Observatoire Européen de la Non-Discrimination et des Droits Fondamentaux

European Observatory For Non-Discrimination and Fundamental Rights

LEGAL ANALYSIS OF THE PROPOSED EU REGULATION ON RETURNS

Fundamental Rights and Rule of Law Considerations

February 2026

The European Union is currently examining a new Regulation concerning the return of third-country nationals staying irregularly within the territory of Member States.

While return policies constitute a legitimate component of migration governance, their design and implementation must remain fully compliant with binding obligations under:

- EU primary law (*Articles 2 and 6 TEU; EU Charter of Fundamental Rights*)
- The European Convention on Human Rights
- The principle of non-refoulement under international refugee and human rights law
- The UN Convention on the Rights of the Child

Any reform that weakens procedural safeguards or expands detention mechanisms risks undermining both legal certainty and the credibility of EU action.

1. RULE OF LAW AS A STRUCTURAL REQUIREMENT

The effectiveness of return policies cannot be measured solely by operational efficiency. It must be assessed against compliance with rule-of-law standards.

Three structural requirements emerge:

1. **Legal foreseeability and clarity** of return decisions

2. **Effective judicial remedies** with suspensive effect where removal may expose individuals to serious harm
3. **Proportionality in enforcement measures**, particularly deprivation of liberty

The Court of Justice of the European Union and the European Court of Human Rights have consistently reaffirmed that migration control does not justify derogation from fundamental rights safeguards.

2. PROTECTION AGAINST REFOULEMENT

The absolute nature of the prohibition of refoulement requires:

- Individualised risk assessments
- Access to legal assistance
- Automatic suspensive remedies where credible risk is raised
- Vigilance in cases involving chain refoulement

Any procedural acceleration that reduces effective access to remedies may create systemic compliance risks for Member States.

3. RETURNS TO THIRD COUNTRIES AND THE RISK OF INDIRECT REFOULEMENT

One of the most sensitive aspects of the proposed Regulation concerns returns to third countries, including situations involving:

- so-called “safe third countries”
- countries of transit
- or states with which readmission arrangements exist

While cooperation with third countries is a recognised element of EU migration policy, such returns raise acute legal concerns under the principle of non-refoulement, including its indirect or “chain refoulement” dimension.

Under international and European human rights law, the prohibition of refoulement is absolute. It applies irrespective of the migration status of the individual concerned and requires:

- an individualised and forward-looking risk assessment
- verification of the actual accessibility of protection in the third country

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- assessment of systemic deficiencies in asylum procedures or reception conditions
- effective access to remedies with suspensive effect

The mere formal designation of a country as “safe” cannot dispense with an individual assessment.

Moreover, where removal to a third country creates a foreseeable risk of subsequent removal to a country of origin where serious harm may occur, Member States and the European Union may incur responsibility for indirect refoulement.

Accelerated procedures or presumptions of safety that are difficult to rebut may generate structural incompatibilities with:

- *Article 3 ECHR*
- *Article 4 of the EU Charter*
- and *Article 33 of the 1951 Refugee Convention*

From a systemic perspective, outsourcing return mechanisms without ensuring enforceable protection standards risks transferring rather than resolving legal responsibility.

4. DETENTION AS A MEASURE OF LAST RESORT

Deprivation of liberty in return procedures must remain:

- Strictly necessary
- Proportionate
- Limited in duration
- Subject to effective judicial review

Expanding detention grounds or normalising prolonged detention may create structural incompatibilities with *Article 5 ECHR* and *Articles 6 and 52 of the EU Charter*.

Alternatives to detention must be genuinely assessed and documented.

5. BEST INTERESTS OF THE CHILD AND VULNERABLE PERSONS

The best interests of the child must be:

- A primary consideration
- Assessed individually

- Documented in a reasoned decision
- Not subordinated to migration control objectives

This obligation applies irrespective of whether the child is unaccompanied or accompanied by a parent or legal guardian. The presence of an adult does not dispense authorities from conducting an autonomous and individual assessment of the child's best interests.

Return decisions concerning families must therefore include a specific evaluation of:

- The child's safety and development prospects in the country of return
- Access to education, healthcare and adequate living conditions
- The risk of indirect exposure to violence, exploitation or destitution

Similarly, vulnerability assessments must be autonomous and not merely formal.

Failure to integrate such safeguards exposes Member States to litigation risks before both the CJEU and the ECtHR.

6. INSTITUTIONAL AND SYSTEMIC RISK

From a systemic perspective, weakening procedural safeguards may:

- Increase litigation before European courts
- Undermine mutual trust between Member States
- Expose EU agencies and Member States to responsibility debates under the evolving framework of international responsibility of international organisations (ARIO)

Sustainable migration governance requires structural compliance, not reactive correction through litigation.

7. CONCLUSION

A European return framework can only be coherent and durable if it is firmly anchored in the effective respect of fundamental rights and the rule of law.

Operational objectives cannot substitute for legal guarantees.

Ensuring compliance at the design stage is not a political option, it is a legal obligation.

Legal sustainability is not an obstacle to migration governance; it is its necessary foundation.

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