Comments on Return Policies, Readmissions and Cooperation with Third Countries within the framework of the New Pact on Migration and Asylum

The New Pact on Migration and Asylum puts a major focus on stepping up the numbers of returns and readmissions, in comparison to other areas such as legal migration. This aim shall be underpinned through various measures and instruments: 'return sponsorship' as a new form of solidarity contribution[1], the increasing operational role of Frontex under its new mandate[2,] and return procedures within the framework of mandatory border procedures[3]. Finally, the Commission pushes for more effective cooperation with third countries through formal and informal agreements and arrangements on return and readmission[4]. These measures, together with the recast of the Return Directive (COM (2018) 634 Final) under negotiation (which would introduce grounds for a shorter period for voluntary departure, appeal restrictions, expansion of detention and procedures at the external borders), risk ignoring the individual situation and undermining fundamental rights of third-country nationals looking for international protection.

❖ Return sponsorships: Misplaced solidarity

We are concerned that the proposals consider support between Member States through the return of third-country nationals as a form of solidarity. The envisaged 'return sponsorship' raises many questions with regard to its practicability but also the social and legal situation of the returnees during the whole process. For example, the proposal for the Asylum and Migration Management Regulation provides that the sponsoring Member State must transfer a third-country national to its territory if a return cannot be carried out within eight months. However, the proposed Regulation does not specify what happens when the third-country national – for legal or practical reasons - still cannot be returned after the transfer. There are no provisions about the legal status of the persons concerned after all return attempts have failed. It is also unclear, under what conditions the persons concerned will be accommodated until they are returned. We fear that this new 'solidarity mechanism' could lead, in certain cases, to indefinite detention periods after the transfer to the sponsoring Member State has taken place. Furthermore, if a Return Coordinator within the European Commission, supported by a new High-Level Network for Returns[5], is appointed, a Relocation Coordinator should also be appointed in order to achieve a more balanced approach.

❖ Return border procedures and the risk of lengthy detention

[1] Art. 55 of the Proposal for a Regulation on asylum and migration management (COM/2020/610 final).
[2] Regulation (EU) 2019/1896 on the European Border and Coast Guard and repealing Regulations (EU) No 1052/2013 and (EU) 2016/1624.
[3] Amended proposal for a Regulation establishing a common procedure for international protection in the Union (COM/2020/611 final).
[4] Proposal for a Regulation of the European Parliament and of the Council on Asylum and Migration Management – AMR (COM (2020) 610 final)
[5] Communication on a New Pact on Migration and Asylum (COM/2020/609 final).

The aim for 'a more European return system' mentioned in the Explanatory Memorandum of the Amended Asylum Procedures Regulation (hereinafter APR) is hampered by the fact that Member States can choose not to apply the Return Directive to asylum seekers whose application is rejected in a border procedure (Article 41a VIII of the APR). Although they must still ensure that the treatment and protection of third-country nationals is 'equivalent' to that of the recast Return Directive, this option may substantiate a broader restriction of procedural rights guaranteed by EU law. The Commission fails to clarify under which conditions these procedures involve deprivations of liberty. Moreover, the Commission wants to introduce the framework that an asylum rejection should be issued within the same administrative act as a return decision. In the case of implementation this unified model may, however, undermine rights of defence and *non-refoulement* guarantees.[6]

Within the framework of the mandatory border procedure, people concerned bear a high risk of being detained until their return to the country of origin. Past years have shown that the deprivation of liberty and the living conditions at the external borders create serious harm to the people on site. Under Art. 41a V, VI APR, a person whose application is rejected in the context of the border procedure and who no longer has a right to remain may: (1) continue to be detained for the purpose of preventing entry into the territory of the Member State; or (2) be detained if there is a (very broadly defined) risk of absconding within the meaning of the recast Return Directive, if the person avoids or hampers the preparation of return or poses a risk to public policy, security and national security. The provisions do not include the requirement to find less coercive measures prior to detaining persons in the border context.

Detention shall be maintained for as short a period as possible according to the Pact, but as long as removal arrangements are in progress and executed with due diligence (Art. 41a VII APR). This indicates that detention could last as long as the entire border procedure. In extreme cases, it could last even longer – up to 18 months – if the return operation takes longer due to the lack of cooperation of the person concerned or delays in obtaining the documents from destination countries (see: Art. 41a VII APR, Art. 15 V, VI recast Return Directive). This scenario must not become a reality. Furthermore, we would like to emphasise that the derogation foreseen in Art. 16 I of the recast Return Directive, which allows Member States to accommodate pre-removal detainees in exceptional cases in ordinary prisons, should be interpreted restrictively.[7] It should also be taken into account that the European Court of Justice has already stated that the absence of identity documents as such is not sufficient to justify the prolongation of detention.[8]

❖ Voluntary returns and regularising unreturnable people: More ambition is needed

Whilst the Commission recognises that voluntary returns should be implemented prior to forced returns, the proposed Regulations do not indicate how this can be achieved in practice. Rather, it appears that the proposals foresee easily implementable conditions for detention and subsequent return. However, detention is an extreme measure that creates major psychological stress for the persons concerned. Unfortunately there are no ambitious

[6] ECJ, Case C-181/16, Gnandi.
[7] ECJ in joint Cases C-473/13, Bero and C-514/13, Bouzalmate.
[8] ECJ, Case C-146/14, Mahdi.

approaches to promote alternatives to detention. The New Pact also does not address the issue that many persons simply cannot be returned to their country of origin – for legal or practical reasons. In this regard we would like to refer to the ECJ judgement (C-441/19, TQ) concerning return decisions and the assessment of adequate reception facilities for unaccompanied minors in the country of return: before issuing a return decision in respect of an unaccompanied minor, a Member State must necessarily take into account the best interests of the child at all stages of the procedure and verify that adequate reception facilities are available for the minor in the country of return. Moreover, if adequate reception facilities are no longer guaranteed at the stage of removal of the minor, the Member State should not enforce the return decision. The new proposals miss the opportunity to include measures or strategies that open a perspective for those concerned to stay and integrate in the EU. From our perspective, this is crucial for a comprehensive approach to return because it puts the individual at the centre of attention and recognises practical realities and obstacles to return.

❖ Partnerships with third countries: Overfocusing on return rates

Through the New Pact, the Commission intends to develop and deepen tailor-made comprehensive and balanced migration dialogues and partnerships. The Visa Code shall be used to incentivise and improve cooperation to facilitate return and readmission (Art. 3 of the Proposed AMR and Communication). This approach struggles to match the reality that the EU and third countries have conflicting interests when it comes to migration and mobility. On the one hand, the EU seeks better cooperation on the return of irregular migrants and border management; on the other hand, many third countries wish to establish legal migration channels to the EU and more support for hosting refugees themselves. We are concerned that the tailor-made partnerships would entail a direct or indirect conditionality with regard to EU development aid or visa policies. Indeed, one of the proposed new ways of facilitating readmission agreements is the limitation to issue visas or the removal of a country from the list of visa-free countries. We are troubled that linking migration management goals with development and visa policies will undermine the nature and principal objectives of mutually beneficial partnerships. This approach may not only put migrants in danger of human rights violations but jeopardise the *culture of encounter* and *universal fraternity* between European countries and third countries too.

The overall focus on return and readmission in the New Pact undermines the potential of real mutually beneficial partnerships, taking into account that third countries are the primary recipients of refugees worldwide. In addition, using informal agreements and enhanced security cooperation, such as with the solidification of security instruments through the Counter Migrant Smuggling Partnerships[9], for migration management with countries like Libya, Eritrea or Turkey, risks enabling human rights abuses and creating even greater instability. Other agreements, such as the one with Sudan, raise serious concerns on the safety of returnees and migrants being readmitted as the countries of arrival are known for violating human rights. Consequently, there needs to be closer scrutiny concerning these agreements, starting with the questionable concepts of safe third country and safe country of origin.

[9] COM/2020/609 final, p. 14.

Furthermore, EU Readmission Agreements (EURAs) need to take into consideration that migrants and asylum seekers and their families are not numbers, but persons with a face, a biography, and a unique human dignity that should be recognised. The EURAs should apply respect for internationally recognised human rights rooted in human dignity and humanitarian obligations, among them, the right to asylum, the principle of *non-refoulement* and the right to an effective remedy. Although standard EURAs contain a 'non-affection clause', which provides that the underlying agreement will not prejudice rights, obligations and responsibilities arising from international law, in practice there are no clear mechanisms to ensure that the human rights of returnees are fully respected in all stages of the process.

We also express our concern about the clauses in EURAs that require third countries to readmit not only their own nationals but also people who have transited through their territory, as this might eventually imply that they could be returned to a country where they may have suffered serious violations of their dignity and human rights and cannot find due protection.

The increasing 'informalisation' of agreements has allowed for a more flexible EU external policy but may cause a decreasing exercise of legal and parliamentary scrutiny (e.g. through the intervention of the European Parliament or control of the Court of Justice of the EU). It may also lead to the weakening of protection of the fundamental rights of irregular migrants, in particular against serious crimes such as torture, inhuman or degrading treatment, rape and sexual violence or even killing. The automatic disregard of these informal agreements or their substitution by bilateral agreements between an EU Member State and a third country – as considered part of the return sponsorship (Art. 55 (4) (c) AMR) – will impact negatively on the judicial control of the EU Court of Justice regarding the human rights and procedural guarantees enjoyed by migrants and asylum seekers.

Informal agreements lack monitoring mechanisms, as in the case of EURAs and the Joint Readmission Committee (JRC) comprising experts and representatives from EU Member States and the partner countries and co-chaired by the Commission and the partner countries. The New Pact does not accurately address this concern, in that it does not mention association agreements nor even the soft law Mobility Partnerships in the proposals. It only mentions that the European Parliament will be 'regularly informed' of the cooperation agreements with third countries in the areas of return and readmission (Article 7 (4) AMR). The continued lack of involvement of the European Parliament in non-binding instruments would weaken EU principles such as the institutional balance or cooperation between European institutions (Art. 13 II TEU). It would also avoid judicial control of the EU Court of Justice. In this regard, if the Pact's new Talent Partnerships substitute other tools of cooperation, it is very important that those agreements are made legally binding and subject to the democratic scrutiny of the ordinary legislative procedure. They should not become a 'bargaining tool' to enhance readmissions. Furthermore, it is essential that agreements enhancing legal pathways are not conditional on the effectiveness of readmission agreements.

❖ Our vision: A humane return system and fair partnerships

Our organisations have repeatedly pointed out that return policies in the EU should be humane and implemented in accordance with the European Convention of Human Rights and

the EU Charter of Fundamental Rights in all procedures and actions, including the principle of *non-refoulement.*[10] We have repeatedly stressed that voluntary return should always be the preferred option over forced return. We therefore welcome the fact that the Commission has announced the presentation of a Strategy on Voluntary Returns and Reintegration in 2021. This strategy needs to be very ambitious in order to establish alternatives to detention and forced returns. As the New Pact on Migration and Asylum tries to offer a holistic approach to migration, the momentum should be used to enforce humane return and comprehensive reintegration policies.

Taking into account these observations and the increasingly dominant public debate on returns and readmissions, we would like to present the following **recommendations** based on the premise that human dignity must always be respected:

- The **EU return policy** and corresponding public communication should not primarily focus on the return rates, but on the quality of return decisions and its implementation in accordance with the procedural safeguards and fundamental rights at all stages of the procedure – *inter alia*, ensuring that Member States provide accessible appeals, guarantee free legal advice and special protection for vulnerable persons. The Commission should monitor the implementation of the overall EU return policy, not only the Return Directive, on a regular basis and submit a report to the European Parliament.

- We recommend that, in the event that **'return sponsorship'** is introduced, it should only be used in practice if it can be guaranteed that there is no risk of violating fundamental rights, especially in cases of people in highly vulnerable conditions. There should be clear, foreseeable and proportionate rules on the reception and transfer conditions for those affected. People cannot be left in return procedures indefinitely.

- The situation of '**unreturnable' migrants** should be recognised and their status should be regularised. They should be entitled to access basic social benefits and services, such as health care, shelter, food and education and given the opportunity to stay on EU territory.

- It should again be highlighted that the primary focus should be on **voluntary return**, not on forced return, as it is more humane and dignified for people concerned. This notion should not only be reflected on paper, but in practice. Member States should work towards Assisted Voluntary Return programmes that require an assessment of *refoulement* risks.

- An independent **monitoring mechanism** should accompany those persons who have returned to their country of origin.

[10] Recommendations for humane return policies in Europe (2018): https://jrseurope.org/wp-content/uploads/sites/19/2020/07/position_paper_return.pdf; Comments on the European Commission's Proposal for a Recast of the Return Directive (COM (2018) 634 FINAL): https://www.caritas.eu/wordpress/wp-content/uploads/2019/02/190207_Return_comments_faith_based_NGOs.pdf.

- **Detention** should only be a measure of last resort, maintained for the shortest period possible, subject to a review, and not become standard procedure when a return decision cannot be executed due to the lack of readmission agreements or arrangements or inefficient implementing protocols. There needs to be a clear and foreseeable legal basis for the application of detention. Alternatives to detention such as holistic case management in community-based settings, bail, supervision and reporting should be promoted more ambitiously and on a more (legally) binding basis. The 'risk of absconding' should be defined more precisely in order to prevent Member States from exploiting the application of detention measures under questionable circumstances.

- **Children** under the age of 18 years, their families, and vulnerable persons should be strictly excluded from detention only for the mere reason of their irregular status.

- **Return to conflict areas**, such as those in Afghanistan or Syria, should be prohibited because it implies a violation of the principle of *non-refoulement.*

- **Readmission agreements** need to be human-centred in their content and form, and respect and protect the human dignity of migrants. Furthermore, reintegration in the country of origin should be accompanied with concrete measures, among others, on education and training, access to the labour market or entrepreneurship and community building. A more sustainable readmission and reintegration policy should go hand in hand with opening more legal pathways.

- **Partnerships with third countries** are more important than ever before and should be of mutual benefit. The EU and its Member States should improve in quality and quantity its development and humanitarian aid – in particular to support international organisations and reliable non-State partners, including churches and religious communities and associations on the ground – in third countries. The EU should also engage in serious and open discussions with third countries in order to explore common priorities that can be addressed together rather than unilaterally.

- *Caritas Europa, www.caritas.eu*
- *CCME – Churches' Commission for Migrants in Europe, www.ccme.eu*
- *COMECE – Commission of the Bishops' Conferences of the European Union (Secretariat), www.comece.eu*
- *Don Bosco International, www.donboscointernational.eu*
- *Eurodiaconia, www.eurodiaconia.org*
- *Sant'Egidio BXL Europe, www.santegidio.org*
- *ICMC – International Catholic Migration Commission, https://www.icmc.net/europe/*
- *JRS Europe – Jesuit Refugee Service Europe, www.jrseurope.org*
- *Protestant Church in Germany – EKD, www.ekd.de/Bevollmaechtigter-EKD-Dienststelle-Bruessel-25117.htm*