Micro-harmonisation of the fundamental right to an effective judicial remedy in the Proposed Return Directive and beyond: a dangerous path?

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1. Introduction

Title V of the Treaty on the functioning of the European Union ('TFEU') opens with the following statement: "the Union shall constitute an area of freedom security and justice with respect for fundamental rights and the different legal systems and traditions of the Member States." This affirmation, contained in art. 67 TFEU sets the Union's shared competence in the Area of freedom security and justice ('AFSJ') on a path of caution, immediately highlighting two features of the field: (i) its far reaching fundamental rights implications; and (ii) its potential for conflicts with national legal system.

This contribution turns the spotlight on a regulatory technique that amplifies both features, namely detailed (or 'micro'-)harmonisation of standards of judicial protection at the EU level. Micro-harmonisation of this kind can be limited to minimum standards, or go as far as to impose maximum standards of protection. It is a characteristic of several EU measures the asylum and migration fields of the AFSJ field and it culminates in the surprising level of procedural detail of the proposed recast of the Return Directive (Commission 2018 – 'Proposed Return Directive').

The following analysis will explore and problematise the consequences of the use of this regulatory technique. It will identify examples of micro-harmonisation of rules of judicial procedure in the Proposed Return Directive and other instruments in the area of migration and asylum, and then explore its implications for fundamental rights and the legal systems of the member states.

2. Micro-harmonisation of rules on judicial protection in the Proposed Return Directive: examples

As mentioned, the micro-harmonisation of standards of judicial protection reaches its apex in the Proposed Return Directive, which contains several examples not only of minimum, but also

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maximum standards of judicial protection. The most striking provisions are found in Chapter III, entitled “Judicial Safeguards” and, more particularly, in its Art. 16.

First, Art. 16(1) starts by establishing a minimum standard of protection, namely the requirement that an effective remedy against return decisions be offered before a judicial, rather than administrative, authority. However, it immediately goes further, by limiting the number of levels of judicial review to no more than one for rejected applicants for international protection.

Second, Art. 16(3) regulates in detail the suspensory effect of appeals. It requires automatic suspension of the return decision in case of appeal when a risk of *refoulement* exists, but forbids automatic suspension in all other cases, requiring instead a case-by-case decision. The provision goes as far as to prohibit the concession of the interim relief to rejected applicants for international protection, when (i) the reason for suspension has already formed the object of an examination in the context of an asylum procedure, or (ii) the return decision is the consequence of a decision terminating legal stay already made subject to effective judicial review.

Third, Art. 16(4) establishes a maximum time-limit to challenge return decisions issued against rejected applicants for international protection. The deadline for appeals is set to no more than 5 days, reduced to 48 hours in the context of the accelerated border procedure provided for in Art. 22 of the Proposed Return Directive.

Besides the detailed rules contained in Art. 16, other provisions contribute to the micro-harmonisation efforts of the Proposed Return Directive. In particular, Art. 6(2), (m) to (p), regulates the burden of proof, by creating a rebuttable presumption that the returnee is at risk of absconding in four situations.

The combined effect of all these norms defining detailed rules of judicial procedure is remarkable: very little leeway is left to member states to design the related rules of judicial procedure and the right to an effective remedy is contained within the narrow perimeter set by the provisions examined above.

3. Micro-harmonisation of rules on judicial protection in the Proposed Return Directive: peculiarities

The level of micro-harmonisation displayed by the Proposed Return Directive is surprising for several reasons.

First, the Commission’s proposal significantly departs from the regulatory technique that characterises legislative instruments currently in force in the area of asylum and migration, by

establishing not only minimum, but also maximum standards of protections.¹ This distinguishes the Proposed Return Directive from other instruments which can also be characterised as micro-harmonising rules of judicial procedure, such as the current Return Directive (European Parliament and Council 2008) and the Asylum Procedures Directive (European Parliament and Council 2013). In fact, the current Return Directive (in particular its Art. 13) and the Asylum Procedures Directive (in particular, its Art. 46) set minimum standards of protection concerning suspensive effects of appeals, reasonable length of time-limits to challenge negative decisions before a court, and access to at least a court or tribunal of first instance. Conversely, the Proposed Return Directive attempts to go further, proposing fully harmonised rules of judicial procedure with respect to several essential aspects of the right to an effective remedy, ranging from the number of levels of jurisdiction, to interim relief and to time-limits for appeal.²

Second, the Proposed Return Directive, much as the current Return Directive and the Asylum Procedures Directive, does not contain a fully-fledged non-regression clause. Its Art. 4(3), similarly to Art. 5 of the Asylum Procedures Directive, reads: “[t]his Directive shall be without prejudice to the right of the Member States to adopt or maintain provisions that are more favourable to persons to whom it applies *provided that such provisions are compatible with this Directive*” (emphasis added). This formulation fails to protect national higher standards from backsliding on procedural rights in the name of the effectiveness of EU law. Instead, such a protection is offered in recent micro-harmonising measures in another field of the AFSJ, namely judicial cooperation in criminal matters. Non-regression clauses in the field all provide that “[n]othing in [the relevant] Directive shall be construed as limiting or derogating from any of the rights or procedural safeguards that are ensured under [...] the law of any Member State which provides a higher level of protection”,³ without further qualifications (see Mitsilegas, forthcoming).

Third, a striking discrepancy exists between the nature of the Proposed Return Directive as an instrument conceived to set objectives only, and its extremely detailed content, which would have been more attuned to a regulation. This point is well illustrated by a comparison between

¹ The avoidance of full harmonisation, through the establishment of minimum standards only, has been traditionally meant to prevent a harmonisation of procedural standards based on the lowest common denominator (De Bruycker 2005, 56).

² Several of the Proposal’s provisions are nuanced in the partial negotiating position adopted by the Council (Council 2019). For example, the position reverts to a minimum standards on number of levels of jurisdiction and extends the maximum time-limits for appeals in the context of the border procedure to one week, rather than 48 hours.

³ Inter alia, Art. 10 Directive on the right to information in criminal proceedings (European Parliament and Council 2010); Art. 13 Directive on presumption of innocence (European Parliament and Council 2016).

the Proposed Return Directive and the Proposed Procedures Regulation (Commission 2016). The two instruments share a micro-harmonising approach, which sees the Union setting maximum time-limits for appeals, imposing recourse to accelerated procedures in certain cases and limiting the availability of interim relief. However, the Proposed Procedures Regulation contains less far reaching provisions (e.g. it does not limit the number of levels of jurisdiction), even though it is presented in a form which would have allowed a higher level of detail, i.e. a regulation.

Fourth, the Proposed Return Directive harmonises areas, such as time-limits for appeals, in which the Union's legislator has so far been reluctant to intervene (Elia Antonio and Muir 2015, 191), possibly by reason of the different nature, conditions of admissibility, and formalities to which appeals are subject in the different member states. Such differences arguably make a one-size-fits-all standard difficult to evaluate as to its compliance with the fundamental right to effective judicial protection across the EU (Muir and Molinari 2018, 84).

Finally, the choice to limit the suspensory effects of appeals departs from the usual nature of legislative interventions on interim reliefs. In fact, the EU has traditionally required member states to make interim relief available, so that rights guaranteed by EU law could be protected, pending a final decision.⁴ In this respect, micro-harmonisation in the AFSJ field presents a peculiarity, linked to the perception of high standard of judicial protection as limits to the effectiveness of EU asylum and migration policies (Commission 2018, 4 and recital (20)), rather than as tools to enhance the effectiveness of the related EU policy, as is the case in other fields of EU law.

4. Problematising micro-harmonisation of rules on judicial protection

The above characteristics of the Proposed Return Directive - and the choice to micro-harmonise rules on judicial protection more generally - have significant implications on the fundamental rights of third country nationals throughout the EU. They also affect the equilibrium of the multilevel European constitutional space (Pernice 2009), which encompasses potentially competing sources of fundamental rights protection (i.e. national constitutions, the EU legal system, as well as international law guarantees, including those enshrined in the European Convention on Human Rights – 'ECHR').

⁴ See Elia Antonio Muir 2015, 196, referring to the Remedies Directive in the field of Public Procurement (Council 1989) and the Injunctions Directive in the field of consumer protection (European Parliament and Council 2009).

A first consequence of micro-harmonisation of rules on judicial protection in the AFSJ is the potential for the national legislator to roll back higher standards of protection, in order to align on the minimum standards provided for by EU law. Several national decrees or laws adopted in member states such as Italy (Decrees 2017 no. 13 and 2018 no. 113), and France (Law no. 2018-778 of 10 September 2018) to regulate asylum procedures have cut back on guarantees previously accorded to international protection applicants, but not required by the EU *acquis* on asylum. Often, these reforms were explicitly justified in the political discourse by the willingness of national governments to align with EU (minimum) procedural standards (Favilli forthcoming; Ministère de l'Intérieur 2018, 4).

A second consequence of micro-harmonisation of rules on judicial protection is the increased likelihood that national safeguards protected by national constitutions be set aside in the name of the effectiveness and unity of EU law. In fact, as affirmed by the European Court of Justice ('ECJ') in its *Melloni* ruling, "where an EU legal act calls for national implementing measures, national authorities and courts remain free to apply national standards of protection of fundamental rights, *provided that* the level of protection provided for by the Charter, as interpreted by the Court, and *the primacy, unity and effectiveness of EU law* are not thereby compromised" (emphasis added – ECJ, *Melloni* 2013, para. 60). In other words, unity and effectiveness of EU law might displace fundamental rights standards enshrined in constitutional texts. The *Melloni* ruling was issued in the field of judicial cooperation in criminal matters, which, since the entry into force of the Lisbon Treaty in 2009, is protected from possible undermining of constitutional standards of protection of fundamental rights by Art. 82(2) TFEU. The latter reads "[...] the European Parliament and the Council may [...] establish minimum [procedural] rules [...]. *Adoption of the minimum rules referred to in this paragraph shall not prevent Member States from maintaining or introducing a higher level of protection for individuals*" (emphasis added). No corresponding mechanism to avoid constitutional clashes is envisaged for the asylum and migration aspects of the AFSJ. As harmonising measures adopted at EU level are capable of trumping fundamental rights guarantees enshrined in national constitutions by virtue of the principle of primacy (ECJ, *Taricco II* 2017, para. 47, and Kolev 2018, para. 75), increased proceduralisation of asylum and migration law at the EU level is likely to create tensions. For example, Art. 16(1) of the Proposed Return Directive, that limits the number of level of judicial remedies to one, would most likely lead to a clash between

primacy of EU law and those national constitutions, such as the Italian one,⁵ which impose higher standards (Muir and Molinari 2019, 56, 90-92.).

A third consequence of micro-harmonisation of rules on judicial protection is a risk for EU secondary measures either to be found in breach of the Charter of Fundamental Rights of the EU ('Charter') or to undermine the Charter right to effective judicial protection through interpretation. The first scenario is undesirable in terms of legal certainty, as it would lead to the total or partial invalidation of the measure in question, with spill over effects on national implementing measures.⁶ An example of a potential Charter breach is the establishment of very short maximum time limits for appeals in Arts 16(4) and 22(3) Proposed Return Directive, which would likely be considered by the ECJ as not "sufficient in practical terms to enable the applicant to prepare and bring an effective action" (ECJ, *Samba Diouf* 2011, para. 66, see Muir Molinari 2018, 83-84).

The second scenario, namely a restrictive interpretation of Charter rights in light of secondary legislation, may have even more disruptive consequences, leading to a reduction of fundamental rights protection across all areas of EU law and trumping higher constitutional safeguards contained in member states legal orders. Moreover, a deferential stance of the ECJ towards legislative choices on procedural standards may lead to incoherence between EU and ECHR standards. In this respect, the recent ECJ's ruling in *Sacko* (ECJ, *Moussa Sacko v Commissione Territoriale per il riconoscimento della protezione internazionale di Milano* 2017) is particularly telling. In *Sacko*, the ECJ qualified the right to be heard in the field of asylum. More particularly, it held that member states can allow courts of first instance to refuse a hearing when reviewing an administrative finding that an international protection application is manifestly unfounded, if a hearing has been conducted in the context of the administrative procedure and "the factual circumstances leave no doubt as to whether that decision was well founded" (para. 49). In its reasoning, the ECJ relies on the case law of the European Court of Human Rights ('ECtHR'), but revisits it in a particularly restrictive manner in light of the wording of the Asylum Procedures Directive, which only requires a "full and *ex nunc* examination of both facts and

⁵ Art. 111 of the Italian Constitution provides, inter alia, that an appeal before the Cassation Court must always be available against any judgment or measure affecting personal freedom, with the only possibility for derogation allowed for the judgments rendered by military courts in times of war.

⁶ The invalidation of EU measures that strike a balance between fundamental rights and policy objectives runs the risk of leading to a legislative void, that national legislators might find difficult to address. This dynamic is exemplified by the insufficiency of the national measures adopted, to ensure compliance of data retention policies with fundamental rights, after the ECJ annulled the Data Retention Directive (European Parliament and Council 2006) in *Digital Rights Ireland* (ECJ, *Digital Rights Ireland* 2014- see FRA 2017, 164-165).

law” by the judicial authority (Art. 46), without mentioning a right to be heard in that context. By omitting to refer to certain parts of the ECtHR’s judgments it itself invoked (i.e. ECtHR, *Jussila v Finland* 2006 and *Döry v Sweden* 2003), the ECJ may be seen, as noted by Favilli (forthcoming) to call into question the presumption that “unless there are exceptional circumstances that justify dispensing with a hearing, the right to a public hearing implies a right to an oral hearing at least before one instance” (ECtHR, *Döry v Sweden* 2003, para. 39). According to the ECJ, the right of defence simply requires that courts be given the possibility to conduct a hearing when the latter is “necessary for the purpose of ensuring that there is a full and *ex nunc* examination of both facts and points of law, as required under Article 46(3) of the [Asylum Procedures] Directive” (para. 49).

The tendency to read fundamental rights restrictively in the context of the interpretation of secondary EU legislation is not unprecedented. The ECJ has already adopted a restrictive interpretation of non-refoulement in order to preserve, to the extent possible, the effectiveness of EU measures aimed at ensuring mutual recognition in the field of asylum. By affirming that only “systemic flaws in the asylum procedure and reception conditions for asylum applicants in [a] Member State” might justify a refusal to transfer the asylum seeker back to that state (ECJ, *N.S. v Secretary of State for the Home Department* 2011, para. 86), the ECJ has initially⁷ adopted a stance that has been perceived as less protective than that upheld by the ECtHR in analogous situations and requiring a case-by-case assessment of the risk of inhuman and degrading treatment (ECtHR, *M.S.S. v Belgium and Greece* 2011, para. 365, and *Tarakhel v Switzerland* 2014, para. 102).

To conclude, micro-harmonisation of rules on judicial protection has the potential to lead to a lowering of fundamental rights standards in member states, as well as to clashes with national constitutional guarantees and the ECHR.

These observations strengthen the concerns raised, in specific fields, by the spillover effects of “incidental proceduralisation”⁸ of EU law (Elia Antonio Muir 2015). As in the area of migration and asylum, micro-harmonisation touches procedural guarantees which constitute the substance

⁷ The distance between the case-law of the two courts was at least partially bridged thanks to the recent acknowledgment by the ECJ that a refusal of transfer would also be justified by “deficiencies [...] which may affect certain groups of people [provided that they] attain a particularly high level of severity, which depends on all the circumstances of the case” (ECJ, *Jawo v Bundesrepublik Deutschland* 2019, paras 87-90, and *Ibrahim at al. v Bundesrepublik Deutschland* 2019, paras 88-89).

⁸ Incidental proceduralisation can be defined as “the insertion of procedural rules in secondary EU law measures adopted on the basis of provisions enabling the EU to develop a substantive policy” (Elia Antonio Muir 2015, 178). It can be contrasted with the adoption of procedural norms in the context of measures which “give specific expression” to a fundamental right (Muir 2014, 223, citing ECJ, *Küçükdeveci v Swedex* 2010).

of the fundamental right to effective judicial protection, the above concerns are particularly pressing: the fundamental right to effective judicial protection constitutes the essential gateway for the protection of all other rights, and thus it is a core tenet of the EU as a rule of law based legal system.

5. Ways forward

Several good practices and initiatives could mitigate or avoid the risks that micro-harmonisation of procedural rules entails.

On a very general level, the EU legislator should be more mindful of the limitation that subsidiarity, proportionality and respect for the difference in the legal systems and traditions of the member states place on the legitimacy of detailed harmonisation techniques in the area of judicial proceedings, especially in the AFSJ field (Muir Molinari 2018).

Second, EU measures in the field should take fundamental rights concerns seriously, attempting to identify in advance potential negative impacts of the proposals on Charter rights and redressing them in the drafting stage. This might allow the institutions to better appreciate the risks of downward spiralling of fundamental rights standards and prevent it through, for example, the insertion of non-regression clauses in the text of proposed legislation. It is particularly regrettable, in this sense, that the entire asylum and migration package of measures proposed by the Commission between 2016 and 2018 has been presented to the EU legislators without any impact assessment, contrary to the Commissions' own guidelines on legislation in fields that touch upon (often absolute) fundamental rights (Commission 2017, 15).

Finally, constitutional and ECHR standards should be taken into serious considerations in the course of the EU legislative process, to avoid proposing measures that might undermine them in the name of effectiveness (Favilli, forthcoming).

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