www.czasopisma.pan.pl PAN www.journals.pan.pl

XLII POLISH YEARBOOK OF INTERNATIONAL LAW
2022
DOI 10.24425/PYIL.2023.147335
PL ISSN 0554-498X

*Katarzyna Strąk**

THE IMPACT OF THE RETURN DIRECTIVE ON POLISH RETURN LAW AND PRACTICE – RECENT DEVELOPMENTS**

Abstract: *This research aims to present and analyse selected issues of Polish return law and practice in the light of the European Union return policy and against the backdrop of the migration crises of 2015 and 2021-2023, with a return decision placed at the heart of the study. The principal research objective is to examine whether the provisions of the 2013 Act on Foreigners follow the standards established in the EU Return Directive as well as in the case-law of the Court of Justice of the European Union. Another objective is to analyse the interaction between the provisions forming the uniform national return policy, but which originate from different legal systems (national and European ones). To this end "anti-terrorism" and "pushback" cases under Polish law will be assessed. The article thus poses several crucial questions, inter alia whether the Polish law and practice comply with standards established at the European level, especially insofar as fundamental rights of individuals are concerned; whether they contribute to the establishment of an effective EU return policy; and what role harmonisation plays in this process.*

Keywords: irregular immigration; EU return policy; harmonisation; national law; judicial scrutiny, fundamental rights.

INTRODUCTION

The objective of this article is to present and assess Polish return policy and practice towards third-country nationals staying illegally on the territory of Poland in the light of the European Union (EU) return policy, in a wider context of migration

* Assistant professor (dr.), Institute of Law Studies of the Polish Academy of Sciences (Warsaw); e-mail: katarzyna.strak@inp.pan.pl; ORCID: 0000-0002-4561-2815.

** Publication financed under the programme "DIALOG" of the Minister of Science and Higher Education in the years 2019-2022.

crises faced by the EU in recent years – primarily the 2015 crisis and then the humanitarian crisis of 2021-2023 at the Polish-Belarusian border. The concept of "a return decision" as understood in EU law is placed at the heart of this study and constitutes the starting point for further considerations at the national level. The article seeks to examine whether the Polish 2013 Act on Foreigners[1] (2013 AoF) complies with the standards established in Directive 2008/115 on common standards and procedures in Member States for returning illegally staying third-country nationals[2] (Return Directive or Directive 2008/115) and in the case-law of the Court of Justice of the European Union (CJEU). The study also poses several crucial questions, *inter alia*, whether Polish law and practice comply with the standards established at the European level, especially insofar as fundamental rights of individuals are concerned; and whether they contribute to the establishment of an effective EU return policy. It is evident that a major shift has been visible in the way Polish migration agencies have been performing their tasks since the migration crisis of 2015, and that the "border crisis" of 2021 witnessed an escalation of restrictive and unfriendly actions towards third-country nationals crossing the Polish-Belarusian border illegally. At the same time, there are examples where the administrative decisions invoking security reasons issued by Polish authorities were disregarded in other EU Member States, despite the fact that decisions issued under the return procedures possess European-wide validity.[3] Also of concern is how the humanitarian crisis on Polish-Belarusian border has been governed since 2021, which is already evidenced by several very recent judgments issued by Polish administrative courts.

At the same time, as a case study this article contributes to the ever-increasing research in the field of the rule of law in general, and with respect to immigration in particular,[4] by emphasising how certain legal and factual activities of the Polish State and its agencies constitute challenges to that principle, which is so deeply rooted in Art. 2 of the Treaty on European Union (TEU); and by analysing them

[1] Ustawa o cudzoziemcach [Act on Foreigners], Journal of Laws 2013, item 1650, as amended.

[2] 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, [2008] OJ L 348.

[3] For example, the controversial case of Lyudmyla Kozlowska, a Ukrainian national engaged in human rights protection, who was issued an entry ban. Later the ban was disregarded by Germany, Belgium, France, Switzerland and the UK, with Belgium issuing her with a 5-year residence permit. B.T. Wieliński, *Deportowana z Polski Ludmiła Kozłowska z prawem pobytu w Belgii* [Lyudmyla Kozlovska, deported from Poland, with a residence permit in Belgium], Wyborcza.pl, 4 March 2019, available at: https://tinyurl.com/3vdnzxd4 (accessed 30 April 2023).

[4] D. Acosta Arcarazo, A. Geddes, *The Development, Application and Implications of an EU Rule of Law in the Area of Migration Policy*, 51(2) Journal of Common Market Studies 179 (2013); I. Goldner Lang, B. Nagy, *External Border Control Techniques in the EU as a Challenge to the Principle of Non-Refoulement*, 17(3) European Constitutional Law Review 442 (2021); E. Tsourdi, *Asylum in the EU: One of the Many Faces of Rule of Law Backsliding*, 17(3) European Constitutional Law Review 471 (2021).

against the backdrop of the principle of human rights' protection arising from the Return Directive. The article highlights the vital role Polish administrative courts have played in safeguarding the rights of affected third-country nationals. It does not, however, deal with the issue of the international protection of third-country nationals.

This article is structured as follows: in the first part (following this introduction) the EU return policy, including the Return Directive, is explored for the purpose of highlighting its validity as a template for national return policies. The second part examines Polish return policy and practice, and is divided into three main sections: section one is devoted to the general principles underlying the Polish return system; and sections two and three present analyses of selected problems resulting from the implementation of the 2013 AoF. In the last part conclusions are drawn.

1. THE EU RETURN POLICY AS A TEMPLATE FOR NATIONAL RETURN POLICIES

The EU has been developing and implementing its common return policy, as part of a broader EU migration policy, since 1999.[5] The principles underlying the EU return policy were developed by the European Commission at the beginning of the 21st century in a series of communications and other forms of soft law. Subsequently, five-year action programmes in the area of freedom, security and justice, starting with the Tampere Programme (1999), witnessed the adoption of further legal instruments and the conclusion of the EU readmission agreements, culminating in 2008 in the adoption of Directive 2008/115 on common standards and procedures in Member States for returning illegally staying third-country nationals. At the same time, Member States were given a two-year period for its transposition into their national legal systems. However very few Member States – if any – complied with this requirement.[6] At that time Member States faced severe problems in properly transposing the new concepts into their existing well-established national return provisions and practices. These problems did not cease to exist after the transposition deadline, and national courts entered into an active dialogue with the CJEU on the interpretation of various provisions of the Return Directive when deciding in disputes at the national level.[7]

[5] F. Lutz, *Prologue: The Genesis of the EU's Return Policy*, in: M. Moraru, G. Cornelisse, P. de Bruycker (eds.), *Law and Judicial Dialogue on the Return of Irregular Migrants from the European Union*, Hart Publishing, Oxford, New York: 2020, p. 3.

[6] National transposition measures communicated by the Member States, *see* at: https://eur-lex.europa.eu/legal-content/EN/NIM/?qid=1544477065620&uri=CELEX%3A32008L0115 (accessed 30 April 2023).

[7] In the framework of the Art. 267 TFEU preliminary rulings procedure.

The common standards and procedures on return – inherent in Directive 2008/115 – are undoubtedly a key element of the EU return policy. They turn the Return Directive into an instrument of a horizontal nature, applicable to all third-country nationals staying illegally in the territory of the Member States,[8] which has resulted in a harmonisation of the Member States' legal systems in the field of returns. At the same time the Directive, when adopted, constituted a follow-up to the instruments already applied in that field,[9] referred to broadly as *acquis return*.[10]

Directive 2008/115 sets out common standards and procedures to be applied in Member States for returning illegally staying third-country nationals, in accordance with fundamental rights as general principles of both EU law as well as international law, including refugee protection and human rights obligations. The Directive defines an illegal stay as the presence on the territory of a Member State of a third-country national (neither an EU citizen nor a person enjoying the EU right of free movement) who does not fulfil, or no longer fulfils, the conditions for entry into the Member State, as set out in the Schengen Borders Code,[11] for a stay of no more than 90 days in any 180-day period, or other conditions of entry into, stay, or residence in that Member State. It is initially for the Member States to determine, in accordance with their national law, what those other conditions are, and hence whether a particular person's stay on their territory is legal or illegal.[12] At the same time, as confirmed in *E*,[13] the tight link between the Schengen Border Code and the Return Directive has the effect that all decisions adopted by the Member States on the entry into and residence of third-country nationals, in accordance with the Schengen Borders Code, and all return decisions and entry bans issued by the Member States under the Return Directive, produce European-wide effects for the other Member States. As the CJEU has rightly pointed out in *Achughbabian*[14] and in *Md Sagor*,[15] the Directive only concerns the return of illegally staying third-country nationals in a Member State, and thus it is not designed to harmonise in their entirety the national rules on the stay of foreign nationals. Moreover, it does not envisage a

[8] I. Wróbel, *Wspólnotowe prawo imigracyjne* [Community Immigration Law], Wolters Kluwer, Warszawa: 2008, p. 412.

[9] M. Schieffer, *Directive 2008/115*, in: K. Hailbronner (ed.), *EU Immigration and Asylum Law. Commentary on EU Regulations and Directives*, Beck, München: 2010, p. 1507.

[10] A.M. Kosińska, P. Wojtasik (eds.), *Acquis return. Doświadczenia implementacji i rozwój polityki powrotowej Unii Europejskiej* [Acquis Return. Implementation Experiences and Development of Return Policy], Fundacja Instytut na rzecz Państwa Prawa, Lublin: 2015.

[11] Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code), [2016] OJ L 73.

[12] Opinion of Advocate General Sharpston of 18 May 2017 in Case C-225/16 *Criminal proceedings against Mossa Ouhrami*, ECLI:EU:C:2017:398, para. 36.

[13] Case C-240/17 *E*, ECLI:EU:C:2018:8, para. 43.

[14] Case C-329/11 *Alexandre Achughbabian v. Préfet du Val-de-Marne*, ECLI:EU:C:2011:807, para. 28.

[15] Case C-430/11 *Criminal proceedings against Md Sagor,* ECLI:EU:C:2012:777, para. 31.

harmonisation of the *reasons* for ending the legal stay of third-country nationals.[16] The common standards and procedures established by Directive 2008/115 concern only the adoption of return decisions and the implementation of those decisions.[17] Nor is the purpose of the Directive to regulate the conditions of residence on the territory of a Member State of third-country nationals who are staying illegally and with respect to whom it is not, or has not been, possible to implement a return decision.[18] The content of the Directive thus implies its dual nature. It is a central instrument of the EU return policy, while at the same time offering the necessary safeguards for the protection of persons falling within its scope.[19] This is clearly confirmed in its preamble and invoked in *Arslan*[20] – Directive 2008/115 seeks to introduce an effective return policy based on common standards, for persons to be returned in a humane manner and with full respect for their fundamental rights and dignity.

To better understand the dual nature of the Return Directive, a short commentary should be made with respect to its Art. 4 in terms of the way it may impact the Member States' legal obligations towards the third-country nationals. Namely, Directive 2008/115 does not allow Member States to apply stricter standards in the area it governs.[21] This is why it is so essential to identify its scope when it comes to the application of national return measures which are *more restrictive*, but which do not fall within the scope of the Directive. Furthermore, Art. 4 provides for the possibility to apply *more favourable* provisions to persons falling within its scope. It thus constitutes an exception to the common standards and procedures laid down by the Return Directive and refers to EU and Member States international agreements with third countries, the Union immigration and asylum *acquis*, and Member States' more favourable provisions, provided they are compatible with the Return Directive. In any case however, the adoption of more favourable clauses of the immigration and asylum *acquis* is grounded in the need to achieve and ensure the consistency of that *acquis*, and consequently in the need to apply a systemic interpretation where that consistency does not exist.[22] This has become particularly important with regard to Directive 2008/115 and its specific horizontal nature. Such clauses preclude the application of *less favourable* provisions towards third-country

[16] Additional opinion of Advocate General Mengozzi of 22 February 2018 in Case C-181/16 *Sadikou Gnandi v. État belge*, ECLI:EU:C:2018:90, fn 8.

[17] Case C-329/11 *Alexandre Achughbabian v. Préfet du Val-de-Marne*, para. 29.

[18] Case C-146/14 PPU *Bashir Mohamed Ali Mahdi*, ECLI:EU:C:2014:1320, para. 87.

[19] Schieffer, *supra* note 9, p. 1509.

[20] Case C-534/11 *Mehmet Arslan v. Policie ČR, Krajské ředitelství policie Ústeckého kraje, odbor cizinecké policie*, ECLI:EU:C:2012:343, para. 42.

[21] Case C-61/11 PPU *Hassen El Dridi, alias Soufi Karim*, ECLI:EU:C:2011:268, para. 33.

[22] Wróbel, *supra* note 8, p. 420.

nationals falling under the EU directives adopted in the field of legal migration policy, which provide rules on the return of third-country nationals. In such situations, the legality of a return decision is examined in light of both the purpose and the wording of the respective directives. The same remarks should be made with respect to the *more favourable* provisions of asylum law, whose aim is to strengthen and confirm the rule that a third-country national who has applied for asylum in a Member State should not be regarded as staying illegally in that Member State.

The reasons why the EU return policy has been developed are mainly reflected in its objective to fight against illegal immigration. The EU return policy is thus an important indicator of the credibility of the EU on one hand, on the other a particularly sensitive area given the risk of violation of human rights that may occur in the course of return operations. Thus, within the framework of the EU return policy those activities must respect fundamental rights as general principles of both EU law as well as international law, including refugee protection and human rights obligations. Apart from this general clause, the Return Directive contains several specific provisions referring to, *inter alia*: the principle of *non-refoulement*; the best interests of a child; respect for the family life; taking into account the individual's state of health; procedural safeguards; a fair and transparent return procedure; and the principle of proportionality as an overarching general principle of EU law. Other sets of specific safeguards include safeguards pending return and a minimum level of protection for third-country nationals excluded from the scope of the Directive. Last but not least the EU Charter of Fundamental Rights – encompassing the values underpinning the EU and placing exceptional significance on the right to an effective remedy, the right to asylum, and the protection against removal – must not be forgotten.

Since receiving regular jurisdiction in the field of immigration, the CJEU has significantly contributed to the state of implementation of the EU return policy in the Member States. It thus exerts a major influence over the relationship between the EU return policy and the policies implemented by particular Member States. Acosta Arcarazo and Geddes[23] rightly conclude that the competence of the CJEU constitutes a challenge to EU policies previously considered as purely sovereign, while at the same time the obligation on the part of Member States to apply supranational standards entails a higher level of protection afforded to third-country nationals, as this limits the ability of the Member States to adopt excessive rules. These authors argue that this is due to the EU rule of law, of which access to effective legal remedies, the right to a fair trial, and the idea that any exercise of power may be subject to judicial review are indispensable components. It is said, with good reason, that the

[23] D. Acosta Arcarazo, A. Geddes, *supra* note 4, p. 179.

"Directive of Shame"[24] has now been regarded as the "Directive of Protection",[25] due to the CJEU's interpretation of its provisions, especially those comprising the substantive and procedural safeguards arising from Art. 47 of the Charter of Fundamental Rights.[26]

By adopting the Return Directive, the EU and the Member States have aimed to achieve the effectiveness of the EU return policy, which is reflected in the ending of the illegal stay of third-country nationals. The ending of the illegal stay entails either the departure of a third-country national from the territory of a Member State, or granting that person a permission to stay on that territory. Thus, the total number of return decisions issued by Member States must equal the number of third-country nationals who left the Member States in fact and on a permanent basis. However, the full effectiveness of the EU return policy is ensured only when the illegally staying third-country national leaves not only the territory of the specific Member State, but the territory of the EU as a whole; their departure is without delay; and the fundamental rights and dignity of those persons are fully respected.[27] The effectiveness of the EU return policy thus implies full respect for the fundamental rights of a third-country national. At the same time, Directive 2008/115 establishes a procedure aimed at ensuring that third-country nationals who are not entitled to stay legally on the territory of the Member States no longer remain on that territory. The term "a return procedure", together with its scope and limits, is regarded as a major factor in the assessment of the effectiveness of the EU return policy in its legal dimension. The return procedure consists of two stages and has been clarified by the CJEU, starting with *El Dridi*. The order in which the stages of the return procedure established by the Return Directive are to take place corresponds to a gradation of the measures to be taken in order to enforce the return decision – a gradation which starts from the measure which allows the third-country national concerned the widest liberty (granting a period for voluntary departure); to measures which restrict that liberty the most (detention in a specialized facility); all under

[24] A.M. Kosińska, *Has the CJEU Made a First Step to Put a Stop to the Criminalisation of Migration? Commentary to the Judgment in the Case of JZ in the Context of the Covid-19 Pandemic*, 26(6) Białostockie Studia Prawnicze 207 (2021), p. 208.

[25] Lutz, *supra* note 5, p. 2.

[26] Among many: Case C-249/13 *Khaled Boudjlida v. Préfet des Pyrénées-Atlantiques*, ECLI:EU:C:2014 (right to be heard); Case C-112/20 *M. A. v État belge*, ECLI:EU:C:2021:197 (taking into account the best interests of the child at the time of the adoption of the return decision); Joined Cases C-704/20 and C-39/21 *Staatssecretaris van Justitie en Veiligheid v C and B and X v. Staatssecretaris van Justitie en Veiligheid*, ECLI:EU:C:2022:858 (fundamental right to liberty, fundamental right to an effective judicial remedy); Case C-69/*21 X v. Staatssecretaris van Justitie en Veiligheid*, ECLI:EU:C:2022:913 (prohibition of inhuman or degrading treatment, respect for private or family life); Case C-528/21 *MD*, ECLI:EU:C:2023:341 (prohibition of refusal to apply certain final court decisions).

[27] K. Strąk, *Polityka Unii Europejskiej w zakresie powrotów. Aspekty prawne* [EU Return Policy. Legal Aspects], Wolters Kluwer, Warszawa: 2019, p. 112.

the condition that the principle of proportionality is fully observed throughout those stages.[28] Seen from this point of view, the Return Directive pursues the dual objective of protecting the fundamental rights of third-country nationals subjected to the return procedures, and accepting the legitimate interest of Member States in speedy and efficient return procedures.[29]

Directive 2008/115 defines a return decision as an administrative decision or a judicial decision (also a judicial decision in a criminal matter) which establishes or declares that a third-country national is staying illegally in a Member State and imposes or declares an obligation to return. It follows from the provisions of Directive 2008/115 as a whole that the return decision may provide a period for voluntary departure - namely voluntary compliance with the obligation resulting from that decision[30] and may be accompanied by an entry ban, understood as an administrative or judicial decision or act prohibiting entry into and stay on the territory of the Member States for a specified period. On the other hand, the removal – the enforcement of the obligation to return – namely the physical transportation out of the Member State, may be either an element of the return decision or a separate administrative or judicial decision or act ordering the removal. Return decisions should be taken on a case-by-case basis, in accordance with objective criteria, which means that considerations should go beyond the mere fact of an illegal stay. This principle of individualism and objectivity must also be respected in the context of the use of standard forms for return decisions, entry bans, voluntary departure periods, and removal decisions. In addition, the return decision should be of unlimited duration unless there has been a material change in facts or in law and both the right to be heard and the right to an effective remedy are safeguarded.[31] The return must take place to the person's country of origin, country of transit, or another third country to which the person concerned decides to return voluntarily and in which he or she will be accepted.[32] More precisely, the return decision must identify the country to which the third-country national must return.[33] It is therefore a third country in each case. It is worth noting[34] that it is only necessary to specify to which third country the person is to be returned if the Member State has to take coercive

[28] Case C-61/11 PPU *Hassen El Dridi, alias Soufi Karim*, paras. 34-41.

[29] Lutz, *supra* note 5, p. 5.

[30] Case C-61/11 PPU *Hassen El Dridi, alias Soufi Karim*, para. 36.

[31] Commission Recommendation (EU) 2017/2338 of 16 November 2017 establishing a common 'Return Handbook' to be used by Member States' competent authorities when carrying out return-related tasks, 2017, OJ L 339.

[32] Case C-673/19 *M, A, Staatssecretaris van Justitie en Veiligheit v. Staatssecretaris van Justitie en Veiligheit, T*, ECLI:EU:C:2021:127, para. 32.

[33] Case C-69/21 *X v. Staatssecretaris van Justitie en Veiligheit*, ECLI:EU:C:2022:913, para. 53, Case C-663/21 *Bundesamt fuer Fremdenwesen und Asyl v. AA*, ECLI:EU:C:2023:540, para. 46.

[34] Commission Recommendation, *supra* note 31.

measures, whereas there is no such necessity in the case of voluntary departure, as it is the sole responsibility of the third-country national to comply with the obligation to return within the set period.

Although the concept of the effectiveness of the EU return policy seems to be well established in the case-law of CJEU, there still remains an issue worth consideration, namely when exactly the return procedure ends under Directive 2008/115.

In fact the Directive, and the position taken by the CJEU as well, only identifies the respective stages of the procedure and establishes a gradation of measures, of which the final one is detention in a specialized facility. Unfortunately the numbers speak clearly against such an understanding of effectiveness. As has been evidenced, the number of effective returns has followed a downward path since 2016. For example, the return rate within the EU was 45.8% in 2016, but later it fell to 36.6% in 2017, 31.9% in 2018 and 28.9% in 2019,[35] with 29% in the third quarter of 2022,[36] although some Member States, including Poland, approached 100% in 2019. Two main reasons for non-return have remained the same, and these are practical problems in the identification of persons issued with the return decisions, and their documentation, namely obtaining the necessary documents from non-EU authorities.[37] The question that arises in this context is which specific measures a Member State may undertake when – after the completion of the return procedure in accordance with the Return Directive – the person concerned is still present on its territory. There is a well-established case-law whereby the Directive precludes the imprisonment of a third-country national who is staying illegally on the territory of a Member State and is not willing to leave that territory voluntarily, but has still not been subject to removal and has not reached the end of the maximum period of detention. The Directive does not however, as was stated in *Achughbabian*,[38] *Affum*[39] or *Ouhrami*,[40] preclude the imprisonment of the person to whom the return procedure established by that Directive has been applied and who is staying illegally in that territory with no justified grounds for non-return, e.g. when there is no threat to his or her life or freedom. Logically, the return procedure ends when the person leaves the territory of the Member States (or when the Member State legalizes their stay). The same follows from the EU return policy objectives. Yet the

[35] M. Díaz Crego, E. Clarós, *Data on returns of irregular migrants*, European Parliament Briefing, 2021, available at: https://tinyurl.com/2s3wjj43 (accessed 30 April 2023).

[36] Eurostat, *Returns of irregular migrants – quarterly statistics*, 2023, available at: https://tinyurl.com/2m6vm4bs (accessed 1 July 2023).

[37] Communication from the Commission to the Council and the European Parliament of 28 March 2014 on EU Return Policy, COM(2014)199 final.

[38] Case C-329/11 *Alexandre Achughbabian v. Préfet du Val-de-Marne*, ECLI:EU:C:2011:807, para. 50.

[39] Case C-47/15 *Sélina Affum v. Préfet du Pas-de-Calais and Procureur général de la Cour d'appel de Douai*, ECLI:EU:C:2016:408, para. 54.

[40] Case C-225/16 *Criminal proceedings against Mossa Ouhrami*, ECLI:EU:C:2017:590, para. 56.

imprisonment of persons issued with a return decision does not solve the problem of their leaving the EU territory. A solution presented by the European Commission[41] seems to be a satisfactory one in view of the doubts expressed above. In this regard, the European Commission has called for the possibility to impose the less coercive measures after the period of detention has been completed (considered the most severe coercive measure listed in the Directive), as long as and to the extent that these less coercive measures can still be considered necessary to enforce a return. Furthermore, the Commission emphasises that there are no absolute maximum time limits foreseen for the application of such measures, but they are subject to assessment in the light of the principle of proportionality. The views expressed by the Commission are supported by the views expressed by the Advocate General Szpunar in *Celaj*, stating that once a person is staying illegally on the territory of a Member State that person must be returned. The Member States' obligations arising from the 2008/115 Directive are persistent and continuous and apply without interruption in the sense that they arise automatically as soon as the conditions of the Directive are fulfilled.[42] In any case, this element of the EU return policy requires further clarification and specification, as it constitutes a factor which may undermine the effectiveness of this policy.

2. POLISH RETURN POLICY AND PRACTICE

2.1. The Principles Underlying Polish Return Policy

Polish return policy is currently conducted under the 2013 AoF, which entered into force on 1 May 2014 and which has been amended thirty one times since then.[43] Poland thus was not an exception to the common trend among the EU Member States to procrastinate in the transposition of the Return Directive.[44]

Under Polish law, a return decision is issued by the Border Guard. It may subsequently be appealed to the Border Guard Commander-in-Chief. The underlying principle is thus the principle of two instances of administrative proceedings, considered fulfilled when it is proven that not only two decisions of two bodies of different ranks have been issued, but also that these decisions have been preceded

[41] Commission Recommendation, *supra* note 31, p. 146.

[42] Opinion of Advocate General Szpunar of 28 April 2015 in C-290/14 *Criminal proceedings against Skerdjan Celaj*, ECLI:EU:C:2015:285, para. 50.

[43] Upon its adoption, the 2013 AoF consisted of 522 articles and has since been widely regarded as "complicated and difficult for both the authorities and the individuals". J. Chlebny, *Artykuł 1*, in: J. Chlebny (ed.), *Prawo o Cudzoziemcach. Komentarz* [Act on Foreigners. A Commentary], Beck, Warszawa: 2020, p. 5).

[44] It initially decided to introduce only entry ban and voluntary departure provisions, which it did in 2012, upon the threat of being sued by the European Commission before the CJEU, by adopting the required amendments.

by a procedure conducted by each of the bodies in a way that it has been possible to achieve the objectives for which the proceedings are conducted.[45] As the next step, return decisions may be subject to judicial scrutiny by the Regional Administrative Court (RAC), and then the RAC's judgments may be appealed to the Supreme Administrative Court (SAC) in a cassation proceeding. The scope of the control over the activities of public administration has been specified by the 2002 Law on proceedings before administrative courts.[46] As the RAC has put it,[47] administrative courts exercise control over public administration activities, where they verify whether the administrative authority did not infringe the law to a degree likely to affect the outcome of the case. Additionally, a cassation proceeding aims at reviewing the first instance judgment. In proceedings before administrative courts, the principle of *tempus regit actum* is applied, which means that the court takes into account the legal and factual circumstances existing on the day the controlled act was issued.[48] By contrast, decisions on placing a third-country national in detention are issued by penal divisions of District Courts (common courts). They may be then appealed to Regional Courts (second instance common courts).[49]

As has already been highlighted in the first part of this article, the sole purpose of the Return Directive is to regulate issues pertaining to the issuance of return decisions to third-country nationals staying illegally, and the implementation of those decisions. In addition, as the Advocate General Mengozzi has put it,[50] "the *specific assessment* of whether a third-country national is staying legally or illegally on the territory of a Member State may, where appropriate, also depend on the application of domestic rules in that Member State". P. Dąbrowski has clarified that the determination of the grounds for the third-country national's obligation to return remains within the exclusive competence of the Member State, as neither EU law nor international law determine national law on foreigners in that respect.[51] This limitation of the scope of the Return Directive thus gives the Member States a useful tool to diversify the grounds for the stay to be considered illegal. In Poland,

[45] Wyrok Naczelnego Sądu Administracyjnego [Judgment of the Supreme Administrative Court], 18 May 2021, II OSK 1644/20.

[46] Ustawa Prawo o postępowaniu przed sądami administracyjnymi [Law on Proceedings before Administrative Courts], Journal of Laws 2002, No. 153, item 1270, as amended.

[47] Wyrok Wojewódzkiego Sądu Administracyjnego w Warszawie [Judgment of the Regional Administrative Court in Warsaw], 29 March 2019, IV SA/Wa 3371/18.

[48] Wyrok Naczelnego Sądu Administracyjnego [Judgment of the Supreme Administrative Court], 20 December 2018, II OSK 2341/18.

[49] For a compact overview of institutional competence in immigration cases in EU Member States, *see* J. Chlebny, *Public Order, National Security and the Rights of Third-Country Nationals in Immigration Cases*, 20(2) European Journal of Migration and Law 115 (2018).

[50] Advocate General Mengozzi, *supra* note 16, para. 18.

[51] P. Dąbrowski, *Artykuł 302*, in: J. Chlebny (ed.), *Prawo o Cudzoziemcach. Komentarz* [Act on Foreigners. A Commentary], Beck, Warszawa: 2020, p. 605.

the grounds to issue a return decision as a consequence of an illegal stay are listed in Art. 302 of the 2013 AoF, with sixteen grounds included in the list. The lack of common standards in this field enables the Member States to end the legal stay on their respective territories on grounds of public order or national security, which is also the Polish case, as evidenced in Art. 302(1)(9). The public order or national security clause was explicitly excluded from the Europe-wide harmonisation of the return policy, at least as the ground for the administrative detention, but, as explained by the European Commission,[52] once the legal stay of a third-country national has been ended for reasons of public order, that person is staying illegally and the Return Directive is then applied to them.

Once the ground for the illegal stay has been identified, the issuance of a return decision is obligatory,[53] in the absence of any negative grounds preventing its issuance.[54]

Polish law specifies five different administrative decisions ending a first instance administrative proceeding. Among them is a return decision, with its eight subtypes. Without entering into details, the most common decision is a return decision specifying a period for voluntary departure and accompanied by an entry ban. Polish law also provides that in situations where a return decision is not issued (e.g. where a third-country national holds a refugee status) or where the return cannot be carried out, a third-country national is granted a residence permit for humanitarian reasons or a permit for a tolerated stay.

In specific situations, a return decision may be subject to forced execution. Subjecting a return decision to forced execution is not considered an administrative decision. It does not concern the rights or obligations of the third-country national, but is a consequence of the finality of the decision which imposes such obligations. Thus the Border Guard, as the authority executing return decisions, is obliged to carry out a forced execution without an additional explanatory procedure. As the Court has put it, there is no other choice but to execute the decision.[55]

Lastly, the 2013 AoF foresees three different forms for the detention of third country nationals: a detention for no longer than 48 hours; placing such persons in a guarded centre; and placing them in a rigorous detention centre.

It follows from the above that in spite of its complicated and lengthy construction, the 2013 AoF reflects the solutions proposed by the Return Directive. How-

[52] European Commission, *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*, 1 September 2005, COM(2005)391.

[53] Wyrok Naczelnego Sądu Administracyjnego [Judgment of the Supreme Administrative Court], 10 May 2018, II OSK 392/18.

[54] Wyrok Wojewódzkiego Sądu Administracyjnego w Warszawie [Judgment of the Regional Administrative Court in Warsaw], 4 February 2019, IV SA/Wa 2781/18.

[55] Postanowienie Wojewódzkiego Sądu Administracyjnego w Rzeszowie [Order of the Regional Administrative Court in Rzeszów], 9 January 2019, II SA/Rz 1153/18.

ever, when it is examined in greater detail, taking into account recent amendments, the picture that emerges is far from clear and does not lay out what is termed the "legitimacy or rationale" behind legal measures.

In this article two controversial measures will be discussed. In particular, they are amendments introduced as a reaction to the 2015 refugee crisis (Section 2.2) and to the 2021-2023 humanitarian crisis ongoing at the Eastern external EU border (Section 2.3). The first one, associated by the Polish government with a terrorist threat, gave rise to the introduction into the 2013 AoF of so-called "anti-terrorism" legislation. The second one was a result of a "hybrid attack" or "hybrid warfare" waged against the EU by Belarus, which assisted third-country nationals in reaching the territory of the EU[56] at its borders with Poland, Lithuania and Latvia. These operations resulted in the adoption in Poland of measures legalizing so-called "pushbacks".

2.2 Fighting a Terrorist Threat – Article 329a

The 2013 AoF allows for return decisions to be issued – at the request of several "security" agencies – by the Minister of Internal Affairs when there is a fear that a third-country national may conduct terrorist or espionage activities or is suspected of committing one of these crimes. Here, a third-country national may lodge a request to the Minister to reconsider their case in the second instance. That regulation[57] was introduced in 2016 under the 2016 Anti-terrorism Act in response to the increased terrorist threat experienced in 2015-2016 in Western European countries such as France and Belgium,[58] and indirectly in response to the migration crisis that peaked in 2015. It was difficult, at least at the beginning, to establish its relationship with other provisions establishing the grounds for issuing a return decision, especially with Art. 302(1)(9) referring to national security grounds.

These doubts were soon clarified by the administrative courts. Initially, the first instance administrative courts accepted the arguments invoked by the administrative authorities.[59] The Minister of Internal Affairs claimed that Art. 329a envisages a spe-

[56] Although a new trend is more and more visible, *see* C. Ciobanu, M. Helobi, *Russian roulette: EU dreams of migrants now come through Moscow*, Balkan Insight, 19 December 2022, available at: https://balkaninsight.com/2022/12/19/russian-roulette-eu-dreams-of-migrants-now-come-through-moscow/ (accessed 30 April 2023).

[57] Art. 329a of the 2013 AoF.

[58] Uzasadnienie do projektu ustawy o działaniach antyterrorystycznych [Explanatory Memorandum to the draft Antiterrorism Act] 2016, available at: https://tinyurl.com/2rb44sae (accessed 30 April 2023).

[59] Wyrok Wojewódzkiego Sądu Administracyjnego w Warszawie [Judgment of the Regional Administrative Court in Warsaw], 13 April 2017, IV SA/Wa 363/17; Wyrok Wojewódzkiego Sądu Administracyjnego w Warszawie [Judgment of the Regional Administrative Court in Warsaw], 11 May 2018, IV SA/Wa 358/18; Wyrok Wojewódzkiego Sądu Administracyjnego w Warszawie [Judgment of the Regional Administrative Court in Warsaw], 13 December 2018, IV SA/Wa 2659/18.

cial return procedure, as opposed to the ordinary procedure, which is reflected, *inter alia*, in different bodies responsible for the issuance of the return decision. It provides for two separate and independent grounds for issuing a return decision, namely the existence of a fear that the person may carry out terrorist or espionage activities, or the finding that a person is suspected of committing one of these offences. It constitutes a *lex specialis* in relation to general grounds for issuing a return decision, such as reasons of defence or state security. Last but not least, it is intended to be an effective and swift administrative measure to prevent threats to public security in the form of espionage or terrorist activities. A return decision issued under this procedure is binding and not left to the discretion of the Minister and is subject to immediate execution.[60]

However, this trend was soon reversed. First and foremost, as stated by the SAC a return decision adopted under Art. 329a with regard to a third-country national residing in Poland on the basis of a temporary residence permit falls within the scope of the Return Directive.[61] This means that it must be interpreted taking into account all the safeguards set out in that Directive. This important conclusion, which is strictly in line with the European Commission's interpretation,[62] is the starting point for further reflections on the nature of return decisions issued on the grounds of a terrorist threat. Firstly, a person concerned may, while filing a complaint before an administrative court, invoke national provisions relating to the suspension of the enforcement of that decision if there is a danger of serious damage or near-irreversible consequences if the person is returned. Secondly, the fact that the decision is subject to an immediate forced execution does not prevent it from being suspended. Thirdly, the court must consider the grounds for the suspension, such as the risk of a person being subjected to torture in their country of origin or having their family life violated. Fourthly, the court must as well consider granting that person a residence permit for humanitarian reasons or a permit for a tolerated stay. Fifthly, the administrative body is obliged to assess and clarify the facts relating to the current situation in the country of origin and the risks presented to the third-country national if they were to return there. The absence of that assessment may lead to the annulment of the return decision.

In conclusion it must be clearly stated that at present, in spite of several controversies,[63] thanks to its judicial interpretation Art. 329a is an integral part of the

[60] *See* Wyrok Naczelnego Sądu Administracyjnego [Judgment of the Supreme Administrative Court], 17 November 2020, II OSK 744/20.

[61] Postanowienie Naczelnego Sądu Administracyjnego [Order of the Supreme Administrative Court], 19 November 2021, II OZ 1152/20; Postanowienie Naczelnego Sądu Administracyjnego [Order of the Supreme Administrative Court], 16 April 2021, II OZ 163/21; Wyrok Naczelnego Sądu Administracyjnego [Judgment of the Supreme Administrative Court], 6 September 2022, II OSK 457/21.

[62] European Commission, *supra* note 52.

[63] One of them being the lack of access to classified data considered as not in violation of procedural rights,

return law in Poland, which means that the same rules apply to the issuance of return decisions under this provision as to the issuance of return decisions under Art. 302 of the 2013 AoF.

2.3. Border Cases – Article 303(1)(9a)

Pursuant to the new wording of the 2013 AoF, as amended in October 2021, if a person was apprehended immediately after illegally crossing the external EU border, the Border Guard shall draw up a report on the border crossing and issue an order to leave the territory of the Republic of Poland. That order specifies the obligation to exit Polish territory and the period of the entry ban. It may be appealed against to the Commander in Chief of the Border Guard, which does not, however, suspend the enforcement of the order.

The explanatory memorandum[64] to the draft law states that the new procedure is intended to streamline and accelerate the return procedures. Therefore, it is clear that the new procedure pertains to those who are physically present in the territory of Poland without legal title to stay there, and that their situation should first be examined by reference to the Return Directive and the return procedure laid down therein.[65] The Directive also stipulates that certain exceptions may apply as regards its personal scope. That exception is set out in Art. 2(2)(a) (and labelled as "border cases"), according to which Member States may decide not to apply the Directive to, *inter alia*, third-country nationals who are apprehended or intercepted by the competent authorities in connection with the illegal crossing of the external border of those States and who have not subsequently obtained an authorisation or a right to stay in that State. It cannot be denied that "frontline" Member States are even encouraged by the European Commission to use this exception in situations of significant migratory pressure, "when this can provide for more effective procedures".[66] Indeed, the purpose of this provision, as interpreted in *Affum*, is to permit Member States to continue to apply simplified national return procedures at their external borders, without having to follow all the procedural stages prescribed by the

see G. Matevžič, *The Right to Know. Comparative Report on Access to Classified Data in National Security Immigration Cases in Cyprus, Hungary and Poland*, Hungarian Helsinki Committee, September 2021, available at: https://helsinki.hu/en/comparative-report-on-access-to-classified-data-in-national-security-immigration-cases/ (accessed 30 April 2023).

[64] Uzasadnienie do projektu ustawy o zmianie ustawy o cudzoziemcach oraz ustawy o udzielaniu cudzoziemcom ochrony na terytorium Rzeczypospolitej Polskiej [Explanatory memorandum to the draft act on amending the act on foreigners and the act on granting protection on the territory of the Republic of Poland], 2021, available at: https://tinyurl.com/y5fesstx (accessed 30 April 2023).

[65] K. Strąk, *The order to leave the territory of the Republic of Poland in light of Directive 2008/115 (the Return Directive)*, in: W. Klaus (ed.), *Beyond the law. Legal assessment of the Polish state's activities in response to the humanitarian crisis on the Polish-Belarusian border*, Publishing House of ILS PAS, Warszawa: 2022, p. 13-15.

[66] Commission Recommendation, *supra* note 31, p. 95.

Directive, in order to be able to remove more swiftly third-country nationals who have been intercepted when crossing those borders.[67] In other words, according to *Arib*, a Member State may be justified in failing to follow all the procedural stages set out in the Return Directive in order to speed up the return of third-country nationals who are unlawfully present on the territory of that Member State to a third country by immediately returning those persons to the external border that they have crossed illegally.[68]

However, Member States may only invoke that exception under certain conditions set out in the Directive. National law must respect the general principles of international law and the fundamental rights of third-country nationals, as well as the minimum guarantees foreseen in Art. 4(4) of the Directive; namely, they must respect the principle of *non-refoulement* and ensure a sufficient level of protection for third-country nationals excluded from the scope of the Directive which is no less favourable than the level of protection set out in the Directive's provisions on: limitations on the use of coercive measures; postponement of removal; emergency health care and necessary medical treatment in case of illness; as well as detention conditions. As the CJEU has put it, Art, 4(4) is intended to ensure that simplified national procedures observe the minimum guarantees prescribed by the Directive.[69]

During the application of the 2013 AoF, it has already turned out that the boundaries between Arts. 303(1)(9a) and 302 – at least insofar as the grounds for return are concerned – have become blurred. Art. 302(1)(10), referring to persons who have illegally crossed or attempted to cross the border, can serve as an example. Under it – but also in other circumstances listed in Art. 302 – a return decision is issued, which means that a third-country national is subject to the return procedure in accordance with the standards set out in the Return Directive. Under Art. 303(1)(9a), referring to persons who were apprehended immediately after crossing the border, only an order is issued and a third-country national is excluded from the return procedure as set out in the Return Directive. Art. 303(1)(9a) primarily refers to persons crossing the border rivers or climbing the wall at the Polish-Belarusian border. The question raised is whether the Border Guard will be able – or willing – to correctly establish in each case that a particular person has been apprehended immediately after crossing the border. The 2013 AoF, after it was amended, does not at any point refer explicitly to the special minimum guarantees listed in the Directive and applicable to "border cases", which has its effects on how the enforce-

[67] Case C-47/15 *Sélina Affum v. Préfet du Pas-de-Calais and Procureur général de la Cour d'appel de Douai*, para. 74.

[68] Case C 444/17 *Prefet des Pyrenees Orientales v. Abdelaziz Arib and others*, ECLI:EU:C:2019:220, para. 55.

[69] Case C-47/15 *Sélina Affum v. Préfet du Pas-de-Calais and Procureur général de la Cour d'appel de Douai*, para. 74.

ment of "leaving the territory of the Republic of Poland" is carried out in practice against third-country nationals. The orders to leave Polish territory only refer to "bringing a person to the state border line". An answer to one of the parliamentary interpellations by the Minister of Internal Affairs[70] shed some light on that issue, explaining that bringing third-country nationals to the state border line is carried out after prior recognition of the situation and with particular regard to ensuring their safety. Moreover, if the person's well-being allows it, they are brought to the place where they illegally crossed the state border, unless such a place is unknown or not safe. In that situation the nearest place ensuring the person's safe return to the country from which they illegally crossed the Polish border is selected. The reason – as the Minister of Internal Affairs further explained – why the enforcement of the orders is conducted in the way described above is because of the fact that in September 2021 Belarus suspended the readmission agreement with the EU and has refused to accept persons residing on its territory since then. Hence, returning them to the border line remains the only possible way of forcibly enforcing the orders to leave the territory of Poland and preventing their further illegal migration to other Schengen countries. In practice – and this is evidenced by third-country nationals' testimonies – these persons were brought to the gates installed in the wall with the assistance of Border Guard, and no formal border crossing points were used to that end.

The new regulation was highly criticised, first at the stage of legislative work, and then after it came into force. First of all, it still remains doubtful whether the exceptions set out in Art. 2(2)(a) of Directive 2008/115 were correctly implemented into the Polish legal order[71]. Secondly, the concerns – expressed in various reports and publications presented by the Polish Ombudsman[72] or migration researchers,[73] among others – have been confirmed in several judgments of administrative courts[74],

[70] Odpowiedź na interpelację nr 30654 w sprawie sytuacji na granicy polsko-białoruskiej [Response to interpellation 30654 on the situation at Polish-Belarusian border], 2022, available at: https://www.sejm.gov.pl/sejm9.nsf/InterpelacjaTresc.xsp?key=CBPJ2H (accessed 30 April 2023).

[71] Strąk, *supra* note 65, p. 14.

[72] Polish Ombudsman, *Letter to the Marshall of Senate*, 3 October 2021, XI.543.13.2018, available at: https://bip.brpo.gov.pl/sites/default/files/2021-10/Opinia_RPO_cudzoziemcy_3.10.2021.pdf (accessed 30 April 2021).

[73] W. Klaus (ed.), *Beyond the law. Legal assessment of the Polish state's activities in response to the humanitarian crisis on the Polish-Belarusian border*, Publishing House of ILS PAS, Warszawa: 2022; G. Baranowska, *Pushbacks in Poland: Grounding the practice in domestic law in* 2021, XLI Polish Yearbook of International Law 193 (2023). *See also* A. Bodnar, A. Grzelak, *The Polish-Belarusian Border Crisis and the (Lack of) European Union Response*, 28(1) Białostockie Studia Prawnicze 57 (2023).

[74] With one exception: Wyrok Wojewódzkiego Sądu Administracyjnego [Judgment of the Regional Administrative Court in Warsaw], 18 May 2022, IV SA/Wa 609/22, already annulled by the SAC: Wyrok Naczelnego Sądu Administracyjnego [Judgment of the Supreme Administrative Court], 10 May 2023, II OSK 1735/22.

explicitly pointing out its contradiction with the principle of *non-refoulement*[75] and fundamental principles of Polish administrative procedure.[76] The analysis of the principle of *non-refoulement* deserves special attention, as it is an essential legal basis for the entire system of international protection of third-country nationals, taking precedence over other norms of international law, EU law, and national laws relating to third-country nationals. What's more, it covers not only those who have lawfully submitted an application for international protection, but also those who have not.[77] In the courts' opinion, the principle of *non-refoulement* requires that no person should be subjected to measures such as refusal of admission at the border or, if already in the territory, expulsion or forced return to a country where they may fear persecution or threats to their life or freedom. However, in the cases before the administrative courts, the Border Guard determined in an arbitrary manner that the situation in Belarus was stable and that there were no indications that the applicant, who had come there as a tourist, would face any danger. Thus, a correct application of the principle of *non-refoulement* implies immediate, if only temporary, protection of a third-country national at the border as well as on the territory of a particular state. The migration crisis, especially at the Polish-Belarusian border, cannot exclude the application of this principle, even if a person crosses the Polish border illegally. The interpretation of the content of the principle of *non-refoulement* should lead to a balance between the protection of borders and stopping the influx of foreigners, and the respect for their rights under various provisions of international law. Hence, the application of the 2013 AoF must take into account not only Polish interests, but also Polish international obligations under the law on foreigners. One of them is the Return Directive, prohibiting *refoulement*[78] and safeguarding effective remedies against decisions related to returns.

The above is related to the way in which a report on a border crossing is filled in by the Border Guard officers. This way does not meet the requirements of the evidentiary procedure conducted in accordance with the principle of formality

[75] Wyrok Wojewódzkiego Sądu Administracyjnego w Warszawie [Judgment of the Regional Administrative Court in Warsaw], 26 April 2022, IV SA/Wa 420/22; Wyrok Wojewódzkiego Sądu Administracyjnego w Warszawie [Judgment of the Regional Administrative Court in Warsaw], 27April 2022, IV SA/Wa 471/22; Wyrok Wojewódzkiego Sądu Administracyjnego w Warszawie [Judgment of the Regional Administrative Court in Warsaw], 20 May 2022, IV SA/Wa 615/22; Wyrok Wojewódzkiego Sądu Administracyjnego w Warszawie [Judgment of the Regional Administrative Court in Warsaw], 27 May 2022, IV SA/Wa 772/22.

[76] Wyrok Wojewódzkiego Sądu Administracyjnego w Warszawie [Judgment of the Regional Administrative Court in Warsaw], 27 May 2022, IV SA/Wa 772/22; Wyrok Wojewódzkiego Sądu Administracyjnego w Warszawie [Judgment of the Regional Administrative Court in Warsaw], 5 October 2022, IV SA/Wa 1031/22; Wyrok Wojewódzkiego Sądu Administracyjnego w Białymstoku [Judgment of the Regional Administrative Court in Białystok], 27 October 2022, II SA/Bk 558/22.

[77] *See* in a similar way Goldner Lang, Nagy, *supra* note 4, p. 444.

[78] Case C-663/21 *Bundesamt fuer Fremdenwesen und Asyl v. AA*, ECLI:EU:C:2023:540, para. 49.

and the principle of objective truth, as it does not serve to clarify the merits of the case, which is one of the pillars of the administrative procedure. In the cases under review, reports on a border crossing contained information limited only to the date and place of apprehension of the third-country nationals on Polish territory, as well as their personal details. There was no evidence that the Border Guard heard the third-country nationals concerned nor information establishing when the third-country nationals crossed the border and under which circumstances (voluntarily or being forced by other persons, alone or in a group,) nor what the purpose of their stay in Poland was (whether to apply for international protection or to use Poland as a transit country to another EU Member State). The above ran counter to the principle that a party was entitled to be heard, and did not allow for a correct determination of the facts of the case, in particular the reasons why the persons concerned entered the territory of Poland illegally, while the correct determination of facts is essential as it provides grounds for the further correct application of the applicable substantive law. As a result, in the cases indicated above the courts annulled the orders issued by the Border Guard.

CONCLUSIONS

This article demonstrates how important it is to provide for a proper level of harmonisation of specific legal solutions at the EU level, so that they result in the effectiveness of the EU return policy in general, and the Return Directive in particular. In the course of the legislative procedure the Commission's proposal was considerably modified, which resulted in the diversification of the implementation patterns. 'Common' standards and procedures have become 'common minimum' standards and procedures, which is particularly visible in the variety of different models that the Member States have developed, with such a diversified personal scope of the Directive at the top. This gives rise to some important consequences – the Directive does not set up a common list of the grounds on which to issue return decisions, and does not refer to returns justified on grounds of public order, national security or terroristic threats. In this way each Member State's return system is composed of legal norms of different origins, although all of them must be compatible with certain fundamental rights.

Polish return law and practice does not differ significantly from other Member States' return systems in this regard. As a whole, and bearing in mind its complexity and detailed nature, it was considered compatible with the EU return policy standards, although some minor deficiencies were identified[79]; and as a response,

[79] Council Implementing Decision setting out a recommendation on addressing the deficiencies identified in the 2019 evaluation of Poland on the application of the Schengen acquis in the field of return, 17 July 2020.

in order to eliminate these deficiencies, specific measures were proposed by the government. However, the major controversies that are discussed in this article are the consequence of the low level of the harmonisation. The first controversy, which refers to the application of the anti-terrorist legislation and which arises from the lack of the harmonisation of the grounds for issuing the return decisions, seems to be already rectified, mainly in the course of the judicial scrutiny carried out in light of the protection of relevant fundamental rights on which the European standards are built. However, it must still be borne in mind that return decisions issued under Art. 329a of the 2013 AoF are immediately executed, with the effect that during the judicial control phase the third-country national is no longer present on Polish territory. The second controversy, i.e. the "border cases" legislation, is undoubtfully the result of how its personal scope was determined in the Directive. The exclusion of certain groups of third-country nationals from that scope in accordance with Article 2(2)(a) results in subjecting them to the simplified national return procedures, with the result that they do not enjoy some of the procedural rights set out in the Directive. While recent judgments annulling orders to leave Polish territory also indicate a tendency to possibly rectify the Border Guard's incorrect practice in executing these orders, nevertheless an order to leave Polish territory is immediately executed and persons subjected to that simplified procedure have little chance to contact and appoint a legal representative.

Pushbacks in particular, and their widespread occurrence throughout Europe, have become a concern of various international bodies, one of them being the Commissioner of Human Rights of the Council of Europe, who interlinks the protection of human rights in the context of carrying out pushbacks with the rule of law. In her recent recommendation,[80] the Commissioner calls upon States to stop disregarding their human rights obligations, as this undermines the rule of law and hard-won human rights protections.

To sum up, in view of the inactivity of the European Commission in bringing Poland before the CJEU under the infringement procedure, the Polish administrative courts now play a special role in safeguarding the rights of individuals in the different return procedures set up under Polish law, either by annulling the administrative acts issued in proceedings that do not fulfil the standards established at the supranational level, or by having recourse to the preliminary ruling procedure before the CJEU.

[80] Council of Europe, *Pushed beyond the limits. Four areas for urgent action to end human rights violations at Europe's borders. Recommendation* 7 April 2022, available at: https://www.coe.int/en/web/commissioner/-/pushed-beyond-the-limits-urgent-action-needed-to-stop-push-back-at-europe-s-borders (accessed 30 April 2023).