for international protection across the EU in 2018), **Turkey** (47%) and **Afghanistan** (46%).⁹⁹ Although the risks of refoulement can differ between regions and are based on individuals' particular profiles and vulnerabilities, in many cases, the risks remain significant. The situation in **Afghanistan** is illustrative. The Joint Way Forward with Afghanistan was agreed in 2016,¹⁰⁰ and 34,396 return decisions of Afghan nationals were reported by member states in 2016, followed by over 18,000 annually in 2017 and 2018.¹⁰¹ The agreement and the rise in returns took place in a context of rising hostilities that were widely reported by civil society, particularly ECRE¹⁰² and Amnesty International,¹⁰³ as well as UNHCR.¹⁰⁴ In addition to dire humanitarian circumstances, these reports outlined the inability of the Afghan government to deal with a surge in the number of returnees, and the particular risk of persecution faced by those that had spent long periods abroad. UNHCR issued an assessment in August 2018 stating that, due to the deteriorating situation in the country, Kabul, ostensibly one of the safest areas of Afghanistan, could not be considered safe for returns.¹⁰⁵ **This has, however, not led to suspension of the Joint Way Forward with Afghanistan or returns to Kabul.** Following UNHCR's assessment, Finland decided to pause, revise and then reinstate deportations to Afghanistan. Other member states have not reviewed their policy on returns to Afghanistan and no public EU statement has recommended that they do so.¹⁰⁶ On the contrary, several member states have accelerated returns to Afghanistan in 2019,¹⁰⁷ as violence soared.¹⁰⁸

3. Bilateralism and blurred authorship

Member states play a substantial role in implementing return and readmission policies. In addition to carrying out the majority of returns (some are conducted by Frontex), most readmission agreements with third countries are reached at national level: member states have over 300 bilateral agreements with non-EU countries, corresponding with their different national priorities and historical relationships.¹⁰⁹ While this is not novel, a more recent trend sees the creation of readmission agreements where their authorship is blurred for strategic purposes. Multiple recent agreements have involved EU resources and support, without facing corresponding EU-level scrutiny. Second, the divergences between member state practices can give rise to inconsistent national return practices, including partnerships with countries that others would consider unsafe. This calls for greater EU oversight.

Multiple recent agreements have involved EU resources and support, without facing corresponding EU-level scrutiny.

3.1 BLURRING OF RESPONSIBILITIES FOR READMISSION AGREEMENTS

In a trend related to informalisation as discussed above, agreements that circumvent EU legal frameworks and institutions increasingly blur the lines between EU and member state responsibilities. As Slominski and Trauner have argued, **states tend to employ a "strategic non-use of the EU" in readmission cooperation.**¹¹⁰ Whereas member states often rely on EU resources to increase their rate of returns, they also, conversely, often deliberately avoid employing EU channels, instruments or procedures, when circumventing them can make cooperation with third countries swifter. In these cases, EU-wide or national readmission agreements will be reached without the appropriate institutional scrutiny faced by EU agreements, while at the same time mobilising EU bodies and resources to support their implementation. The situation is further obscured when agreements are informal, since these have no clear signatory. They may be published as a press statement or not at all, leaving their authorship as an open question.¹¹¹

The **EU-Turkey Statement** is a key example and the focus of extensive scholarship. In a controversial order in February 2017 following a legal challenge by three asylum

seekers, the CJEU determined that it was not competent to hear legal cases against the Statement, arguing that the agreement should be attributed not to the EU but to the representatives of signatory member states.¹¹² In this way, despite being concluded at the fringes of an EU Summit, being presented as an EU agreement and with EU bodies mobilised to monitor and fund its implementation,¹¹³ the agreement escaped the relevant democratic and judicial scrutiny at EU level. This was precisely the intention: the European Council and the Commission argued in court that the agreement was not intended to create legal effects but was a political arrangement and, in any event, was agreed by member states without institutional involvement.¹¹⁴ The same is true for Italy's Memorandum of Understanding with **Libya**. The European Council was instrumental in coordinating the adoption of their agreement at an EU Summit, endorsed it in the subsequent Malta Declaration, and committed funds to Libya within the agreement's framework, without corresponding legal responsibility for its outcomes.¹¹⁵

The EU-Turkey Statement was never approved by the European Parliament, but it was crucially not debated in national parliaments either.

This blurring of responsibilities between the EU and its member states has implications for democratic and judicial scrutiny, further complicating the challenges identified in the previous section on informalisation:

- ▶ First, the **difficulty in determining who is responsible for an agreement creates a blind spot in democratic accountability**. The EU-Turkey Statement was never approved by the European Parliament, but it was crucially not debated in national parliaments either. Agreements under negotiation are thus not discussed in any public forum either at national or EU level. Following an agreement's adoption, the public's ability to hold representatives to account remains limited, since it may be unclear who has the capacity to stop or change it.
- ▶ Second, it **hinders judicial scrutiny and the easy identification of legal responsibility**. The role of the CJEU in particular is sidelined: the Court is poorly positioned to determine the legality of agreements that could lead to refoulement when these are attributed to member states rather than EU institutions. As such, the only attempt to challenge the legality of a readmission agreement to date (the EU-Turkey Statement) was found inadmissible. This role can, to an extent, be played by national courts and the ECtHR, and indeed both sets of judiciaries have played an active role in confronting dangerous return practices, not least in relation to returns to Turkey from Greece.¹¹⁶ Nevertheless,

an important legal avenue is excluded, and the process of challenging an agreement that led to refoulement becomes much more complicated. Third country nationals seeking to block returns under a readmission agreement would have to prove that the agreement is indeed a legally binding treaty (when it was presented as informal), and identify the most suitable court for their case while proving that the agreement's signatory falls under its jurisdiction (when its authors are unclear). In many cases, these new obstacles may preclude full judicial scrutiny.

In many cases, these new obstacles may preclude full judicial scrutiny.

3.2 DISCREPANCIES IN NATIONAL RETURN PRACTICES

Member states have wide discrepancies in their return practices, resulting from different national contexts and limited harmonisation. These discrepancies arise across return procedures themselves, the definitions states employ, and the information that they collect and provide to EU bodies. This poses two problems:

- ▶ The first concerns the **lack of meaningful information on returns at national or EU level**. For several countries, data on basic parameters is not available, such as on the grounds and length of detention, whether voluntary returns took place, when return decisions were issued, or the use of entry bans.¹¹⁷ For example, Germany, Finland, Cyprus, the Netherlands, the UK, Lithuania, and until recently Greece, Austria and Czechia do not differentiate between voluntary and forced return in their data collection.¹¹⁸ These deficiencies in data collection leave most of the facts related to return "in the dark" for both the public and policymakers.¹¹⁹ A further complication relates to how existing data is released. For example, there is no publicly available information on the number of returns by country of destination, only by country of nationality of the returnee.¹²⁰ This amounts to a considerable impediments, since in reality third country nationals are regularly returned to countries that are not their country of nationality.¹²¹ In any case, this data is only collected on a voluntary basis from member states and is therefore largely incomplete.¹²² This makes it difficult for the public to determine who is being returned, how, and to where.
- ▶ Second, **member states' differing understandings of what constitutes a safe third country for returns** poses distinct problems. One member state may sign a readmission agreement with, and/or conduct returns to, a country that other member

states would deem unsafe. The predominance of bilateral readmission agreements prompts questions about the need for closer EU oversight.

Sudan¹²³ and **Libya**,¹²⁴ with whom Italy holds Memoranda of Understanding, are a case in point. In Libya, reports of extensive abuse of migrants are widespread,¹²⁵ and UNHCR statements in 2018¹²⁶ and 2019¹²⁷ urged states to suspend all forced returns to Libya. Despite this, deportations appear to have been ongoing up until at least 2018.¹²⁸ In Sudan, there have been consistent allegations of abuse against individuals deported by Italy, Belgium, France and the UK,¹²⁹ as well as multiple ECtHR rulings against deportations.¹³⁰ Despite this, returns were only briefly suspended by Belgium from December 2017 to February 2018,¹³¹ and have since continued.¹³² Similarly, Spain has conducted repeated summary expulsions without due process to **Morocco**, despite allegations of abuse faced by returnees.¹³³ Most recently, these included a pushback of 114 people in August 2018, employing a readmission agreement from 1992.¹³⁴

Deficiencies in data collection leave most of the facts related to return “in the dark” for both the public and policymakers.

There is no consensus on how the EU should address problematic bilateral agreements or national return practices. Sometimes, these may not even be known. The possibility for the EU to provide guidance on countries that could not be considered safe for returns has been discussed repeatedly, yet this never gained

4. Lack of monitoring

Given the risks inherent in return operations, particularly regarding direct and indirect refoulement, there is a need to ensure that they are conducted in a controlled way and in full awareness of their implications. Nevertheless, EU return practices are far from reaching this goal. Neither the EU institutions nor member states have systems in place to track individuals following expulsion from their territory. Therefore, **member states are poorly positioned to guarantee the safety of returnees or to enact conditions on their protection in readmission agreements with third countries.** This section discusses, first, the implications of the absence of monitoring mechanisms for returnees’ safety and the risk of indirect refoulement in particular. Second, it considers the extent to which the recast Return Directive proposal addresses

ground.¹³⁵ However, as Cassarino has argued, since return is an area of shared competences, there is a role for the Commission to monitor bilateral agreements’ compliance with the treaties, including with enshrined fundamental rights.¹³⁶ Just as there is a need for greater scrutiny over the compliance with non-refoulement of readmission cooperation at EU level, similar safeguards are needed at national level.

In the absence of harmonisation, several countries have suspended Dublin transfers to member states where there was a risk of onward deportations to unsafe countries.

The current lack of EU involvement has repercussions for trust and cooperation within the Union. In the absence of harmonisation, several countries have suspended Dublin transfers to member states where there was a risk of onward deportations to unsafe countries. For example, last year France halted transfers of Afghan asylum seekers to several countries that have persistently divergent recognition rates and conduct large numbers of returns to Afghanistan.¹³⁷ Transfers to Hungary were effectively suspended across the EU in 2018, partly due to the risk of indirect refoulement to Serbia and onward under Hungary’s safe third country policy.¹³⁸ Courts have also recently blocked transfers on indirect refoulement grounds from Germany to Greece and Sweden, Belgium to Bulgaria, Switzerland to Croatia, and Italy to Norway.¹³⁹ The costs in interstate trust and cooperation of side-lining non-refoulement concerns can be felt across other aspects of EU migration policy.

these challenges or, conversely, further obscures and complicates the consequences of return.

4.1 HIDDEN CONSEQUENCES OF READMISSION AGREEMENTS

As reports from several countries of readmission have highlighted, **post-return, no institution collects information on the conditions, integration prospects, or further mobility of returnees.**¹⁴⁰ Whereas member states are obliged to monitor conditions throughout the return process, this obligation ends at the point of arrival in the third country. In receiving states, in turn, provisions for continued monitoring and support for returnees’ integration tend to be extremely limited. Much

of the available infrastructure is run by the International Organisation for Migration (IOM), with member states facing increasing pressure to develop reintegration programmes, but this has so far been limited to cases of voluntary return.¹⁴¹ Those subject to forced return, who are most at risk, are not tracked or supported. In effect, individuals are “returned and lost”.¹⁴²

In effect, individuals are “returned and lost”.

The lack of data on returnees’ fate has several implications:

- ▶ First, it **prevents a comprehensive evaluation of the fundamental rights compliance of any readmission agreement**, in particular with regard to non-refoulement.¹⁴³ Where evaluations have been conducted, such as progress reports of the EU-Turkey Statement, these have been criticised by the European Ombudsman for a lack of analysis, specificity, or consideration of human rights risks.¹⁴⁴ Problematic readmission agreements and returns to dangerous third countries risk remaining operational indefinitely. For instance, when consequences for returnees remain obscured, they do not inform assessments of conditions in the country for future return decisions.
- ▶ Second, the **lack of information hinders the inclusion of non-refoulement conditions in readmission partnerships**. Following pressure from the European Parliament and civil society, formal readmission agreements after 2005 have included a non-affected clause, which states that the agreement is without prejudice to international law requirements.¹⁴⁵ However, this remains non-committal and far from a guarantee against human rights violations after the conclusion of the return operation. There is no specific protection for returnees’ rights, nor with respect to secondary expulsion to states that may not respect those rights. Furthermore, the non-affected clause is not accompanied by consequences or remedies: readmission agreements do not include a suspension clause that calls for a halt to returns if new information surfaces regarding a country’s failure to protect returnees. As a result, there are no actionable guarantees of returnees’ protection.

Considerations of the risk of indirect refoulement are notably absent. **Even when partner states themselves appear safe, they may pose a risk of indirect refoulement.** Several partner countries are not parties to the Refugee Convention (or only partially, such as Turkey),¹⁴⁶ lack a functional asylum system, or do not recognise refugee status, such as Libya and Pakistan.¹⁴⁷ As such, they may be poorly equipped to assess returnees’

claims to international protection fairly or sufficiently assess the risk of refoulement before deporting them onward. Third countries may have incentives to deport non-nationals further, without sufficiently or correctly assessing the risk of refoulement. Accepting returnees of another nationality can be politically unpopular and economically burdensome for third countries, in particular since it is uncertain that their countries of origin would or could take them back.¹⁴⁸ The increasing EU pressure (for example through the withdrawal of visa rights) may however induce these countries to accept non-nationals without being able or willing to settle them, or guarantee their safety. This is particularly the case for countries of transit that are overburdened by arrivals and readmissions from multiple directions at once, like most North African states, Turkey, or Niger.¹⁴⁹

Considerations of the risk of indirect refoulement are notably absent.

For example, **Turkey** has readmission agreements with Syria, Yemen and Pakistan, among others.¹⁵⁰ In 2016, it began negotiating others with Iraq, Afghanistan, Eritrea, Iran, the Democratic Republic of Congo, Myanmar, Somalia, Sudan and other refugee-producing states.¹⁵¹ The risk for migrants returned to Turkey under the EU-Turkey Statement to be sent to states that will not protect their rights, thereby violating non-refoulement, is significant. This is all the more so since returns to Turkey under the Statement have included nationals of states with whom Turkey has been pursuing readmission agreements.¹⁵² Recent reports of the mass expulsion of over 6,000 Syrians in a single month show the significance of the risks at play.¹⁵³ This is part of a drive to deport 80,000 people in 2019,¹⁵⁴ and follows mass deportations of Afghan nationals in April and May 2018.¹⁵⁵

Other priority EU partners have been similarly accused of refoulement and collective migrant expulsions in violation of international law. These include **Cameroon**, which has systematically expelled thousands of Nigerian refugees back across the border, prompting regular condemnations from UNHCR and NGOs.¹⁵⁶ **Nigeria** expelled 47 Cameroonian asylum seekers to Cameroon in 2018.¹⁵⁷ A violent crackdown against irregular migrants in **Angola** in 2018 saw 330,000 people reportedly expelled to the Democratic Republic of Congo.¹⁵⁸ Finally, **Morocco** and **Algeria** have regularly conducted mass deportations of migrants into Sub-Saharan Africa, involving widespread allegations of abuse.¹⁵⁹ EU negotiations to strengthen cooperation are ongoing with Algeria, Nigeria and Morocco, and informal readmission arrangements already exist with all three states, whereas several bilateral agreements exist with Angola¹⁶⁰ and Cameroon.¹⁶¹

These agreements make no meaningful attempt to improve the available protections. None of the publicly

available agreements concluded since 2016 make reference to a monitoring mechanism to determine the fate of returnees at risk or include a suspension clause to halt the agreement in the event that credible allegations of direct or indirect refoulement surface. **On the contrary, certain harmful practices are encouraged.** Far from discouraging indirect refoulement, the EU and member states sometimes actively promote it. Third countries have been encouraged to accelerate returns and establish their own readmission agreements with additional countries, which may include countries that are considered unsafe. For instance, **Turkey's** pursuit of the readmission agreements listed above in 2016 is not coincidental, but rather was a requirement set by the visa liberalisation roadmap launched with the EU in 2013.¹⁶² The roadmap states a criterion for Turkey to “effectively seek to conclude and implement readmission agreements with the countries that represent sources of important illegal migration flows directed towards Turkey or the EU member states”.¹⁶³ Similarly, Article 2 of Italy's Memorandum of Understanding with **Libya** includes a provision on cooperation with returning migrants from Libya to other African states.¹⁶⁴

Far from discouraging indirect refoulement, the EU and member states sometimes actively promote it.

While the establishment of an efficient readmission network between countries of origin and transit may be helpful to EU objectives of speeding up returns and deterring irregular migration, it significantly raises the risk of indirect refoulement.

4.2 REDUCED CONTROL POST-RETURN IN THE RETURN DIRECTIVE

The lack of information regarding returns has been the subject of ample calls for reform from academics, NGOs and from within EU institutions.¹⁶⁵ In 2011, a Commission evaluation of readmission agreements recommended the introduction of suspensive clauses into such agreements in the event of fundamental rights violations, requirements on human rights compliance in the treatment of returnees, and the establishment of post-return monitoring mechanisms.¹⁶⁶ In 2016, the European Parliament expressed concern at the inadequate follow-up of forced return decisions, and called for similar measures.¹⁶⁷ However, this has not been reflected in the formal or informal agreements concluded since.

On the contrary, the **recast Return Directive proposal** constitutes a missed opportunity for reform and **further diminishes monitoring and control over the outcomes of return.** First, the proposed recast limits

opportunities for voluntary departure. Second, the Council's partial general approach reflects a troubling trend of returning individuals to third countries to which they have no connection. Both trends have a number of implications for (particularly indirect) refoulement.

► First, the **Commission's proposal would prioritise forced return over voluntary departure, in contradiction to core principles of EU return policy** until now. The recast, while retaining a maximum of 30 days for voluntary returns, removes the minimum of seven days.¹⁶⁸ State practices suggest that this is far from sufficient time to enable voluntary departure, and precludes the establishment of pre-departure advice and reintegration programmes.¹⁶⁹ The proposal would also prohibit the possibility of voluntary departure in multiple cases, including when individuals pose a risk of absconding, when individuals do not cooperate at all stages of return procedures, or as a rule within the border procedure.¹⁷⁰ As highlighted by legal scholars, the definition of a risk of absconding, which is introduced for the first time in this proposal, is exceptionally broad and includes almost all individuals subject to return.¹⁷¹ The criteria include a lack of identity documentation, fixed residence or financial resources, or the illegal entry or unauthorised movement into or between member states.¹⁷² Also of concern is the obligation placed on third country nationals to cooperate with return procedures, including by contacting authorities of their country of origin to verify their identity or request a travel document.¹⁷³ There are good reasons why third country nationals may be unwilling to contact their country of origin, particularly if they believe there to be a risk of reprisals from government authorities upon return. Denying these individuals an opportunity to depart voluntarily would increase the risks they face and may penalise them unfairly. On voluntary return, the Council echoes the Commission's restrictions. Under the Council's partial general approach, the duty to cooperate would be expanded and, although the definition of the risk of absconding is somewhat amended, it would remain exceedingly broad and keep the criteria on irregular entry or transit.¹⁷⁴

If forced return increasingly replaces voluntary departure, the real consequences of returns may become further obscured.

These changes would lead to a loss of individuals' control over their own return and an expanded use of detention when voluntary departure is denied. They would also **restrict the already limited possibilities for monitoring post-return.** Currently, and as per the recast proposal and Council approach, the only

formal mechanisms in place to assess returnees' wellbeing or support their reintegration are restricted to voluntary return.¹⁷⁵ If forced return increasingly replaces voluntary departure, the real consequences of returns may become further obscured, including the risks of indirect refoulement through secondary expulsion.

- ▶ Second, the **Council seeks to affirm the possibility of returning third country nationals to any third country**, whereas previously return was only envisioned to countries of origin or transit, or to another third country only with the consent of the returnee.¹⁷⁶ This change reflects the European priority in readmission negotiations for third countries to readmit non-nationals, and a growing return practice. Of returns reported on Eurostat, 15% of returnees in 2018 ended up in a country other than their country of nationality, up from 9% in 2017.¹⁷⁷

The practice of 'returning' an individual to a country where they have never lived and to which they have no meaningful connection raises several questions and ignores UNHCR recommendations.¹⁷⁸ In particular, as discussed in the previous section, it places individuals at risk of secondary expulsions amounting to refoulement. The consequences for returnees, including potential indirect refoulement, will depend heavily on the institutions and protections available in the country of return, such

as reception conditions, regularisation or voluntary return programmes, and an adequate asylum system.

The consequences for returnees, including potential indirect refoulement, will depend heavily on the institutions and protections available in the country of return.

Discussions in the Council reportedly focused on the **Western Balkans** as potential countries of return.¹⁷⁹ Despite their presumed alignment with EU asylum standards as they advance in accession procedures, significant concerns remain regarding their exceptionally low recognition rates, the inadequacy of non-refoulement assessments and the standardised use of safe third country policies.¹⁸⁰ Nevertheless, the Western Balkans are not named explicitly, so this provision leaves the door open for other states with even fewer safeguards in place. A careful assessment of conditions and incentives to ensure that any country of return can uphold the relevant standards will be paramount.

Conclusions and key recommendations

In the months to come, returns will remain prominent in the EU's migration policy agenda, particularly as the Commission's efforts to pursue readmission agreements with third countries are sustained and discussions on the recast Return Directive continue. The EU and its member states must, however, take stock of the implications of current policies for fundamental rights in the next legislative cycle.

The drive to accelerate the rate of returns has led to a substantial reduction in accountability over who is expelled, how, and to where.

The drive to accelerate the rate of returns has led to a substantial reduction in accountability over who is expelled, how, and to where. On one hand, the rise in the number of **informal, bilateral and blurred-authorship readmission agreements**, and the continued **failure to monitor conditions post-return**, have created a veil

that reduces democratic and judicial scrutiny. This has resulted in a growing number of agreements with countries that pose a risk of refoulement. In the cases discussed in this paper, NGOs and academics have raised the alarm that migrants are being returned to potentially unsafe states, in violation of the principle of non-refoulement. It is telling that, despite overwhelming condemnation from civil society, agreements such as the EU-Turkey Statement¹⁸¹ and the Joint Way Forward with Afghanistan¹⁸² both remain operational today. The risk may be one of direct refoulement, where countries themselves are accused of persecution, are conflict-ridden, or are refugee-producing. It may also be indirect, where countries that lack functional asylum systems or have partnerships with unsafe third countries may expel individuals onward to persecution. In both regards, **the EU and its member states risk falling short of international legal obligations.**

At the same time, the recent proposal for a recast of the Return Directive constitutes a missed opportunity for reform. Its emphasis on making returns more effective has not been complemented by a similar focus on strengthening protections or making returns more sustainable. On the contrary, key provisions in the Commission's proposal and the Council's partial general approach **compromise procedural safeguards**, notably

on the **right to appeal**, the **suspensive effect** thereof, and the **assessment of the risk of refoulement**. These elements will, in all likelihood, increase the number of erroneous decisions that send individuals into danger. Equally concerning are proposed **limitations on voluntary departure** and the possibility introduced by the Council of **returning individuals to countries other than those of origin or transit**.

The proliferation of readmission agreements with unsafe states demands that there exist careful procedural safeguards in return practices.

The simultaneous weakening of safeguards in return practices and readmission cooperation must be considered jointly, since they are produced by the same policy objective and carry the same consequence of exacerbating the risk of refoulement. Indeed, they produce a perilous synergy.

For example, **signing a readmission agreement with a country is distinct from actually conducting returns to that country**. It is possible that, even if readmission cooperation mechanisms are established with unsafe states, the required case-by-case assessment of each returnee's circumstances ensures that they are not met with disproportionate risk of refoulement. However, these trends in readmission cooperation are still worrisome for three reasons. First, as this paper has highlighted, it is not clear that thorough assessments are being carried out in practice, and the recast Return Directive proposal has the potential to weaken these safeguards further. Second, the end goal of readmission agreements is to accelerate each return procedure. If they are effective, they may increase the risk of individuals being returned too promptly, while their attempt to appeal a return decision is pending. This assumes that the appeal in question is not suspensive, whereas currently appeals on a non-refoulement basis automatically suspend a return decision. However, as noted in this paper, the recast Return Directive could be set to change that.¹⁸³ Third, the fact that an agreement is signed and sustained is a clear indication of an intention and willingness to return considerable numbers of individuals to that country. In particular, the existence of readmission partnerships could be the best indication of where returnees end up. Eurostat data on returnees' country of destination (rather than only their country of nationality) is lacking and imprecise, only collected from member states on a voluntary basis, and does not differentiate between forced and voluntary return.¹⁸⁴

In other words, the proliferation of readmission agreements with unsafe states demands that there exist careful procedural safeguards in return practices, so that this cooperation is not abused and fundamental

rights are respected. However, as this paper has shown, the political urgency accorded to increasing returns leads to the opposite conclusion. Safeguards are being compromised overall.

Finally, it would be wrong to conclude that these trends and reduced safeguards are worthwhile as long as they fulfil the objective of making returns more effective. First, **insofar as the goal is to increase the number of returns, it is far from clear that the trends discussed in this paper achieve this**. The recast Return Directive proposal was not accompanied by an impact assessment, nor by evidence to suggest that a punitive approach to return procedures is more likely to induce compliance. In fact, as the EPRS' substitute impact assessment suggests, the opposite may be true.¹⁸⁵ When migrants in an irregular situation are threatened with longer detention periods, no right to depart voluntarily, entry bans, or substantial fines, they may be more likely to abscond than when a cooperative environment is fostered.¹⁸⁶ Regarding readmission, informal agreements that avoid public scrutiny may be easier to establish, yet this may come at a cost in predictability and enforceability that can render them ineffective, since the cost of defection is lower.¹⁸⁷

An effective return and readmission system should seek to promote sustainable returns.

Second, it is pertinent to **challenge the narrow definition of effective returns**. Evaluating return policy purely through numbers of individuals exiting Europe does not only miss a crucial fundamental rights component: it is also myopic. This approach ignores questions such as the sustainability of return or returnees' reintegration prospects, both clearly desirable policy goals that avoid situations of migrants 'in orbit', facing persecution, or attempting to re-enter the EU. An effective return and readmission system should seek to promote sustainable returns. This involves, first, strengthening rather than weakening safeguards to prevent direct and indirect refoulement; second, prioritising assisted voluntary departure; and third, refraining from sending individuals to countries with which they have no connection. It may also involve looking beyond return when these conditions are not met and giving comparable attention to alternative policies to address the situation of migrants without a legal right to remain, including regularisation programmes.

Third, the **trends outlined in this paper have wide-ranging implications for the EU's effectiveness**. For instance, the widely divergent national return practices, which sometimes lead to violations of non-refoulement, generate a lack of interstate trust and have led to suspensions of Dublin transfers between member states.

The principle of sincere cooperation is also increasingly undermined between institutions, whenever Parliament is side-lined in readmission cooperation. Neither trend is conducive to an effective EU migration policy.

A review of protections against refoulement in the return and readmission system, and appropriate attention to increasing protections are urgently needed.

Compliance with fundamental rights and the principle of non-refoulement is not mutually exclusive with a robust return and readmission system. Rather, ensuring that return procedures entail appropriate scrutiny, accountability and control over the consequences is in the EU's interest. As such, a review of protections against refoulement in the return and readmission system, and appropriate attention to increasing protections are urgently needed.

In view of this, the paper advances the following two sets of recommendations concerning (i) future readmission cooperation and (ii) the recast Return Directive negotiations.

Recommendations concerning future readmission cooperation

- ▶ **The Commission and the Council should reconsider their strategy of prioritising informal over formal cooperation in the next legislative cycle.** Informal partnerships lead to reduced control over the agreements' implementation, limit the available legal remedies for returnees, and reduce democratic involvement in readmission policy within the EU, while being less predictable and sustainable than formal agreements. At the very least, the European Parliament should be informed at all stages of negotiation, and all agreements must be made public.
- ▶ **The Commission and the Council should establish post-return monitoring in their agreements with third countries.** These mechanisms can be monitored through Joint Readmission Committees (JRCs) in the case of formal agreements, or the equivalent monitoring bodies in informal agreements and states' bilateral implementing protocols and must include independent oversight with a rights mandate. These monitoring mechanisms should coordinate with infrastructure established by member states and the IOM to support reintegration following voluntary return and cooperate with NGOs operating in the country of return.
- ▶ **An evaluation should be conducted of formal and informal readmission agreements at EU and national level, which fully reflects their**

implications, not only in terms of operability, but also respect for **human rights and non-refoulement obligations**. These reviews should be regular and periodic. This could be used to provide information on when refoulement has taken place, allow suspensive clauses to be included in these agreements, and be used in Country of Origin Information reports produced by EASO and member states to reduce future risks.

- ▶ Agreements negotiated by the Commission and signed by the Council must **include guarantees for returnee rights**. Agreements can be useful tools to promote good practices and ensure compliance with the principles that the EU claims to uphold. To achieve this aim, two things are particularly important. First and foremost, **agreements should not be concluded with countries that are at risk of violating the principle of non-refoulement either directly or indirectly**. This assessment cannot be based on diplomatic assurances or states being a signatory to relevant conventions but must involve a thorough assessment by the Commission of human rights conditions and the adequacy of asylum procedures. Second, **all agreements should include a suspensive clause**. Much as an appeal on the grounds of refoulement should always trigger a suspension of the return decision, the same principle must be applied for readmission agreements with countries that pose a systemic risk of refoulement. As evidence emerges that suggests the country is no longer respecting human rights of returnees, all returns should be halted. This evidence can relate to the practice of returns to, or establishment of readmission agreements with, unsafe countries. Rather than encouraging third countries to set up return agreements with unsafe countries, the Commission must promote adequate protection measures down the line.
- ▶ Readmission cooperation must be **coupled with targeted EU support to ensure the rights compliance of partner states**. Member states benefit from incentivising the cooperation of third countries on readmission, yet this cooperation must comply with international law. This should include financial assistance to compensate for long-term costs of readmission, as well as operational support and expertise to develop asylum and reception systems in third countries.

Recommendations concerning the recast Return Directive negotiations

Past Action Plans and Handbooks accompanying the Return Directive have focused exclusively on making returns more effective, without giving comparable attention to ensuring adequate safeguards and protections for those subject to the Directive. The upcoming negotiations for the recast Return Directive must not become a missed opportunity to ensure that member states' return practices comply with international legal obligations, particularly the principle of non-refoulement. The following recommendations

should be considered by all institutions in ongoing discussions:

- ▶ The **recast Return Directive should also reflect the recommendations above, which concern future readmission cooperation**. Their implementation into member state practices is necessary to ensure that they have meaningful effect, given the predominantly bilateral nature of readmission agreements. More specifically:
 - ▶ The **Directive should call on member states to prioritise formal over informal cooperation** rather than the inverse, **establish post-return monitoring mechanisms** in their readmission agreements with third countries, and **include suspensive clauses into these agreements** securing respect for the fundamental rights of returnees. This will reduce the likelihood of refoulement and allow member states to adapt return practices to new elements of risk, while making readmission cooperation more predictable.
 - ▶ The **Directive must recognise the notion of indirect refoulement**. Despite being a well-established notion in European case law, the prohibition on indirect refoulement is scarcely reflected in EU documents and legislation.¹⁸⁸ Without this explicit recognition, the recast risks failing to take into account the full extent of member states' legal obligations.
 - ▶ **Member states should be discouraged from conducting returns to countries where the third country national has no meaningful connection**. These returns are not sustainable and increase the risk of mistreatment and indirect refoulement. When returns to the country of nationality are not possible, alternatives to deportation (such as assisted voluntary departure or regularisation) should take priority.
 - ▶ Efforts should be made to **prevent the establishment of unsafe readmission agreements at national level**. These pose unacceptable risks for returnees in violation of international law and damage cooperation and trust between member states, leading for example to suspend Dublin transfers within the EU. These efforts could include an **updated list of binding criteria to identify third countries with which readmission agreements can or cannot be negotiated**, as proposed in the initial negotiations for the Return Directive. These must consider, among others, the existence of an effective asylum system in the third country as well as the average recognition rates of asylum applications, and take into account all available information and reports from civil society organisations. It must be emphasised that these criteria cannot in any way replace the need for **individual case-by-case assessments of the risk of refoulement in all return decisions**, since the risk of refoulement is fundamentally individual.
 - ▶ The **recast Return Directive must ensure that effective remedies exist to prevent violations of**

the principle of non-refoulement. Key to this is an appropriate period for appeals. They should always be of 15 days at a minimum, which CJEU case law deems to generally not be unreasonable, with a possibility of extension.¹⁸⁹ This would allow individuals to seek legal assistance and prepare an effective case if necessary. In addition, the risk of refoulement must always be assessed as part of a return decision, independently of prior assessments under a different *acquis*, due to their different scope and considerations. An appeal on the grounds of a risk of refoulement must be automatically suspensive. If border procedures are introduced, these safeguards must also apply in those cases.

- ▶ **Voluntary departure must continue to be prioritised over forced return** in accordance with the core principles of EU return policy. Voluntary return should be available to all individuals subject to return orders. This requires a reasonable period in which the individual is not detained and can therefore organise their departure. A minimum of 30 days should be established in the Return Directive for individuals to return voluntarily to allow them to prepare, seek advice and reintegration support. This would reduce the risk of refoulement and, absent other reforms, would be a prerequisite for obtaining basic information on the fate of returnees. Assisted voluntary return that include reintegration support are also more likely than forced return to secure cooperation from third country nationals and third countries themselves.
- ▶ There is a need for **better public data on return practices from member states in order to monitor compliance with the Directive and non-refoulement obligations**. The recast Return Directive proposal includes the establishment of national Return Management Systems. As part of these systems, member states should be expected to report basic parameters for each return decision, such as if voluntary departure was offered and accepted. In particular, there is a need for standardised public information on returns by country of destination that include the nationality of the returnee and whether the return was forced or voluntary. Current Eurostat data is incomplete and poorly adapted for a reality in which many individuals are not returned to their country of nationality, thereby preventing a full assessment of the risks involved.

This paper has highlighted key structural shortcomings in the EU and member states' efforts to prevent violations of the principle of non-refoulement. A growing accountability gap has allowed readmission agreements to be established and sustained with states that pose significant risks of direct and indirect refoulement. At the same time, weakening safeguards in the recast Return Directive may considerably increase the risk of erroneous assessments amounting to refoulement. If returns do indeed increase, so too will demands for accountability regarding these practices. Reversing these trends to comply with international law and protect returnees from persecution must therefore become a priority in the EU's next legislative cycle.

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- ⁵ European Parliament and Council of the European Union (2008a), "[Directive 2008/115/EC of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals](#)", Brussels.
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- ¹⁷ Council of the European Union (2019a), "[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](#)"; Brussels, Articles 13(3) and 10(7).
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