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The Repressive Function of Migration Law and the Fairness and Effectiveness of the European Union's Return Policy

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Abstract

The research objective of this paper is to determine the impact that the repressive nature of the European Commission's amendments to Directive 2008/115 will likely have on the two basic values of the return policy, that is, its fairness and effectiveness. The basic thesis of this study is that the direction of the directive's recast, assuming – *inter alia* – an extension of the list of circumstances for applying the entry ban and detention, is contrary to the declared fairness of the migration policy towards third-country nationals. At the same time, the effectiveness of the planned changes is already questionable at the stage of draft legislation. These considerations are based on a juxtaposition of the proposed changes with currently binding legislation, the Commission's soft law and the case law of the CJEU. The final effect of these analyses is the finding that the solutions proposed by the Commission will lead to an inevitable increase in the use of coercive measures against irregular immigrants in a way that stands in fundamental contradiction to the declared fairness and proportionality of EU actions. In this context, the effectiveness of the return policy should not be identified with a percentage of returns, but rather with the recognised necessity of overall and perfect control over irregular migrants. At the same time, the Recast Return Directive will contribute to the development of an already existing tendency to treat migration law as an instrument of security and public order, and to use administrative law measures so that they function in a manner equivalent to that of a criminal sanction.

Keywords: entry ban, detention, proportionality, human rights.

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Funkcja represyjna prawa migracyjnego oraz sprawiedliwość i skuteczność polityki Unii Europejskiej w zakresie powrotów

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Streszczenie

Celem badawczym niniejszej pracy jest określenie wpływu, jaki prawdopodobnie będzie miał represyjny charakter zmian wprowadzonych przez Komisję Europejską do dyrektywy 2008/115 na dwie podstawowe wartości polityki dotyczącej powrotów, tj. na sprawiedliwość i skuteczność tejże polityki.

Podstawową tezą niniejszego studium jest to, że kierunek, w którym zmierza zmieniona wersja dyrektywy – przy założeniu, między innymi, rozszerzenia listy okoliczności pozwalających na zastosowanie zakazu wjazdu i na detencję – jest sprzeczny z deklarowaną sprawiedliwością polityki migracyjnej wobec obywateli państw trzecich. Jednocześnie skuteczność planowanych zmian wzbudza wątpliwości już na etapie projektu aktu. Rozważania te oparte są na zestawieniu proponowanych zmian z obecnie obowiązującymi przepisami prawa wiążącego, aktami prawa miękkiego Komisji oraz orzecznictwem TSUE.

Efektem końcowym tych analiz jest odkrycie, że rozwiązania proponowane przez Komisję doprowadzą do nieuniknionego zwiększenia stosowania środków przymusu wobec nieregularnych migrantów w sposób, który zasadniczo przeczy deklarowanej sprawiedliwości i proporcjonalności działań UE. W tym kontekście skuteczność polityki w zakresie powrotów powinna być utożsamiana nie z odsetkiem powrotów, ale raczej z uznaną koniecznością ogólnej i doskonałej kontroli nieregularnych migrantów. Jednocześnie zmieniona wersja dyrektywy powrotowej przyczyni się do rozwoju już istniejącej tendencji do traktowania prawa migracyjnego jak narzędzia bezpieczeństwa i porządku publicznego oraz do stosowania środków prawa administracyjnego w taki sposób, by działały tak samo jak sankcja karna.

Słowa kluczowe: zakaz wjazdu, detencja, proporcjonalność, prawa człowieka.

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Introduction

Contemporary legislation is essentially assumed and, at the same time expected, to make good laws. This means introducing norms into the system of law that are adequate to the adopted aim, meet the criterion for the inner *quality of law* and implement specific values. However, these – so to speak – fundamental requirements, which the European institutions accept as well,[2] seem to be gravely violated in the case of irregular migration. The following considerations have been inspired by the currently processed legislative proposal of the European Commission[3] for a targeted recast of Directive 2008/115/EC on Common Standards and Procedures in Member States for Returning Illegally Staying Third-Country Nationals (hereinafter referred to as the Return Directive).[4] Analysing the projects of legal acts during the legislative procedure may seem counterproductive, given the potential evolution of their content and an uncertain outcome of the procedure. What matters here, however, are the circumstances in which the proposed solutions were formulated and their general orientation, for there is an indubitable and persisting tendency to increase the restrictiveness of the provisions that pertain to the nationals of third countries illegally entering or staying on the territories of particular Member States. Currently, the provisions regarding the international movement of persons are beginning to closely intersect with criminal law, which is referred to as the criminalisation of migration[5] or crimmigration.[6] Migration law is clearly becoming a means of ensuring

2 Cf. An Interinstitutional Agreement on Better Law-Making, signed by the European Parliament, the Council and the Commission on 13 April 2016, OJ L 123, 12 May 2016, p. 1; European Commission, Better Regulation: Guidelines and Toolbox (2017), https://ec.europa.eu/info/law/law-making-process/planning-and-proposing-law/better-regulation-why-and-how/better-regulation-guidelines-and-toolbox/better-regulation-toolbox_en (access: 20.08.2020).

3 European Comission, 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). A Contribution from the European Commission to the Leaders' Meeting in Salzburg on 19–20 September 2018, COM(2018)634.

4 Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on Common Standards and Procedures in Member States for Returning Illegally Staying Third-Country Nationals, OJ L 348/98, 24 December 2008.

5 For further discussion of this concept, see V. Mitsilegas, *The Criminalisation of Migration in Europe: Challenges for Human Rights and the Rule of Law*, Springer 2014.

6 Cf. M. Van der Woude, J. van der Leun, *Crimmigration Checks in the Internal Border Areas of the EU: Finding the Discretion That Matters*, "European Journal of Criminology" 2017, 14(1), pp. 27–45;

order and public security, which typically constitute an area of the criminal law. These processes increasingly cast doubt as to their compliance with the principle of the proportionality of interference with human rights, while the reasons for the adopted solutions and their justification are not fully transparent. In this context, it is remarkable that the European Commission attached no impact assessment of the proposed solutions to the projected recast of the Return Directive, and that this was not the first time that the EC has failed to apply the standards of good legislation to the migration law, that is, the standards it itself adopted.[7] However, such analyses have already been prepared by other entities, clearly showing – on the one hand – a doubtful or unclear usefulness of many of the provisions for the assumed aim, and – on the other hand – an extensive catalogue of amendments that will probably have a negative impact on the possibility of exercising fundamental rights.[8] This calls for more general conclusions about the intentions and ideas behind the proposed amendments and for demonstrating their inconsistency with the axiological order declared by the legislator.

Objectives of the EU Return Policy

The Return Directive combines the law and practice of the Member States in the area of the removal and return of the nationals of third countries, who have illegally entered or remain on the territories of these Member States.[9] The Directive includes provisions pertaining to the return decision, enforcement of the return decision (voluntary or forcible return), entry ban, and detention.

Crucially to the following considerations, according to Article 67(1) of the Treaty on the Functioning of the European Union, "[t]he Union shall constitute an area of freedom, security and justice with respect for fundamental rights." At the same time, Article 67(2) of the TFEU defines 'fairness' as the criterion for the EU's policy

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I. Majcher, *Crimmigration in the European Union Through the Lens of Immigration Detention*, Global Detention Project, Working Paper No. 6, September 2013; T. Miller, *Citizenship & Severity: Recent Immigration Reforms and the New Penology*, "Georgetown Immigration Law Journal" 2003, 17, p. 619.

7 Cf. *The Proposed Return Directive (Recast). Substitute Impact Assessment Study*, European Research Parliament Research Service, February 2019, p. 6.

8 See ibidem, pp. 67–87; European Union Agency for Fundamental Rights, *The Recast Return Directive and Its Fundamental Rights Implications: Opinion of the European Union Agency for Fundamental Rights*, 10 January 2019, Luxembourg: Publication Office of the European Union 2019.

9 Cf. Article 79(2)(c) of the Treaty on the Functioning of the European Union, which empowers the Union to adopt measures in the field of illegal immigration and unauthorised residence, including the removal and repatriation of persons residing without authorisation.

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towards third-country nationals.[10] In this normative context, justice should be identified with specifying and applying clear and objective criteria for assessing the legal position of foreigners, coupled with procedural safeguards protecting the individual against the arbitrariness of authorities. At the same time, it requires that all activities of the EU meet the criterion for the proportionality of interference with human rights, understood as the interference for the sake of a legitimate aim, exclusively by means necessary in a given case and onerous only to the extent that is indispensable for the achievement of the assumed aim.[11]

The EC claims that the main rationale for the projected recast of Directive 2008/115 is the improvement of the effectiveness of the EU return policy, defined as an increase in the percent of returns, while shortening the removal procedures themselves. Undoubtedly, in the current jurisdiction, there is a significant disproportion between the number of actual returns and the number of return decisions issued.[12] However, effectiveness can also be evaluated in terms of the sustainability of return, that is – in terms of whether third-country nationals do not re-enter the EU after a relatively short time. In this case, the sustainability of return is supported by its voluntariness.[13] In its current form, the Return Directive assumes that voluntary

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10 Cf. Article 67(2) states that the Union shall frame a common policy on asylum, immigration and external border control "(…) which is fair towards third-country nationals."

11 Cf. Recitals 6 and 13 of the Preamble of the Return Directive; M. Michalska, *Proportionality as the Tool for Adjudicating Conflicts of Fundamental Rights: Criticism and Retort*, "Krytyka Prawa" 2019, 11(2), pp. 253–269; at the same time, it should be noted that the concept of proportionality in the EU law is not homogenous – see more *inter alia* J. Długosz, *The Principle of Proportionality in European Union Law as a Prerequisite for Penalization*, "Adam Mickiewicz University Law Review" 2017, pp. 283–300; W. Sauter, *Proportionality in EU Law: A Balancing Act?*, "Cambridge Yearbook of European Studies" 2013, 15, pp. 439–466.

12 Cf. European Commission, COM(2018)634…, p. 2; Commission Recommendation (EU) 2017/432 of 7 March 2017 on Making Returns More Effective When Implementing the Directive 2008/115/EC of the European Parliament and of the Council, par. 6, OJ L 66, 11 March 2017, pp. 15–21; Commission Recommendation Establishing a Common 'Return Handbook' to Be Used by Member States' Competent Authorities When Carrying Out Return-Related Tasks, Brussels, 27 September 2017 COM(2017), hereinafter referred to as *Return Handbook*; Communication from the Commission to the Council and the European Parliament on EU Return Policy, COM(2014) 199 final. p. 3.

13 See UNHCR, *Return Arrangements for Non-Refugees and Alternative Migration Options*, 2012, https://returnandreintegration.iom.int/en/resources/guidelines/return-arrangements-non-refugees-and-alternative-migration-options. It should be noted that 'sustainability' is a more complex issue, and voluntariness is one of many other factors deciding if return is sustainable – see more in OHCHR, *Expert Meeting on Protecting the Human Rights of Migrants in the Context of Return: Background Paper*, 6.03.2018; R. Ruben, M. Van Houte, T. Davids, *What Determines the Embeddedness of Forced-Return Migrants: Rethinking the Role of Pre- and Post-Return Assistance*, "International Migration Review" 2009, 43(4), pp. 903–937; K. Kushminder, *Interrogating the Relationship Between Remigration and Sustainable Return*, "International Migration" 2017, 55(6), pp. 107–121.

returns are to be preferred[14] and the European Commission unambiguously indicated the precedence of this type of returns over coercive measures.[15]

The reasons why the outcomes of the return policy are not satisfactory have already been diagnosed and quite precisely defined. First, foreigners themselves do not co-operate in their identification. Second, a similar problem pertains to third--country authorities, who refuse to recognise given persons as their citizens or to allow their entry on the basis of the identity documents issued by the EU Member States. Third, there is no proper co-ordination and prompt exchange of necessary information between the EU Member States that would facilitate the performance of return operations. In particular, the Commission emphasised a lack of coherent definitions and interpretations of the risk of absconding and of the grounds for using detention, which results in the absconding and secondary movement of irregular migrants.[16] However, it was determined that, rather than by the provisions of the Return Directive themselves, all of the above-mentioned problems were either caused by external factors or the insufficient level of the Directive's implementation. Not earlier than in 2017, the European Commission was still trying to solve these problems by issuing acts of soft law,[17] only to take a legislative proposal a year later that had never been deemed necessary before. The catalogue of proposed amendments is extensive and for the sake of the current study, it will be limited to the entry ban and detention in connection with forced return.

Although the proposed legal act declaratively maintains the preference for voluntary return, the solutions supporting this form of returns are limited to one provision pertaining to logistical assistance (Article 14 of the Recast Directive). At the same time, the number of situations in which voluntary return will be possible has been curtailed,[18] and it is stipulated that an entry ban may be issued even when not accompanied by a return decision (Article 13 of the Recast Directive). The project considerably extends the catalogue of the premises for using detention. Namely, a new ground for detention is introduced in relation to border procedures (Article 22 of the Recast Directive). According to Article 18(1)(c), detention can be used when the third-country national poses a risk to 'public policy, public security or national

14 Cf. Recital 10 of the Preamble of the Return Directive.

15 Cf. European Commission, COM(2014)199, op. cit., especially pp. 7, 9, 10, 21 and 30; COM(2015)453, p. 3; COM(2017)200, p. 7; *Return Handbook*…, p. 31.

16 Cf. European Commission, COM(2018)634, op. cit., pp. 1–2.

17 See the above-mentioned *Return Handbook* and Recommendation COM(2017)432.

18 Cf. Article 9(4) of the Recast Return Directive.

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security.'[19] It is also proposed that national legislation define the initial minimum period of detention as no less than three months (Article 18(1) and (5) of the Recast Directive). In turn, the recast version of Article 6(2) contains an unusually extensive list of as many as 16 criteria for the risk of absconding of a foreigner, of which four have the character of a rebuttable presumption.[20] It seems credible that such an extensive stipulation of the absconding criteria will likely exacerbate the automatism of the activities undertaken by state authorities and courts in migration cases, one that has already been signalled in the jurisprudence of both the CJEU[21] and the ECtHR.[22] Fortunately, the Council proposed to remove some of these criteria and to modify the remaining ones and to introduce some limits for detention of children.[23]

Repressive Function of the Proposed Provisions

Given the ambiguity surrounding the notion of the function of law, for the sake of the current study, this notion will be understood in terms of both the aim adopted by the legislator and the result actually brought about by given provisions.[24] Scholars have long argued that both the entry ban and detention play a deterrent role,[25] at the same time functioning as a form of retribution for illegal entry or stay.[26] At this point, it should be noticed that many administrative law measures have the

19 In the Council's version, the term *public policy* is changed to less broad *public order* – see Council, *Partial General Approach on the Proposal for a Directive of the European Parliament and of the Council on Common Standards and Procedures in Member States for Returning Illegally Staying Third-Country Nationals (Recast)*, 23.05.2019, published https://data.consilium.europa.eu/doc/document/ST-9620-2019-INIT/en/pdf (access: 20.08.2020).

20 *Return Handbook*…, pp. 10–11; European Commission, Recommendation COM(2017)432, op. cit., par. 15; see also European Commission, COM(2014)199, op. cit., p. 15.

21 *Sagor Md*, C-430/U, CJEU Judgment of 6 December 2013, ECLI:EU:C:2012:777, par. 41; Mahdi, op. cit., par. 70, 74; for further discussion, see: M.-L. Basilien-Gainche, *Detention Under Control: A Deceptive Upheaval?*, "EU Law Analysis" 9.06.2014.

22 Cf. *Thimothawes v. Belgium*, application No. 39061/11, ECtHR Judgment of 4 April 2017, par. 73; *Mahamed Jama v. Malta*, application No. 10290/13, ECtHR Judgment of 26 November 2015, par. 146; *Bistieva and Others*, op. cit., par. 88.

23 Cf. Council, *Partial*…, Article 18(5) the last sentence.

24 For further considerations about this term, see: I. Bogucka, *Funkcje prawa. Analiza pojęcia*, Zakamycze 2000.

25 Š. Dušková, *Migration Control and Detention of Migrants and Asylum Seekers: Motivations, Rationale and Challenges*, "Groningen Journal of International Law" 2017, 5(1), p. 30.

26 C.C.G. Hernández, *Immigration Detention as Punishment*, "UCLA Law Review" 2014, 61, p. 1346; cf. G. Cornelisse, *Immigration Detention and Human Rights: Rethinking Territorial Sovereignty*, Leiden–Boston 2010, p. 26; I. Majcher, C. de Senarclens, *Discipline and Punish? Analysis of the Purposes of Immigration Detention in Europe*, "AmeriQuests" 2014, 11(2), p. 2.

character of sanctions, a fact that generates extensive doctrinal discussions about the differences between them and the criteria for choosing specific measures of administrative or criminal liability, as well as the very nature of the regimes of such liability.[27] The mere fact that the legislator responds to certain behaviours with repression, choosing certain measures of social control rather than others, is within the legislator's discretional freedom. However, when administration is entitled to use sanctions of a predominantly repressive function, due caution is required.[28] According to Polish scholars, such sanctions are inconsistent with the foundations of a democratic state based on the rule of law, that is – with the principle of the separation of powers or the right to a court. As Lewicki argues, "in practice, what is primarily at stake is the level of the admissible and approved intensity – given the constitutional foundations of the system of law – met by the repressive function's administrative and judicial sanctions."[29] The problem is clearly recognised in international jurisprudence as well: as the European Court of Human Rights (hereinafter referred to as the ECtHR) observed in *Engel v. The Netherlands*, the States Parties to the European Convention on Human Rights (ECHR) can relatively easily bypass the guarantees of due process if they claim that given actions and related sanctions have an administrative character.[30]

In another judgment, the ECtHR ruled that the deterrent and repressive aim of the penalty suffices to determine that the violation of law being the object of judicial ruling was "criminal in nature", as defined by Article 6 of the ECHR.[31] The CJEU has a more ambiguous approach to the broad interpretation of 'criminal charges' existing in the Strasbourg case law,[32] but some of its judgments can be seen as

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27 For further discussion, see: P. *Nowak, Sankcja karna w prawie administracyjnym oraz charakter prawny administracyjnych kar pieniężnych*, "Internetowy Przegląd Prawniczy TBSP UJ" 2012, 3(10), 1, pp. 53–70.

28 Cf. Recommendation No. R (91) 1. of the Committee of Ministers to Member States on Administrative Sanctions, 13 February 1991; Committee of Ministers, Resolution (77) 31 on the Protection of the Individual in Relation to the Acts of Administrative Authorities, 28 September 1977.

29 M. Lewicki, *Funkcje sankcji prawnych w prawie administracyjnym zagadnienia wybrane*, "Acta Universitatis Lodziensis Folia Iuridica" 2009, 69, p. 55; D. Szumiło-Kulczycka, *Prawo administracyjne karne*, Zakamycze 2004.

30 In this judgment, the ECtHR established the so-called 'Engel criteria', indicating (not cumulatively) when administrative measures can be qualified as criminal charges within the meaning of Article 6(1) of the ECHR; cf. *Engel and others v. The Netherlands*, application No. 5100/71, 5101/71, 5102/71, ECtHR Judgment of 8 June 1976, par. 81. For a more recent discussion, see *Ali Riza and Others v. Turkey*, applications Nos. 30226/10 and 4 others, ECtHR Judgment of 28 January 2020.

31 *Öztürk v. Germany*, application No. 8544/79, Grand Chamber ECtHR Judgment of 21 February 1984, par. 53.

32 For more detailed considerations, see D. Szumiło-Kulczycka, P. Czarnecki, P. Balcer, A. Leszczyńska, *Analiza obrazu normatywnego deliktów administracyjnych*, Warszawa 2016, pp. 59–75.

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supporting a thesis that, given the practice of using them in specific circumstances, the entry ban and immigration detention are both measures with the effect equivalent to criminal sanctions.[33]

According to Article 3(6) of the Return Directive, an entry ban is "an administrative or judicial decision or act prohibiting entry into and stay on the territory of the Member States for a specified period, accompanying a return decision." The deterrent function of this instrument is unambiguously declared by European Commission and treated as a 'message' for irregular migrants that if they disregard migration law, they "will not be allowed to re-enter the EU for a specified period of time."[34] The entry ban is connected with forcible return, which means that its function is to motivate irregular foreigners to leave voluntarily before they are deported.[35] What is controversial is the disproportionality of the entry ban which, although issued by a single host state, covers the entire Schengen area. Moreover, the Council proposed to extend the maximum duration of entry bans from five to ten years[36] (Article 13 (3)). The doctrine has also emphasised that circumstances of an obligatory entry ban are formulated too broadly. This instrument is frequently used automatically, thereby violating the principle of the individual assessment of the foreigner's legal position.[37] It should be stressed that the preventive role of an entry ban is limited for two reasons. Firstly, its imposition prevents the legal re-entering of foreigners to the EU, but it does not mean that they will not attempt to enter the EU illegally. Secondly, the very threat of imposing this measure is most effective. Once imposed, the entry ban could discourage foreigners from leaving the EU because this will be connected with the impossibility of legally re-entering for a few years.[38] Article 13 of the Recast Directive, which extends the entry ban to the foreigners in the process of voluntarily leaving the EU, will probably lose its current preventive character, instead becoming primarily a measure of retribution for vio-

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33 I. Majcher and C. de Senarclens (op. cit., p. 2) argue that Engel criteria are enough to treat immigration detention as a criminal punishment.

34 Cf. *Return Handbook*…, p. 124.

35 Under the Return Directive provisions, return decisions should be accompanied by an entry ban if no period for voluntary departure has been granted or if the obligation to return has not been complied with. In other cases, the return decisions may be accompanied by an entry ban (Article 11(1) Return Directive).

36 See Article 13(3) of the Recast Return Directive – Council, *Partial*…

37 Cf. *Zh. and O. Zh. v Staatssecretaris van Veiligheid en Justitie and Staatssecretaris van Veiligheid en Justitie v I. O*, CJEU Judgment of 11June 2015, C-554/13, ECLI:EU:C:2015:377, par. 49. In this case, the CJEU referred to Recital 6 in the Preamble to Directive 2008/115; *Bashir Mohamed Ali Mahdi,* C-146/14 PPU, CJEU Judgment of 5 June 2014, ECLI: EU:C:2014:1320, par. 40. For further discussion, see: I. Majcher, *The Return Directive 2008/115/EC European Implementation Assessment*, K. Eisele (ed.), 2020, pp. 77–82.

38 Cf. I. Majcher, *The Return Directive*…, p. 82.

lating migration law. In this context, it is emphasised that the Commission did not specify how the basic procedural rights of foreigners will be secured in that case.[39]

From the perspective of the analysed problems, immigration detention is a slightly different matter because, on the basis of the currently binding law, it is not a sanction at all – it is not an administrative sanction, let alone a criminal one. Its deterrent nature is not explicitly declared by the legislator. Moreover, it is inconsistent with the letter of the EU law, as well as with the guarantees of human rights in international law.[40] The deprivation of liberty used as a measure of controlling the territory should exclusively serve to ensure the presence of foreigners for the purpose of migration procedures. The Court of Justice of the European Union (CJEU) ruled that the Member States must not use detention as a milder form of criminal imprisonment because, on the basis of Directive 2008/115/EC, its only aim is to guarantee that concerned individuals do not obstruct the removal procedure by absconding. The aim of this provision is not the protection of public order or public security, which should be ensured by other relevant criminal or criminal-administrative provisions.[41] It seems important to emphasise at this point that the CJEU specified the aim of this provision not only in terms of certain desirable outcomes declared by the legislator, but also in terms of its role in relation to the values implemented in the EU legal order. Yet, the European Commission should clearly assume that the deterrent and repressive outcome will occur in case of introducing solutions that allow for the extensive and systematic use of such measures in violation of the principle of proportionality, without the individualised assessment of their adequacy, and without due and accessible judicial control in practice.[42]

Immigration detention is *ex definitione* an onerous measure because, despite its administrative character, it consists in the deprivation of liberty. In practice, it still happens that foreigners are detained in locations related to the criminal system or in a penitentiary-like regime,[43] and in conditions that, in terms of sanitary or other

39 Cf. *Substitute Impact Assesment…*, p. 58.

40 Cf. *Azimov v. Russia*, application No. 67474/11, ECtHR Judgment of 18 April 2013, par. 172; Committee of Ministers, Recommendation Rec(2003) 5 of the Committee of Ministers to Member States on Measures of Detention of Asylum Seekers, 16 April 2003, par. 3.

41 Cf. *Kadzoev*, C-357/09 PPU, CJEU Judgment of 30 November 2009, ECLI:EU:C:2009:741; *Return Handbook…*, p. 69.

42 Cf. *Return Handbook…*, p. 70.

43 Cf. M. Bosworth, S. Thurnbull, *Immigration, Detention and the Expansion of Penal Power in the United Kingdom*, [in:] K. Reiter, A. Koenig (eds.), *Extreme Punishment: Comparative Studies in Detention, Incarceration, and Solitary Confinement*, London 2015, pp. 50–51; M. Bosworth, *Border Criminologies: Assessing the Changing Architecture of Crime and Punishment*, Global Detention Project, Working Paper No. 10, February 2016, p. 5.

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facilities, are of a punitive character.[44] Academic research has demonstrated a considerable level of psychological harm caused by detention, even if neither the very conditions of the deprivation of liberty nor the regime are bad or particularly strict,[45] and when the detention itself is short-term.[46] The ECtHR has also rightly observed that neither good conditions in a detention centre nor its adjustment to the needs of foreigners deprive it of its isolating character,[47] a remark that is consistent with the experiences of foreigners themselves, who perceive and experience detention as a penalty.[48]

The extensive formulation of the grounds for using detention leads to irregular foreigners becoming *detainable* just because they violate migration provisions. This contradicts the fundamental assumption of the protection of the rights of the individual, namely that human beings are free.[49] Even with respect to the currently binding provisions, there have been voices signalling the lack of precision and predictability found in Article 15(1) of the Return Directive and in national legislation in relation to the broad and imprecise formulation of the criterion for "avoiding or hampering return."[50] It has been rightly observed that such provisions destabilise the relationship between the rule (i.e. freedom) and the exception in the form of the deprivation of liberty.[51] According to the model accepted in the international law, foreigners – even those with an unregulated status – are free indi-

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44 Cf. Fundamental Rights Agency, *Migration: Key Fundamental Concerns*, "Quarterly Bulletin" 2019, 1 July 2019–30 September 2019, pp. 26–27; see conditions of detention in Hungarian Centre Nyírbátor, http://www.asylumineurope.org/reports/country/hungary/detention-asylum-seekers/detention-conditions/conditions-detention (access: 20.08.2020); Concluding Observations on the Combined Fifth and Sixth Periodic Reports of the Netherlands, Adopted by the Committee at Its Fiftieth Session (6–31 May 2013), par. 16.

45 Cf. G.J. Coffey, I. Kaplan, R.C. Sampson, M. Tucci, *The Meaning and Mental Health Consequences of Long-Term Immigration Detention for People Seeking Asylum*, "Social Science & Medicine" 2010, 70(12), pp. 2070–2079.

46 Cf. N. Fischer, *The Detention of Foreigners in France: Between Discretionary Control and the Rule of Law*, "European Journal of Criminology" 2013, 6, pp. 692–708; Jesuit Refugee Service, *Europe: Becoming Vulnerable in Detention*, 2011; K. Robjant, R. Hassan, C. Katona, *Mental Health Implications of Detaining Asylum Seekers: Systematic Review*, "British Journal of Psychiatry" 2009, 194, pp. 306–312; K.H. Schwarz-Nielsen, A. Elklitt, *An Evaluation of the Mental Status of Rejected Asylum Seekers in Two Danish Asylum Centers*, "Torture" 2009, 19, pp. 51–59.

47 *Bistieva v. Poland*, application No. 75157/14, ECtHR Judgment of 10 April 2018, par. 73.

48 Cf. L. Sexton, *Penal Subjectivities: Developing a Theoretical Framework for Penal Consciousness*, "Punishment & Society" 2015, 17(1), p. 118.

49 Cf. Article 1 of the Universal Declaration of Human Rights, Preamble to International Covenant to Civil and Political Rights mentioning about the ideal of free human beings enjoying civil and political freedom and freedom from fear.

50 Cf. I. Majcher, *Return Directive*…, p. 89.

51 Cf. ibidem.

viduals, who can be deprived of liberty by way of an exception, for very specific reasons and for a very specific time[52] and should be safeguarded against arbitrariness.[53] Meanwhile, not only do the proposed amendments extend the catalogue of the premises for using detention, but also the reservation that the use of detention should be restricted has been removed from the recast version of Recital 27 of the Preamble of the Recast Directive.[54] Next, Article 18(1) undermines the rule – following the content of Article 15 of the Return Directive and supported by jurisprudence – of treating detention as an ultimate measure, while maintaining the gradation of measures used and the close functional connection between the deprivation of liberty and removal.[55] In this context, it seems credible that the restricting clause currently included in Article 15(1) of the Return Directive will be substituted by one allowing for the use of detention.[56]

Additionally worrying, from the perspective of the principle of proportionality, are the changes regarding the duration of detention together allowing for depriving foreigners of liberty for a total of 22 months. This will be possible in the case when a foreigner is first detained for four months on the basis of the proposed border procedures (Article 22 of the Recast Directive) and later for the maximum time of 18 months, in accordance with the general provisions (Article 18 of the Recast Directive). At the same time, the assumption that detention should last at least three months is charged with quite a degree of arbitrariness, given that this measure should be used for the shortest duration possible and only as long as it is necessary for the performance of removal.[57]

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52 Human Rights Committee, General Comment No. 35, Article 9 (Liberty and Security of Person), CCPR/C/GC/35, 16 December 2014, par. 18; *F.K.A.G et al. v. Australia*, Views of 20 August 2013, Communication 2094/2011, CCPR/C/108/D/2094/2011, par. 9; the Interamerican Commission on Human Rights, Report on the Migration in the United States: Detention and Due Process, OEA/Ser. L/.V/II, Doc. 78/10, 30 December 2010, par. 39.

53 Cf. *Saadi v. the United Kingdom*, application No. 13229/03, ECtHR Grand Chamber Judgment of 29 January 2008, par. 74.

54 According to the current version of Recital 16 of Preamble of the Return Directive, the use of detention for the purpose of removal "should be limited" and subject to the principle of proportionality.

55 Cf. El Dridi, C-61/11 PPU, CJEU Judgment of 28 April 2011, ECLI:EU:C:2011:268, par. 41; FRA, op. cit., p. 11; FRA Opinion 11.

56 Cf. *Substitute Impact Assessment*…, p. 73.

57 Cf. Article 15(1) of the Return Directive; Resolution 1707 (2010) of Parliamentary Assembly, *Detention of Asylum Seekers and Irregular Migrants in Europe*, par. 9.1.10; This principle is present in the case law of the ECtHR: "the length of the detention should not exceed that reasonably required for the purpose pursued"; see ECtHR Judgments: *Amie and others v. Bulgaria*, application No. 58149, 12 February 2013, par. 72; *A. and Others v. the United Kingdom*, [GC], application No. 3455/05, 19 February 2009, par. 164; *Yoh-Ekale Mwanje v. Belgium*, application No. 10486/10, 20 December 2011, par. 117–119; see the following Concluding Observation of the Human Rights Committee:

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It should be especially emphasised that the extended list of the risk of absconding criteria includes conviction for any kind of criminal offence, regardless of its character (Article 6(1)(k) of the Recast Directive). This means, among other things, that any violation of migration provisions sanctioned criminally – even with non-isolation measures – will nonetheless result in the deprivation of liberty in accordance with the administrative procedures in relation to the risk of absconding.

Relationship Between Reasonableness, Transparency, and Legitimate Aim

The above brief analysis of only some of the projected amendments to the Return Directive shows quite clearly that they will result in an inevitable increase in the use of detention measures (Articles 6, 7, 18 and 22 of the Recast Directive) and that the entry ban will affect a much larger number of foreigners than before (Article 13 of the Recast Directive). The amendments proposed by the Council seem only to soften the severity of these solution, but do not fundamentally change its substance.

What seems particularly problematic in this context is the fact that it has not yet been demonstrated how the new provisions are supposed to contribute to solving the problems mentioned above. Analytical studies demonstrate that the proposed regulations discussed here were formulated on the basis of unclear, or at least insufficiently specified, premises derived from incomplete data or with no reference to data at all, which makes it impossible to assess their usefulness for the achievement of the declared aim.[58] Among other things, this pertains to the new premise for issuing the entry ban, the introduction of which was not accompanied by a thorough assessment of the deterring impact that this provision may have on irregular migrants willing to leave the EU.[59]

It proves difficult not to agree with the critical opinions underlining a lack of adequacy and common-sense justification of some of the risk of absconding criteria, as well as their inconsistency with prior assumptions.[60] The idea of introducing the list of such criteria is so controversial itself that the authorities of some of the

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Hungary CCPR/C/hUN/CO/6, par. 46(b); Sweden 2016 CCPR/C/SWE/CO/7, par. 33; Ukraine 2013, CCPR/C/UKR/CO/7, par. 18; United Kingdom 2015, CCPR/C/GBR/CO/7, par. 21.

58 Cf. *Substitute Impact Assessment*…, p. 13.

59 Cf. ibidem, p. 58.

60 See, for instance, an introduction of a criterion 'illegal entry' (Article 6 (1)(d) of the Recast Directive), even though the Commission previously stated that "[a]ny automaticity (such as "illegal entry = risk of absconding") must be avoided and an individual assessment of each case must be carried out" – *Return Handbook*…, p. 12.

Member States have reported difficulties pertaining not so much to the criteria themselves as to the methodology of individually assessing whether a particular foreigner is, in fact, likely to abscond.[61] By way of comparison, it is worth mentioning that such issues were addressed by the UNHCR on the basis of the provisions of refugee law and include, among others, determining the progress in the application for international protection or the family ties of the asylum seeker in the target country of the application.[62]

In the explanatory memorandum of the project, the European Commission declared that the aim of the proposed amendments is, among other goals, to ensure a more effective use of detention to facilitate return operations.[63] However, this claim was not supported by any detailed explanation of how this is expected to transpire. What is more, EU institutions do not have complete data on the number of detained foreigners, and the EU has so far adopted no consistent methodology of collecting and processing such data.[64] Yet, such methodology is indispensable if only because foreigners in the process of return enforcement and asylum seekers are frequently detained in the same centres. Moreover, irregular migrants are often deprived of liberty multiple times during the same procedures. In addition, only some of the Member States maintain statistical records of all foreigners actually deprived of liberty and agree to their publication.[65]

Without a doubt, the proposed provisions practically allow for detaining a majority of irregular migrants for a potentially very long time. This seems surprising inasmuch, as the European Commission itself called for a moderate use of detention, arguing that an excessively repressive system may prove inefficient by discouraging foreigners from co-operation under the return procedures.[66] It has not been explained why a precisely three-month detention should be conducive to increasing the chances of forcible return. Contrary to that, some studies show that most return procedures are completed within a shorter period of detention.[67] The exten-

61 Cf. *Substitute Impact Assessment*…, p. 53.

62 UNHCR, *Guidelines on the Applicable Criteria and Standards Relating to the Detention of Asylum Seekers and Alternatives to Detention*, 2012, par. 19.

63 Cf. European Commission, COM(2018) 634 final/2 2018/0329 (COD), p. 3.

64 What is postulated by the UNHCR, *Beyond Detention: A Global Strategy to Support Governments to End the Detention of Asylum Seekers and Refugees 2014–2019*, 2014, p. 7, footnote 3.

65 Cf. COM(2014) 199 final, p. 16; The problem of a lack of consistency and reliability statistic data is discussed *inter alia* in: *Detention of Asylum Seekers and Irregular Migrants and the Rule of Law: Checklists and European Standards*, European Law Institute, Vienna 2018, pp. 18–27; Global Detention Project, *Uncounted: The Detention of Migrants and Asylum Seekers in Europe*, 2015, p. 3.

66 Cf. *Return Handbook*…, p. 70.

67 See European Council on Refugees and Exiles, *ECRE Comments on the Commission Proposal for a Recast Return Directive COM(2018) 634*, November 2018, pp. 6–7.

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sive catalogue of the premises for detaining foreigners will necessitate a considerable development of existing detention facilities, which will heavily impact the Member States' budgets. Even as of today, the lack of proper facilities results in foreigners being detained in locations related to criminal justice,[68] leading some of the Member States to voice concerns over the possibility of meeting the standards of the directive following such a potential increase in the number of detainees.[69]

Neither can it be ignored that the problem of the lack of foreigners' co-operation was solved in the spirit of so-called wishful thinking – by introducing the obligation to co-operate (Article 7 of the Recast Directive). The mere fact that such a duty was imposed does little to make foreigners more willing to co-operate with the authorities of Member States. It follows that what is at stake here is not so much the improvement of co-operation as the possibility of sanctioning foreigners for the lack thereof.

The European Council of Refugees and Exiles is of the view that "[a]s there is no clear evidence that return policy acts as a deterrent to migration, irregular or otherwise, it seems presumptuous to make this an aim of EU return policy."[70] Does this mean, then, that the European legislator is completely irrational and inconsistent? The exact opposite seems to be true, provided that one takes into account other aims than those officially declared. Namely, it can be assumed that – apart from the clear intention to increase the percent of forcible returns – the legislator's primary aims are enhancing control over foreigners, sanctioning migration law violations, and ensuring public policy and security. The latter is particularly clear because these two goods are cited among the premises for using detention. The character of the proposed changes reveals the intention to gain far-reaching control over irregular foreigners, where the techniques and methods of criminal law are to be preferred. By definition, irregular foreigners – as migration law violators – are to be physically controlled by the state. This entire construction has far-reaching negative consequences for fundamental rights and as such is deeply inconsistent with justice as the criterion for assessing the admissibility of the EU activities. At the same time, it cannot but be observed that the provisions of the directive will

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68 Ireland is an example of EU Member State where third-country nationals are detained only in prisons, but efforts are being made to open a specialised detention centre. Greece and Cyprus systematically use police and border guard stations for migration detention purposes. It is not a rule in other states, but in limited circumstances or on a temporary basis, detention of migrants is connected with criminal institutions – see European Migration Network, *The Use of Detention and Alternatives to Detention in the Context of Immigration Policies: Synthesis Report for the EMN Focussed Stud*y, 2014, p. 29.

69 Cf. *Substitute Impact Assessment*…, p. 49.

70 Cf. European Council on Refugees and Exiles, op. cit., p. 6.

become more repressive, while the procedural safeguards related to the return process will be diminished.

Conclusions

The direction of the amendments proposed by the European Commission reveals the intention of increasing the repressive functions of migration law to the detriment to the declared fairness of return procedures. This criterion for migration policy, which was introduced by the TFEU, will become a façade should the amendments be adopted in the projected form, especially given the non-transparency of the activities of the European Commission.

The adequacy and usefulness of the currently proposed changes in the EU law were not sufficiently and clearly demonstrated by the European Commission and their impact was not assessed at all. These changes will facilitate the development of disproportionate, repressive law that – even more clearly than before – violates the principle of proportionality and that will likely achieve its aim only at the cost of disrespecting human beings.

At the same time, there is reason to be concerned that the problem of the proportionality of interference in the rights of the individual will escalate even further. It cannot be ignored that there is a deep inconsistency between the declaration of maintaining the preference for voluntary returns and the content of the proposed provisions, which do not support such returns and introduce new premises for using coercive measures. Therefore, it seems fair to conclude that repression and control of foreigners are the intended, though not explicitly articulated, aim of the project. It appears that the European Commission is essentially motivated by the deep conviction that irregular immigrants are dangerous individuals who should be physically governed by the state and its apparatus. It can thus be argued that the proposed targeted recast of the Return Directive in the analysed form only further solidifies and aggravates the problems that have already been diagnosed in the context of the provisions currently in force.

It seems credible that such administrative measures as detention or the entry ban in the projected form will be equivalent to criminal sanctions because they will not sufficiently safeguard the individual against the arbitrariness of authorities. What is more, they legitimise such arbitrariness. In response to that, as has been signalled by scholars, the safeguards against arbitrariness enjoyed by the individual should be extended to the level adequate for criminal proceedings – the ultimate character of the deprivation of liberty should be unconditionally observed and its legitimacy subjected to automatic judicial control. It should be noticed that, while

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foreigners are vulnerable to various onerous measures that, although grounded in administrative law, are comparable to criminal sanctions, they do not enjoy an equal level of criminal procedural protection. This results in the following paradox: individuals who are not criminals are treated as such, but they are unable to exercise the legal safeguards provided for such a position.

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