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#### NOTE

From:	Presidency
To:	Council
No. Cion doc.:	12099/18
Subject:	Proposal for a Directive of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third-country nationals (recast) – Partial general approach

Delegations will find attached a final Presidency compromise proposal as regards the draft Directive of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third-country nationals (recast).

Changes made to the Commission proposal (12099/18) are indicated in ➡ **bold** ⬅ for new text and ~~strikethrough~~ for deleted text.

The Presidency intends to submit the text set out in the Annex to the Council with a view to reaching a general approach on it with the exception of Article 22 on the Border procedure and the related recitals 32 - 36.

Proposal for a

**DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL**

**on common standards and procedures in Member States for returning illegally staying third-country nationals (recast)**

*A contribution from the European Commission to the Leaders' meeting in  
Salzburg on 19-20 September 2018*

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty ~~establishing the European Community~~ ☒ on the Functioning of the European Union ☒, and in particular Article ~~63(2)(b)~~ ☒ 79(2)(c) ☒ thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national parliaments,

Acting in accordance with the ordinary legislative procedure,

Whereas:

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↓ new

↻ Council

- (1) A number of amendments are to be made to Directive 2008/115/(EC) of the European Parliament and of the Council<sup>1</sup>. In the interests of clarity, that Directive should be recast.
- (2) An effective and fair return policy is an essential part of the Union's approach to better manage migration in all aspects, as reflected in the European Agenda on Migration of May 2015<sup>2</sup>.
- (3) On 28 June 2018, in its conclusions, the European Council underlined the necessity to significantly step up the effective return of ↻ **illegally staying third country nationals** ↻ ~~irregular migrants~~, and welcomed the intention of the Commission to make legislative proposals for a more effective and coherent European return policy.

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↓ 2008/115/EC recital 1 (adapted)

~~The Tampere European Council of 15 and 16 October 1999 established a coherent approach in the field of immigration and asylum, dealing together with the creation of a common asylum system, a legal immigration policy and the fight against illegal immigration.~~

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<sup>1</sup> Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals (OJ L 348, 24.12.2008, p. 98).

<sup>2</sup> COM(2015) ↻ 240 ↻ 285-final.

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↓ 2008/115/EC recital 2 (adapted)

~~The Brussels European Council of 4 and 5 November 2004 called for the establishment of an effective removal and repatriation policy, based on common standards, for persons to be returned in a humane manner and with full respect for their fundamental rights and dignity.~~

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↓ 2008/115/EC recital 3 (adapted)

~~On 4 May 2005 the Committee of Ministers of the Council of Europe adopted ‘Twenty guidelines on forced return’.~~

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↓ 2008/115/EC recital 4 (adapted)

⇒ new

↻ Council

- (4) ☒ That European return policy should be based on common standards, for persons to be returned in a humane manner and with full respect for their fundamental rights and dignity ☒  
⇒, as well as international law, including refugee protection and human rights obligations.  
↔ Clear, transparent and fair rules need to be ☒ established ☒ ~~fixed~~ to provide for an effective return policy ~~as a necessary element of a well managed migration policy~~ ⇒ which  
↻ **also entails reduction of incentives for illegal immigration** ↻ ~~serves as a deterrent to irregular migration~~ and ensures coherence with and contributes to the integrity of the Common European Asylum System and the legal migration system ↔.

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↓ 2008/115/EC recital 5

- (5) This Directive should establish a horizontal set of rules, applicable to all third-country nationals who do not or who no longer fulfil the conditions for entry, stay or residence in a Member State.

- (6) Member States should ensure that the ending of illegal stay of third-country nationals is carried out through a fair and transparent procedure. According to general principles of EU law, decisions taken under this Directive should be adopted on a case-by-case basis and based on objective criteria, implying that consideration should go beyond the mere fact of an illegal stay. When using standard forms for decisions related to return, namely return decisions and, if issued, entry-ban decisions and decisions on removal, Member States should respect that principle and fully comply with all applicable provisions of this Directive.
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- (7) The link between the decision on ending of the legal stay of a third-country national and the issuing of a return decision should be reinforced in order to reduce the risk of absconding and the likelihood of unauthorised secondary movements. It is necessary to ensure that a return decision is issued ➡ **without undue delay** ⬅ ~~immediately~~ after the decision rejecting or terminating the legal stay, or ideally in the same act or decision. That requirement should in particular apply to cases where an application for international protection is rejected, ~~provided that the return procedure is suspended until that rejection becomes final and pending the outcome of an appeal against that rejection.~~

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↓ 2008/115/EC recital 7 (adapted)

⇒ Council

- (8) The need for ~~Community~~ ☒ Union ☒ and bilateral readmission agreements with third countries to facilitate the return process is underlined. International cooperation with countries of origin at all stages of the return process is a prerequisite to achieving sustainable return.

⇒ To this end available instruments should be used as much as possible in view of the coordinated and structured approach on migration which maximises the synergies and applies the necessary leverage, especially in case of lack of cooperation of the third countries on readmission. Such instruments could include international agreements, dialogues and arrangements, mobility partnerships, as well as existing mechanisms under Regulation of the European Parliament and of the Council No. ....amending Regulation (EC) No 810/2009 (Visa Code) and Regulation 2018/1806. ☺

- ⇒ 8a In case of lack of cooperation of certain third countries to readmit their nationals apprehended in a situation of illegal stay and failure of those third countries to cooperate effectively in the return process, a restrictive and temporary application of certain provisions of the Visa Code should be applied on the basis of objective criteria, to enhance a given third country's cooperation on readmission. ☺

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↓ 2008/115/EC recital 8

- (9) It is recognised that it is legitimate for Member States to return illegally staying third-country nationals, provided that fair and efficient asylum systems are in place which fully respect the principle of *non-refoulement*.

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↓ 2008/115/EC recital 9

- (10) In accordance with Council Directive 2005/85/EC ~~of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status~~<sup>3</sup>, a third-country national who has applied for asylum in a Member State should not be regarded as staying illegally on the territory of that Member State until a negative decision on the application, or a decision ending his or her right of stay as asylum seeker has entered into force.

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<sup>3</sup> Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status (OJ L 326, 13.12.2005, p. 13).



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↓ new

↻ Council

(11) To ensure clearer and more effective rules for granting a period for voluntary departure and detaining a third-country national, determining whether there is or there is not a risk of absconding should be based on Union-wide objective criteria. Moreover this Directive should set out specific criteria which establish a ground for a rebuttable presumption that a risk of absconding exists. ➡ **A third country national should provide all elements necessary for the assessment of the risk of absconding.** ©

➡ **(11a) Unless Member States decide not to apply this Directive in application of Article 2(2)(b), when determining the risk of absconding, the competent national authorities may take into account the infringement of the criminal codes of the Member States, for a serious criminal offence, as this may in particular indicate a disregard for the legal framework of the Member States, including of migration rules. Such authorities may also take into account the existence of an ongoing criminal investigation or prosecution that have not yet led to a conviction, where provided by national law.** ©

(12) To reinforce the effectiveness of the return procedure, clear responsibilities for third-country nationals should be established, and in particular the obligation to cooperate with the authorities at all stages of the return procedure, including by providing the information and elements that are necessary in order to assess their individual situation. At the same time, it is necessary to ensure that third-country nationals are informed of the consequences of not complying with those obligations, in relation to the determination of the risk of absconding, the granting of a period for voluntary departure and the possibility to impose detention ➡ **and penalties where provided for by national law** Ⓒ, and to the access to programmes providing logistical, financial and other material or in-kind assistance.

↓ 2008/115/EC recital 10 (adapted)

⇒ new

↻ Council

- (13) Where there are no reasons to believe that ☒ the granting of a period for voluntary departure ☒ ~~this~~ would undermine the purpose of a return procedure, voluntary return should be preferred over forced return and a ⇒ an appropriate ⇐ period for voluntary departure ⇒ of up to thirty days, ~~depending in particular on the prospect of return,~~ ⇐ should be granted. ⇒ A period for voluntary departure should not be granted where it has been assessed that third-country nationals pose a risk of absconding, ~~have had a previous application for legal stay dismissed as fraudulent or manifestly unfounded,~~ or they pose a risk to public ↻ order ↻ policy, public security or national security. ⇐ ↻ **Member States may decide not to grant a period for voluntary departure where a third country national has had a previous application for legal stay dismissed as fraudulent, manifestly unfounded or inadmissible.** ↻ An extension of the period for voluntary departure should be provided for when considered necessary because of the specific circumstances of an individual case. ~~In order to promote voluntary return, Member States should provide for enhanced return assistance and counselling and make best use of the relevant funding possibilities offered under the European Return Fund.~~

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↓ new

↻ Council

(14) In order to promote voluntary ↻ departure ↻ ~~return~~, Member States should have operational programmes providing for enhanced return assistance and counselling, which may include support for reintegration in third countries of return ↻ ~~.~~ ↻ ~~taking into account the~~ ↻ The ↻ common standards on Assisted Voluntary Return and Reintegration Programmes developed by the Commission in cooperation with Member States and endorsed by the Council ↻ could be taken into account ↻.

↻ Assistance for voluntary departure should be granted in accordance with national rules which may not need to be administrative procedures, and should be subject to conditions and grounds for exclusion set therein. ↻

↻ This directive does not establish a subjective right for the third-country national to receive assistance for voluntary departure or reintegration. ↻

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↓ 2008/115/EC recital 11

(15) A common minimum set of legal safeguards on decisions related to return should be established to guarantee effective protection of the interests of the individuals concerned.

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↓ new

☞ Council

(16) The deadline for lodging an appeal against decisions related to return should provide enough time to ensure access to an effective remedy, while taking into account that long deadlines can have a detrimental effect on return procedures. To avoid possible misuse of rights and procedures, a maximum period ~~not exceeding five days~~ should be granted ☞ **established** ☞ to appeal against a return decision ☞ **before a court or tribunal** ☞. ~~This provision should only apply following a decision rejecting an application for international protection which became final, including after a possible judicial review.~~

(17) ☞ **Without prejudice to the procedural autonomy of the Member States, in order to improve the effectiveness of the return procedures, while ensuring the respect of the right to an effective remedy, Member States should provide that appeals against return decisions take place as much as possible before a single level of jurisdiction of a court or tribunal.** ☞ ~~The appeal against a return decision that is based on a decision rejecting an application for international protection which was already subject to an effective judicial remedy should take place before a single level of jurisdiction only, since the third country national concerned would have already had his or her individual situation examined and decided upon by a judicial authority in the context of the asylum procedure.~~

☞ **(17a) Member States may keep administrative review proceedings prior to an appeal before a court or tribunal, provided that the administrative review does not affect the effectiveness of the return procedure.** ☞

➔ (17b) A body that exercises judicial function should qualify as tribunal if it is established by law, is permanent, independent and impartial, includes inter-partes procedure, has compulsory jurisdiction, applies rules of law and offers necessary procedural guarantees. ☺

(18) An appeal against a return decision should have ➔ either ☺ an automatic suspensive effect ➔ or suspensive effect granted on request ☺ only in cases where there ➔ may be ☺ is a risk of breach of the principle of *non-refoulement*.

(19) ~~In cases where the principle of *non-refoulement* is not at stake, appeals against a return decision should not have an automatic suspensive effect. The judicial authorities ➔ Member States ☺ should be able to temporarily suspend the enforcement of a return decision in individual cases for other reasons, either upon request of the third-country national concerned or acting *ex officio*, where deemed necessary. Such decisions should, as a rule, be taken within 48 hours. Where justified by the complexity of the case, judicial authorities should take such decision without undue delay.~~

➔ 19a The national application of the rules on the provisions of this Directive related to appeals and suspensive effect should comply with the right to an effective remedy as provided for in Article 47 of the Charter of Fundamental Rights. ☺

(20) To improve the effectiveness of return procedures and avoid unnecessary delays, without negatively affecting the rights of the third-country nationals concerned, **⇒ the risk to breach the principle of *non-refoulement* should be verified in the appeal against the return decision, unless this verification** **⊖** the enforcement of the return decision should not be automatically suspended in cases where the assessment of the risk to breach the principle of *non-refoulement* already took place and judicial remedy was effectively exercised as part of the asylum **⇒ appeal** **⊖** procedure carried out prior to the issuing of the related return decision against which the appeal is lodged, **⇒ except if** **⊖ unless** the situation of the third-country national concerned would have significantly changed since.

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↓ 2008/115/EC recital 11 (adapted)

⇒ new

(21) The necessary legal aid should be made available **⇒** , upon request, **⇐** to those who lack sufficient resources. ~~Member States should provide in their~~ National legislation **⊗** should establish a list of instances where **⊗** ~~for which cases~~ legal aid is to be considered necessary.

- (22) The situation of third-country nationals who are staying illegally but who cannot yet be removed should be addressed. Their basic conditions of subsistence should be defined according to national legislation. In order to be able to demonstrate their specific situation in the event of administrative controls or checks, such persons should be provided with written confirmation of their situation. Member States should enjoy wide discretion concerning the form and format of the written confirmation and should also be able to include it in decisions related to return adopted under this Directive.

- (23) The use of coercive measures should be expressly subject to the principles of proportionality and effectiveness with regard to the means used and objectives pursued. Minimum safeguards for the conduct of forced return should be established, taking into account Council Decision 2004/573/EC of 29 April 2004 on the organisation of joint flights for removals from the territory of two or more Member States, of third-country nationals who are subjects of individual removal orders<sup>4</sup>. Member States should be able to rely on various possibilities to monitor forced return.

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<sup>4</sup> Council Decision 2004/573/EC of 29 April 2004 on the organisation of joint flights for removals from the territory of two or more Member States, of third-country nationals who are subjects of individual removal orders (OJ L 261, 6.8.2004, p. 28).



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↓ 2008/115/EC recital 14

↻ Council

- (24) The effects of national return measures should be given a European dimension by establishing an entry ban prohibiting entry into and stay on the territory of all the Member States. The length of the entry ban should be determined with due regard to all relevant circumstances of an individual case and should not normally exceed ↻ ten ↻ ~~five~~ years. In this context, particular account should be taken of the fact that the third-country national concerned has already been the subject of more than one return decision or removal order or has entered the territory of a Member State during an entry ban.

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↓ new

- (25) When an illegally staying third-country national is detected during exit checks at the external borders, it may be appropriate to impose an entry ban in order to prevent future re-entry and therefore to reduce the risks of illegal immigration. When justified, following an individual assessment and in application of the principle of proportionality, an entry ban may be imposed by the competent authority without issuing a return decision in order to avoid postponing the departure of the third-country national concerned.

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↓ 2008/115/EC recital 15

- (26) It should be for the Member States to decide whether or not the review of decisions related to return implies the power for the reviewing authority or body to substitute its own decision related to the return for the earlier decision.

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↓ 2008/115/EC recital 16

- (27) The use of detention for the purpose of removal should be ~~limited and~~ subject to the principle of proportionality with regard to the means used and objectives pursued. Detention is justified only to prepare the return or carry out the removal process and if the application of less coercive measures would not be sufficient.

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↓ new

→ Council

(28) Detention should be imposed, following an individual assessment of each case, → **taking into account the situation of vulnerability,** ↻ where there is a risk of absconding, where the third-country national avoids or hampers the preparation of return or the removal process, or when the third country national concerned poses a risk to public → **order** ↻ policy, public security or national security.

→ **Where the national law provides for the detention of minors, the best interests of the child should be a primary consideration.** ↻

(29) Given that maximum detention periods in some Member States are not sufficient to ensure the implementation of return, a maximum period of detention between three and six months, which may be prolonged, should be established in order to provide for sufficient time to complete the return procedures successfully, without prejudice to the established safeguards ensuring that detention is only applied when necessary and proportionate and for as long as removal arrangements are in progress.

➡ (29a) Where the order to detain a third country national has been issued in an administrative procedure, the court responsible for assessing the lawfulness of that decision may take into account all relevant facts, evidence and observations which may be submitted by the parties to that court. ↻

➡ Where the detention measure has been decided in an administrative procedure in breach of the right to be heard, the national court responsible for assessing the lawfulness of that decision may order the lifting of the detention measure only if it considers, in the light of all of the factual and legal circumstances of the case, that the infringement at issue actually deprived the party relying thereon of the possibility of arguing his defence better, and to the extent that the outcome of that administrative procedure could have been different. ↻

(30) This Directive should not preclude Member States from laying down effective, proportionate and dissuasive ~~penalties and~~ criminal penalties, including imprisonment, in relation to the infringements of migration rules, provided that such penalties are compatible with the objectives of this Directive, do not compromise the application of this Directive and are in full respect of fundamental rights.

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↓ 2008/115/EC recital 17

⇒ Council

(31) Third-country nationals in detention should be treated in a humane and dignified manner with respect for their fundamental rights and in compliance with international and national law. Without prejudice to the initial apprehension by law-enforcement authorities, regulated by national legislation, detention should, ~~as a rule,~~ ⇒ generally ⇄ take place in specialised detention facilities.

⇒ (31a) Taking into account that third country nationals detained for the purpose of removal are not detained as suspects of criminal activities, or as criminal convicts they should not be accommodated together with ordinary prisoners. Separation from ordinary prisoners can also be ensured by accommodating those third-country nationals in dedicated parts of prisons used only for that purpose. ⇄

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↓ new

↻ Council

[ (32) ~~Without prejudice to the possibility for Member States not to apply this Directive with regard to the cases referred to in Article 2(2)(a), w~~ ↻ **W** ↻ When a border procedure is applied in accordance with Regulation (EU) .../... [*Asylum Procedure Regulation*], a specific border procedure should follow for the return of illegally staying third-country nationals whose application for international protection under that asylum border procedure has been rejected in order to ensure direct complementarity between the asylum and return border procedures and prevent gaps between the procedures. In such cases, it is necessary to establish specific rules that ensure the coherence and synergy between the two procedures and preserve the integrity and effectiveness of the whole process. ↻ **Member States should be able to rely on appropriate Union funding to carry out the necessary activities in the context of the border procedure.** ↻

↻ **Member States that issue a refusal of entry to third country nationals who had applied for international protection at the border, and that have decided not to apply this Directive in accordance with Article 2(2)(a), should grant those third country nationals a treatment equivalent to the one in the border procedure.** ↻

- (33) To ensure effective return in the context of the border procedure, a period for voluntary departure should not be granted. However, a period for voluntary departure ~~should~~ **may** be granted to third-country nationals who hold a valid travel document and cooperate with the competent authorities of the Member States at all stages of the return procedures. In such cases, to prevent absconding, third-country nationals should hand over the travel document to the competent authority until their departure.
- (34) For a rapid treatment of the case, a maximum time limit is to be granted to appeal against a return decision following a decision rejecting an application for international protection adopted under the border procedure ~~and which became final~~.
- ~~(35) An appeal against a return decision taken in the context of the border procedure should have an automatic suspensive effect in cases where there is a risk of breach of the principle of *non-refoulement*, there has been a significant change in the situation of the third-country national concerned since the adoption under the asylum border procedure of the decision rejecting his or her application for international protection, or if no judicial remedy was effectively exercised against the decision rejecting his or her application for international protection adopted under the asylum border procedure.~~

(36) It is necessary and proportionate to ensure that a third country national who was already detained during the examination of his or her application for international protection as part of the asylum border procedure may be kept in detention in order to prepare the return and/or carry out the removal process, once his or her application has been rejected. To avoid that a third country national is automatically released from detention and allowed entry into the territory of the Member State despite having been denied a right to stay, a limited period of time is needed in order to try to enforce the return decision issued at the border. ~~The third-country national concerned may be detained~~ ➔ **The detention** ☺ in the context of the border procedure ~~for a maximum period of~~ ➔ **should not exceed** ☺ four months and ➔ **should be maintained only** ☺ as long as removal arrangements are in progress and executed with due diligence. That period of detention should be without prejudice to other periods of detention established by this Directive. Where it has not been possible to enforce return by the end of the former period, further detention of the third-country national may be ordered under another provision of this Directive and for the duration provided for therein. ]<sup>5</sup>

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<sup>5</sup> Recitals 32-36 as regards the border procedure does not constitute part of the general approach.



↓ 2008/115/EC recital 18 (adapted)

⇒ new

⇒ Council

(37) Member States should have rapid access to information on ⇒ return decisions and ⇐ entry bans issued by other Member States. ~~This information-sharing~~ ☒ Such access ☒ should take place in accordance with ⇒ Regulation (EU) ⇒ 2018/1860 ~~C .../...~~<sup>6</sup> [*Regulation on the use of the Schengen Information System for the return of illegally staying third country nationals*] and ⇐ Regulation ⇒ (EU) 2018/1861<sup>7</sup> ~~C (EC) No 1987/2006 of the European Parliament and of the Council of 20 December 2006 on the establishment, operation and use of the second generation Schengen Information System (SIS II)~~<sup>8</sup> ⇒, including to facilitate mutual recognition of these decisions amongst competent authorities, by virtue of Council Directive 2001/40/EC<sup>9</sup> and Council Decision 2004/191/EC<sup>10</sup> ⇐ .

<sup>6</sup> [*Regulation on the use of the Schengen Information System for the return of illegally staying third country nationals*] (OJ L ...).

<sup>7</sup> Regulation (EU) 2018/1861 of the European Parliament and of the Council of 28 November 2018 on the establishment, operation and use of the Schengen Information System (SIS) in the field of border checks, and amending the Convention implementing the Schengen Agreement, and amending and repealing Regulation (EC) No 1987/2006, OJ L 312, 7.12.2018, p. 14.

<sup>8</sup> Regulation (EC) No 1987/2006 of the European Parliament and of the Council of 20 December 2006 on the establishment, operation and use of the second generation Schengen Information System (SIS II) (OJ L 381, 28.12.2006, p. 4).

<sup>9</sup> Council Directive 2001/40/EC of 28 May 2001 on the mutual recognition of decisions on the expulsion of third-country nationals (OJ L 149, 2.6.2001, p. 34).

<sup>10</sup> Council Directive 2001/40/EC of 28 May 2001 on the mutual recognition of decisions on the expulsion of third-country nationals, OJ L 149, 2.6.2001, p. 34; and Council Decision 2004/191/EC of 23 February 2004 setting out the criteria and practical arrangements for the compensation of the financial imbalances resulting from the application of Directive 2001/40/EC on the mutual recognition of decisions on the expulsion of third-country nationals (OJ L 60, 27.2.2004, p. 55).

➔ **37a Mutual recognition of return decisions may contribute to ensuring a more effective implementation of returns. Member States should make use of all available means of cooperation and of exchange of information for this purpose. The Commission should assess Union legal acts on returns with the aim of achieving a more uniform and consistent implementation of return decisions and of reducing administrative burden on national authorities, notably through mutual recognition of return decision, and should consider submitting legislative proposal in that respect.** ⌚

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↓ new

➔ Council

(38) Establishing return management systems in Member States contributes to the efficiency of the return process. Each national system should provide timely information on the identity and legal situation of the third country national that are relevant for monitoring and following up on individual cases. To operate efficiently and in order to significantly reduce the administrative burden, such national return systems should be linked to the Schengen Information System to facilitate and speed up the entering of return-related information, as well as to the ~~central system~~ ➔ **platform** ⌚ established by the European Border and Coast Guard Agency in accordance with Regulation (EU) .../... [*EBCG Regulation*].

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↓ 2008/115/EC recital 19

⇒ new

- (39) Cooperation between the institutions involved at all levels in the return process and the exchange and promotion of best practices ⇒ , including by taking into account and regularly updating the Return Handbook to reflect legal and policy developments, ⇐ should accompany the implementation of this Directive and provide European added value.

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↓ new

- (40) The Union provides financial and operational support in order to achieve an effective implementation of this Directive. Member States should make best use of the available Union financial instruments, programmes and projects in the field of return, in particular under Regulation (EU) .../... [*Regulation establishing the Asylum and Migration Fund*], as well as of the operational assistance by the European Border and Coast Guard Agency according to Regulation (EU) .../... [*EBCG Regulation*]. Such support should be used in particular for establishing return management systems and programmes for providing logistical, financial and other material or in-kind assistance to support the return – and where relevant the reintegration – of illegally staying third-country nationals.

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↓ 2008/115/EC recital 20 (adapted)

(41) Since the objective of this Directive, namely to establish common rules concerning return, removal, use of coercive measures, detention and entry bans, cannot be sufficiently achieved by the Member States and can therefore, by reason of its scale and effects, be better achieved at ~~Community~~ ☒ Union ☒ level, the ~~Community~~ ☒ Union ☒ may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty ☒ on the European Union ☒ . In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary to achieve that objective.

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↓ 2008/115/EC recital 21

(42) Member States should implement this Directive without discrimination on the basis of sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinions, membership of a national minority, property, birth, disability, age or sexual orientation.

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↓ 2008/115/EC recital 22

(43) In line with the 1989 United Nations Convention on the Rights of the Child, the ‘best interests of the child’ should be a primary consideration of Member States when implementing this Directive. In line with the European Convention for the Protection of Human Rights and Fundamental Freedoms, respect for family life should be a primary consideration of Member States when implementing this Directive.

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↓ 2008/115/EC recital 23

- (44) Application of this Directive is without prejudice to the obligations resulting from the Geneva Convention relating to the Status of Refugees of 28 July 1951, as amended by the New York Protocol of 31 January 1967.

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↓ 2008/115/EC recital 24

- (45) This Directive respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union.

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↓ new  
↻ Council

- (46) The purpose of an effective implementation of the return of third-country nationals who do not fulfil or no longer fulfil the conditions for entry, stay or residence in the Member States, in accordance with this Directive, is an essential component of the comprehensive efforts to tackle ~~irregular migration~~ ↻ **illegal immigration** ↻ and represents an important reason of substantial public interest.

(47) Member States' return authorities need to process personal data to ensure the proper implementation of return procedures and the successful enforcement of return decisions. The third countries of return are often not the subject of adequacy decisions adopted by the Commission under Article 45 of Regulation (EU) 2016/679 of the European Parliament and of the Council<sup>11</sup>, ~~or under Article 36 of Directive (EU) 2016/680<sup>12</sup>~~, and have often not concluded or do not intend to conclude a readmission agreement with the Union or otherwise provide for appropriate safeguards within the meaning of Article 46 of Regulation (EU) 2016/679 ~~or within the meaning of the national provisions transposing Article 37 of Directive (EU) 2016/680~~. Despite the extensive efforts of the Union in cooperating with the main countries of origin of illegally staying third-country nationals subject to an obligation to return, it is not always possible to ensure such third countries systematically fulfil the obligation established by international law to readmit their own nationals. Readmission agreements, concluded or being negotiated by the Union or the Member States and providing for appropriate safeguards for the transfer of data to third countries pursuant to Article 46 of Regulation (EU) 2016/679 ~~or pursuant to the national provisions transposing Article 36 of Directive (EU) 2016/680~~, cover a limited number of such third countries. In the situation where such agreements do not exist, personal data should be transferred by Member States' competent authorities for the purposes of implementing the return operations of the Union, in line with the conditions laid down in Article 49(1)(d) of Regulation (EU) 2016/679 ~~or in the national provisions transposing Article 38 of Directive (EU) 2016/680~~.

<sup>11</sup> Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (OJ L 119 4.5.2016, p. 1).

<sup>12</sup> Directive (EU) 2016/680 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA (OJ L 119 4.5.2016, p. 89).

(48) In accordance with Articles 1 and 2 of ~~the Protocol~~ ☒ No 22 ☒ on the position of Denmark annexed to the Treaty on European Union and the Treaty ☒ on the functioning of the European Union ~~☒ establishing the European Community~~, Denmark is not taking part in the adoption of this Directive and is not bound by it or subject to its application. Given that this Directive builds – to the extent that it applies to third-country nationals who do not fulfil or who no longer fulfil the conditions of entry in accordance with ~~the Schengen Borders Code~~<sup>13</sup> ☒ Regulation (EU) 2016/399 of the European Parliament and of the Council<sup>14</sup> ☒ – upon the Schengen acquis~~under the provisions of Title IV of Part Three of the Treaty establishing the European Community~~, Denmark shall, in accordance with Article 5 ☒ 4 ☒ of the said ☒ that ☒ Protocol, decide, within a period of six months after ~~the adoption of~~ ☒ the Council has decided on ☒ this Directive, whether it will implement it in its national law.

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<sup>13</sup> ~~Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code) (OJ L 105, 13.4.2006, p. 1).~~

<sup>14</sup> 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), OJ L 77, 23.3.2016, p. 1.

(49) To the extent that it applies to third-country nationals who do not fulfil or who no longer fulfil the conditions of entry in accordance with ~~the~~ Regulation (EU) 2016/399 ~~the Schengen Borders Code~~, this Directive constitutes a development of ~~the~~ the ~~provisions of the~~ Schengen acquis in which the United Kingdom does not take part, in accordance with Council Decision 2000/365/EC ~~of 29 May 2000 concerning the request of the United Kingdom of Great Britain and Northern Ireland to take part in some of the provisions of the Schengen acquis~~<sup>15</sup>. Moreover, in accordance with Articles 1 and 2 of ~~the~~ Protocol ~~No 21~~ ~~on the position of the United Kingdom and Ireland~~ in respect of the area of freedom, security and justice, ~~annexed to the Treaty on European Union and to the Treaty~~ on the Functioning of the European Union ~~establishing the European Community~~, and without prejudice to Article 4 of ~~the said~~ that ~~that~~ Protocol, the United Kingdom is not taking part in the adoption of this Directive and is ~~therefore~~ not bound by ~~it in its entirety~~ or subject to its application.

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<sup>15</sup> Council Decision 2000/365/EC of 29 May 2000 concerning the request of the United Kingdom of Great Britain and Northern Ireland to take part in some of the provisions of the Schengen acquis (OJ L 131, 1.6.2000, p. 43).



- (50) To the extent that it applies to third-country nationals who do not fulfil or who no longer fulfil the conditions of entry in accordance with ☒ Regulation (EU) 2016/399 ☒ ~~the Schengen Borders Code~~, this Directive constitutes a development of ☒ the ☒ provisions of the Schengen acquis in which Ireland does not take part, in accordance with Council Decision 2002/192/EC of 28 February 2002 concerning Ireland's request to take part in some of the provisions of the Schengen acquis<sup>16</sup>. Moreover, in accordance with Articles 1 and 2 of the Protocol ☒ No 21 ☒ on the position of the United Kingdom and Ireland ☒ in respect of the area of freedom, security and justice, ☒ annexed to the Treaty on European Union and to the Treaty ☒ on the Functioning of the European Union ☒ ~~establishing the European Community~~, and without prejudice to Article 4 of ~~the said~~ ☒ that ☒ Protocol, Ireland is not taking part in the adoption of this Directive and is ~~therefore~~ not bound by ~~it in its entirety~~ or subject to its application.

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<sup>16</sup> Council Decision 2002/192/EC of 28 February 2002 concerning Ireland's request to take part in some of the provisions of the Schengen acquis (OJ L 64, 7.3.2002, p. 20).

(51) As regards Iceland and Norway, this Directive constitutes — to the extent that it applies to third-country nationals who do not fulfil or who no longer fulfil the conditions of entry in accordance with ~~the~~ Regulation (EU) 2016/399 ~~the Schengen Borders Code~~ — a development of ~~the~~ ~~the~~ provisions of the Schengen *acquis* within the meaning of the Agreement concluded by the Council of the European Union and the Republic of Iceland and the Kingdom of Norway concerning the ~~the~~ ~~latters’ association of those two States~~ with the implementation, application and development of the Schengen *acquis*, which fall within the area referred to in Article 1, point C, of Council Decision 1999/437/EC<sup>17</sup> ~~on certain arrangements for the application of that Agreement.~~

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<sup>17</sup> Council Decision 1999/437/EC of 17 May 1999 on certain arrangements for the application of the Agreement concluded by the Council of the European Union and the Republic of Iceland and the Kingdom of Norway concerning the association of those two States with the implementation, application and development of the Schengen *acquis* (OJ L 176, 10.7.1999, p. 31).

(52) As regards Switzerland, this Directive constitutes – to the extent that it applies to third-country nationals who do not fulfil or who no longer fulfil the conditions of entry in accordance with ☒ Regulation (EU) 2016/399 ☒ ~~the Schengen Borders Code~~ – a development of ☒ the ☒ provisions of the Schengen *acquis* within the meaning of the Agreement between the European Union, the European Community and the Swiss Confederation on the Swiss Confederation's association with the implementation, application and development of the Schengen *acquis*<sup>18</sup>, which fall within the area referred to in Article 1, point C, of Decision 1999/437/EC read in conjunction with Article 3 of Council Decision 2008/146/EC<sup>19</sup> ~~on the conclusion, on behalf of the European Community, of that Agreement.~~

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<sup>18</sup> OJ L 53, 27.2.2008, p. 52.

<sup>19</sup> Council Decision 2008/146/EC of 28 January 2008 on the conclusion, on behalf of the European Community, of the Agreement between the European Union, the European Community and the Swiss Confederation on the Swiss Confederation's association with the implementation, application and development of the Schengen *acquis* (OJ L 53, 27.2.2008, p. 1).

- (53) As regards Liechtenstein, this Directive constitutes – to the extent that it applies to third-country nationals who do not fulfil or who no longer fulfil the conditions of entry in accordance with ~~⊗~~ Regulation (EU) 2016/399 ~~⊗~~ ~~the Schengen Borders Code~~ – a development of ~~⊗~~ the ~~⊗~~ provisions of the Schengen *acquis* within the meaning of the Protocol between the European Union, the European Community, the Swiss Confederation and the Principality of Liechtenstein on the accession of the Principality of Liechtenstein to the Agreement between the European Union, the European Community and the Swiss Confederation on the Swiss Confederation's association with the implementation, application and development of the Schengen *acquis*<sup>20</sup>, which fall within the area referred to in Article 1, point C, of Decision 1999/437/EC read in conjunction with Article 3 of Council Decision 2011/350/EU<sup>21</sup> ~~2008/261/EC~~<sup>22</sup> ~~on the signature, on behalf of the European Community, and on the provisional application of, certain provisions of that Protocol.~~

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<sup>20</sup> OJ L 160, 18.6.2011, p. 21

<sup>21</sup> Council Decision 2011/350/EU of 7 March 2011 on the conclusion, on behalf of the European Union, of the Protocol between the European Union, the European Community, the Swiss Confederation and the Principality of Liechtenstein on the accession of the Principality of Liechtenstein to the Agreement between the European Union, the European Community and the Swiss Confederation on the Swiss Confederation's association with the implementation, application and development of the Schengen *acquis*, relating to the abolition of checks at internal borders and movement of persons (OJ L 160, 18.6.2011, p. 19).

<sup>22</sup> OJ L 83, 26.3.2008, p. 3.

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↓ new

- (54) The obligation to transpose this Directive into national law should be confined to those provisions which represent a substantive amendment as compared to the earlier Directive. The obligation to transpose the provisions which are unchanged arises under the earlier Directive.
- (55) This Directive should be without prejudice to the obligations of the Member States relating to the time-limits for the transposition into national law of the Directive set out in Annex I,

HAVE ADOPTED THIS DIRECTIVE:

## CHAPTER I

### GENERAL PROVISIONS

#### *Article 1*

##### **Subject matter**

This Directive 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 ~~Community~~ ☒ Union ☒ law as well as international law, including refugee protection and human rights obligations.

#### *Article 2*

##### **Scope**

1. This Directive applies to third-country nationals staying illegally on the territory of a Member State.

2. Member States may decide not to apply this Directive to third-country nationals who:
- (a) are subject to a refusal of entry in accordance with Article ~~14~~<sup>13</sup> of ~~the~~ Regulation (EU) 2016/399 ~~the Schengen Borders Code~~, or who are apprehended or intercepted by the competent authorities in connection with the irregular crossing by land, sea or air of the external border of a Member State and who have not subsequently obtained an authorisation or a right to stay in that Member State;
  - (b) are subject to return as a criminal law sanction or as a consequence of a criminal law sanction, according to national law, or who are the subject of extradition procedures.
3. This Directive shall not apply to persons enjoying the ~~Community~~ right of free movement ~~the~~ under Union law ~~the~~ as defined in Article 2(5) of ~~the~~ Regulation (EU) 2016/399 ~~the~~ ~~Schengen Borders Code~~.

## Article 3

### Definitions

For the purpose of this Directive the following definitions shall apply:

1. ‘third-country national’ means any person who is not a citizen of the Union within the meaning of Article 20 ~~17(1)~~ of the Treaty ~~on the Functioning of the European Union~~ and who is not a person enjoying the ~~Community~~ right of free movement ~~under Union law~~, as defined in point 5 of Article 2(5) of ~~Regulation (EU) 2016/399~~ ~~the Schengen Borders Code~~;
2. ‘illegal stay’ means the presence on the territory of a Member State, of a third-country national who does not fulfil, or no longer fulfils the conditions of entry as set out in Article ~~65~~ of ~~Regulation (EU) 2016/399~~ ~~the Schengen Borders Code~~ or other conditions for entry, stay or residence in that Member State;



3. 'return' means the process of a third-country national going back – whether in voluntary compliance with an obligation to return, or enforced – to:

~~(a)~~ his or her country of origin, or

~~(b)~~ a country of transit in accordance with ~~Community~~ ☒ Union ☒ or bilateral readmission agreements or other arrangements, or

~~(c)~~ another third country, to which the third-country national concerned voluntarily decides to return and in which he or she will be accepted;

➡ **(d) a third country where the third country national has a right to enter and reside;** ☺

➤ (e) as a last resort, if the return to a third country referred to in points (a) to (d) cannot be enforced due to lack of cooperation in the return process either of the third country or of the third country national, to any third country with which there is an EU or bilateral agreement on the basis of which the third country national is accepted, and is allowed to remain, where international human rights standards according to the International Covenant on Civil and Political Rights are respected, and provided that no international, European or national rules prevent the return. When the return is carried out to a third country, which has a common border with a Member State, the prior agreement of that Member State is required before starting negotiations on any such bilateral agreement. ©

4. ‘return decision’ means an administrative or judicial decision or act, stating or declaring the stay of a third-country national to be illegal and imposing or stating an obligation to return;
5. ‘removal’ means the enforcement of the obligation to return, namely the physical transportation out of the Member State;

6. 'entry ban' means an administrative or judicial decision or act prohibiting entry into and stay on the territory of the Member States for a specified period, ~~accompanying a return decision~~;
7. 'risk of absconding' means the existence of reasons in an individual case which are based on objective criteria defined by law to believe that a third-country national who is the subject of return procedures may abscond;
8. 'voluntary departure' means compliance with the obligation to return within the time-limit fixed for that purpose in the return decision;
9. 'vulnerable persons' means ☞ , *inter alia*, ☞ minors, unaccompanied minors, disabled people, elderly people, pregnant women, single parents with minor children and persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence: ☞ ; ☞

☞ **10. 'other authorisation offering a right to stay' means any document issued by a Member State to a third-country national authorising the stay on its territory, which is not a residence permit within the meaning of Article 2, point 16 of Regulation 2016/399 or a long-stay visa within the meaning of Article 2, point 14 of Regulation 2018/ 1860 (the SIS Return Regulation), and with the exception of the document referred to in Article 6 of the Directive 2013/33/EU. ☞**

## Article 4

### More favourable provisions

1. This Directive shall be without prejudice to more favourable provisions of:
  - (a) bilateral or multilateral agreements between the ~~Community~~ ☒ Union ☒ or the ~~Community~~ ☒ Union ☒ and its Member States and one or more third countries;
  - (b) bilateral or multilateral agreements between one or more Member States and one or more third countries.
2. This Directive shall be without prejudice to any provision which may be more favourable for the third-country national, laid down in the ~~Community~~ ☒ Union ☒ acquis relating to immigration and asylum.
3. This 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.
4. With regard to third-country nationals excluded from the scope of this Directive in accordance with Article 2(2)(a), Member States shall:
  - (a) ensure that their treatment and level of protection are no less favourable than as set out in Article ~~108~~(4) and (5) (limitations on use of coercive measures), Article ~~119~~(2)(a) (postponement of removal), Article ~~1714~~(1)(b) and (d) (emergency health care and taking into account needs of vulnerable persons), and Articles ~~1916~~ and ~~2017~~ (detention conditions) and
  - (b) respect the principle of non-refoulement.

*Article 5*

**Non-refoulement, ☯ proportionality, ☯ best interests of the child, family life and state of health**

When implementing this Directive, Member States shall take due account of:

- (a) the best interests of the child;
- (b) family life;
- (c) the state of health of the third-country national concerned,

and respect the principle of non-refoulement ☯ **and the principle of proportionality** ☯.

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↓ new

→ Council

## Article 6

### Risk of absconding

1. → **When applying this article, the existence of a risk of absconding or the absence of such a risk shall be determined on the basis of an overall assessment of the specific circumstances of the individual case.** ☹ The objective criteria referred to in point 7 of Article 3 shall include at least the following criteria:
  - (a) — ~~lack of documentation proving the identity;~~
  - (b) — ~~lack of residence, fixed abode or reliable address;~~
  - (c) — ~~lack of financial resources;~~
  - (d) illegal entry into the territory of the Member States → **or apprehension or interception in connection with the irregular crossing by land, sea or air of the external border of a Member State** ☹ ;
  - (e) unauthorised movement to the territory of another Member State → **, including following a transit through a third country or the attempts to do so** ☹ ;

- (f) explicit expression of intent of non-compliance with return-related measures applied by virtue of this Directive ~~☞~~ **or actions clearly showing the intention not to comply with such measures** ~~☞~~;
- (g) being subject of a return decision issued by another Member State;
- (h) non-compliance with a return decision ~~☞~~ **within the granted period for voluntary departure** ~~☞~~ ~~, including with an obligation to return within the period for voluntary departure;~~
- (i) non-compliance with ~~☞~~ **Article 8(2) or Article 9(3) of this Directive** ~~☞~~ the requirement of Article 8(2) to go immediately to the territory of another Member State that granted a valid residence permit or other authorisation offering a right to stay;
- (j) not fulfilling the obligation to cooperate with the competent authorities of the Member States at all stages of the return procedures, referred to in Article 7;
- (k) existence of ~~☞~~ **prior** ~~☞~~ conviction for a criminal offence ~~☞~~ **considered as serious in the national law of Member States or for offences, as referred to in Article 2(2) of Framework Decision 2002/584/JHA within the European Union** ~~☞~~ ~~, including for a serious criminal offence in another Member State;~~
- ~~(l) — ongoing criminal investigations and proceedings;~~
- (m) using false or forged identity ~~☞~~ **or travel** ~~☞~~ documents, ~~☞~~ **residence permits or visas, or documents justifying the conditions of entry,** ~~☞~~ destroying or otherwise disposing of ~~☞~~ **such** ~~☞~~ existing documents, ~~☞~~ **using aliases with fraudulent intent, providing other false information in an oral or written form** ~~☞~~ or refusing to provide ~~☞~~ **biometric data** ~~☞~~ fingerprints as required by Union or national law ~~☞~~ ~~, or otherwise fraudulently opposing the return procedures~~ ~~☞~~;

(n) opposing violently ~~or fraudulently~~ the return procedures;

(o) ~~not complying with a measure aimed at preventing the risk of absconding referred to in Article 9(3);~~

(p) not complying with an existing ➔ valid entry ban.

➔ (r) risk to public order, public security or national security. ➔

➔ Member States may provide for additional objective criteria in their national legislation, such as lack of documentation proving the identity or ongoing criminal investigations or proceedings for criminal offence. ➔

2. ~~The existence of a risk of absconding shall be determined on the basis of an overall assessment of the specific circumstances of the individual case, taking into account the objective criteria referred to in paragraph 1.~~

~~However,~~ Member States shall establish that a risk of absconding is presumed in an individual case, unless proven otherwise, when one of the objective criteria referred to in points ➔ (f), ➔ (m), (n), ~~(o)~~ and (p) of paragraph 1 is fulfilled.

➔ Member States may establish in their national law that a risk of absconding is presumed in an individual case, unless proven otherwise, when one of the objective criteria referred to in points (d), (e), (g), (h), (k), (i), (j), (r) of paragraph 1 is fulfilled. ➔



## Article 7

### Obligation to cooperate

1. Member States shall impose on third-country nationals the obligation to cooperate with the competent authorities of the Member States at all stages of the return procedures. That obligation shall include ~~the following~~ in particular:
  - (a) the duty to provide all the elements that are necessary for establishing or verifying identity ➡, **and to prove the efforts made if requested** ⬅;
  - (b) the duty to provide information on the third countries transited;
  - (c) the duty to ➡ **provide a reliable address to the competent authorities, in the form and within the timeframe established by national law, and to** ⬅ remain present and available throughout the procedures;
  - (d) the duty to lodge to the competent authorities of third countries a request for obtaining a valid travel document- ➡ **and to provide all information and statements necessary to obtain such a document and to cooperate with these authorities;** ⬅
  - ➡ e) **to appear in person, if and where required for this purpose, before the competent national and third country authorities.** ⬅

2. The elements referred to in point (a) of paragraph 1 shall include the third-country nationals' statements and documentation in their possession regarding the identity, nationality or nationalities, age ➡ **date of birth and place of birth** ⬅, country or countries and place or places of previous residence, travel routes and travel documentation ➡ **, as well as biometric data** ⬅.
3. Member States shall inform the third-country nationals about ➡ **their obligations referred to in paragraph 1 and** ⬅ the consequences of not complying with ➡ **them** ⬅ ~~the obligation referred to in paragraph 1~~ ➡ **, including the penalties under national law where provided for by Member States, consistent with the rule of law principles** ⬅. ➡ **Member States shall establish modalities for providing such information.** ⬅

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↓ 2008/115/EC (adapted)

⇒ new

⇒ Council

## CHAPTER II

### TERMINATION OF ILLEGAL STAY

#### *Article ~~86~~*

#### **Return decision**

1. Member States shall issue a return decision to any third-country national staying illegally on their territory, without prejudice to the exceptions referred to in paragraphs 2 to 5 **⇒ and in paragraph 7 and to the situation referred to in Article 13(2)** **⇒ The third country national shall comply with this decision.** **⇒**
2. **⇒ Without prejudice to Regulation (EU) 604/2013, t** **⇒** third-country nationals staying illegally on the territory of a Member State and holding a valid residence permit or **⇒ long-stay visa** **⇒** ~~other authorisation offering a right to stay~~ issued by another Member State shall be required to go to the territory of that other Member State immediately. ~~In the event of non-compliance by the third-country national concerned with this requirement, or w~~  
  
**⇒ W** **⇒** where the third-country national's immediate departure is required for reasons of public **⇒ order,** **⇒** ~~policy~~ **⇒ public security** **⇒** or national security, paragraph 1 shall apply.

➡ In the event of non-compliance by the third-country national concerned with this requirement, paragraph 1 shall apply and the Member State that issued the return decision shall start a consultation in accordance with Article 10 of Regulation (EU) 2018/1860 on the use of the Schengen Information System (SIS) for return of illegally staying third country nationals. ©

➡ When the Member State that issued the residence permit or long-stay visa notifies to the Member State that issued the return decision that it is maintaining that permit or long-stay visa, or when it does not take a decision within the period set by letter (e) of Article 10 of Regulation (EU) 2018/1860, that Member State shall be obliged to admit the third-country national into its territory. ©

➡ When the Member State that issued the residence permit or long-stay visa notifies to the Member State that issued the return decision that it is not maintaining that permit or long-stay visa, the Member State that issued the return decision shall take the necessary measures to enforce that decision. ©

➡ **2a Without prejudice to Regulation (EU) 604/2013, third-country nationals staying illegally on the territory of a Member State and holding other authorisation offering a right to stay issued by another Member State shall be required to go to the territory of that other Member State immediately. In the event of non-compliance by the third-country national concerned with this requirement, or where the third-country national's immediate departure is required for reasons of public order, public policy or national security, paragraph 1 shall apply.** Ⓒ

3. Member States may refrain from issuing a return decision to a third-country national staying illegally on their territory if the third-country national concerned is taken back by another Member State under bilateral agreements or arrangements existing on ☒ 13 January 2009 ~~☒ the date of entry into force of this Directive~~. In such a case the Member State which has taken back the third-country national concerned shall apply paragraph 1.

4. Member States may at any moment decide to grant an autonomous residence permit ☞, **long-stay visa** ☞ or other authorisation offering a right to stay for compassionate, humanitarian or other reasons to a third-country national staying illegally on their territory. In that event no return decision shall be issued. Where a return decision has already been issued, it shall be withdrawn or suspended for the duration of validity of the residence permit ☞, **long-stay visa** ☞ or other authorisation offering a right to stay.
5. If a third-country national staying illegally on the territory of a Member State is the subject of a pending procedure for renewing his or her residence permit ☞, **long-stay visa** ☞ or other authorisation offering a right to stay, that Member State shall consider refraining from issuing a return decision, until the pending procedure is finished, ~~without prejudice to paragraph 6.~~

6. ⇒ Member States shall issue a return decision immediately after the adoption of a decision ending ☒ as provided for in their national legislation: ☐

☒ (a) in the same act with the decision ending or refusing ☐ a legal stay of a third-country national, including a decision not granting a third-country national refugee status or subsidiary protection status in accordance with Regulation (EU) .../... [Qualification Regulation]: ☐ , or ☐

☒ (b) together with or without undue delay after the adoption of a decision ending or refusing a legal stay of a third-country national including a decision not granting a third-country national refugee status or subsidiary protection status in accordance with Regulation (EU) .../... [Qualification Regulation], ☐

This Directive shall not prevent Member States from adopting a ☒ return ☐ decision ~~on the ending of a legal stay~~ together with a ~~return decision and/or~~ ☒ a decision ending a legal stay of a third-country national, ☐ a decision on a removal and/or entry ban in a single administrative or judicial decision or act as provided for in their national legislation, ~~without prejudice to the procedural safeguards available under Chapter III and under other relevant provisions of Community and national law.~~

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↓ new

↻ Council

The first and second subparagraphs are ↻ **This paragraph is** ↻ without prejudice to the safeguards under Chapter III and under other relevant provisions of Union and national law.

↻ **In particular, Member States shall ensure that the legal effects of a return decision are suspended pending the outcome of an appeal lodged in accordance with [Article 53 of Regulation (EU) .../... *Asylum Procedure Regulation*] where the third country national is authorized to remain on the territory of the Member State concerned in accordance with [Article 54(1) or 54 (2b) of Regulation (EU).../...*Asylum Procedure Regulation*].** ↻

↻ **7. Member States may recognise any return decision issued in accordance with paragraph 1 by competent authorities of other Member States in accordance with Council Directive 2001/40/EC. In such cases, the return is carried out according to the applicable legislation of the Member State which carries out the return procedure.** ↻



⇒ (8) Member States shall, where necessary, cooperate through designated contact points, for the purpose of facilitating the implementation of return decisions. In particular Member States may cooperate by means of allowing transit through the territory of another Member State for the purpose of complying with a return decision or obtaining travel documents. The modalities of such a cooperation may be set out in bilateral or multilateral arrangements or agreements and may include conditions concerning the escorting, deadlines for reply and associated costs. ↻

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↓ 2008/115/EC

⇒ new

#### *Article 97*

### **Voluntary departure**

1. A return decision shall provide for an appropriate period for voluntary departure of ~~between seven and~~ ⇒ up to ⇐ thirty days, without prejudice to the exception referred to in paragraphs 2 and 4. Member States may provide in their national legislation that such a period shall be granted only following an application by the third-country national concerned. In such a case, Member States shall inform the third-country nationals concerned of the possibility of submitting such an application.

The time period provided for in the first subparagraph shall not exclude the possibility for the third-country nationals concerned to leave earlier.

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↓ new

The length of the period for voluntary departure shall be determined with due regard to the specific circumstances of the individual case, taking into account in particular the prospect of return.

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↓ 2008/115/EC (adapted)

⇒ new

↻ Council

2. Member States shall, where necessary, extend the period for voluntary departure by an appropriate period, taking into account the specific circumstances of the individual case, such as the length of stay, the existence of children attending school and the existence of other family and social links.
3. Certain obligations aimed at avoiding the risk of absconding, such as regular reporting to the authorities, deposit of an adequate financial guarantee, submission of documents or the obligation to stay at a certain place may be imposed for the duration of the period for voluntary departure.

4. **⇒** Without prejudice to the possibility for the third-country national concerned to voluntarily comply with an obligation to return and to be granted support in accordance with Art. 14 (3), **⊖** Member States shall not grant a period for voluntary departure in **⇒** the **⊖** following cases: **⇐**

(a) ~~if~~ **⊗** where **⊗** there is a risk of absconding **⇒** determined in accordance with Article 6 **⇐** <sub>22</sub>

~~(b) or if~~ **⊗** where ~~an~~ **⊗** an application for a legal stay has been dismissed as manifestly unfounded or fraudulent;<sub>22</sub>

~~(c)~~ **⇒** (b) where the third-country national concerned poses a risk to public order, public security or national security. **⊖** ~~or if~~ **⊗** where ~~the person~~ **⊗** third-country national ~~concerned poses a risk to public policy, public security or national security;~~ **⊖** ~~Member States may refrain from granting a period for voluntary departure, or may grant a period shorter than seven days.~~

**⇒** Member States may refrain from granting a period for voluntary departure **⊖** ~~(b)~~ ~~or~~ **⊗** where **⊗** an application for a legal stay has been dismissed as manifestly unfounded or fraudulent;<sub>22</sub> **⇒** or inadmissible. **⊖**

**⇒** Member States may decide not to apply this paragraph to minors and families with children. **⊖**

*Article ~~108~~*

**Removal**

1. Member States shall take all necessary measures to enforce the return decision if no period for voluntary departure has been granted in accordance with Article ~~97~~(4) or if the obligation to return has not been complied with within the period for voluntary departure granted in accordance with Article ~~97~~. ⇒ Those measures shall include all ➡ **actions** ◯ ~~measures~~ necessary to confirm the identity of illegally staying third-country nationals who do not hold a valid travel document and to obtain such a document ➡ **including the penalties under national law where provided for by Member States, consistent with the rule of law principles** ◯. ⇐
2. If a Member State has granted a period for voluntary departure in accordance with Article ~~97~~, the return decision may be enforced only after the period has expired, unless a risk as referred to in Article ~~97~~(4) arises during that period.

3. Member States may adopt a separate administrative or judicial decision or act ordering the removal.
4. Where Member States use – as a last resort – coercive measures to carry out the removal of a third-country national who resists removal, such measures shall be proportionate and shall not exceed reasonable force. They shall be implemented as provided for in national legislation in accordance with fundamental rights and with due respect for the dignity and physical integrity of the third-country national concerned.
5. In carrying out removals by air, Member States shall take into account the Common Guidelines on security provisions for joint removals by air annexed to Decision 2004/573/EC.
6. Member States shall provide for an effective forced-return monitoring system.

**⇒ 7. Member States may decide that costs associated with removal, including detention in accordance with Articles 18 and 22, are borne by the third-country national concerned or another person or entity that has signed a declaration of commitment facilitating the prior entry and stay in the European Union. ⇐**

*Article ~~119~~*

**Postponement of removal**

1. Member States shall postpone removal:
  - (a) when it would violate the principle of non-refoulement, or
  - (b) for as long as a suspensory effect is granted in accordance with Article ~~1613(2)~~.
2. Member States may postpone removal for an appropriate period taking into account the specific circumstances of the individual case. Member States shall in particular take into account:
  - (a) the third-country national's physical state or mental capacity;
  - (b) technical reasons, such as lack of transport capacity, or failure of the removal due to lack of identification.
3. If a removal is postponed as provided for in paragraphs 1 and 2, the obligations set out in Article ~~97~~(3) may be imposed on the third-country national concerned.

*Article ~~1240~~*

**Return and removal of unaccompanied minors**

1. Before deciding to issue a return decision in respect of an unaccompanied minor, assistance by appropriate bodies other than the authorities enforcing return shall be granted with due consideration being given to the best interests of the child.
2. Before removing an unaccompanied minor from the territory of a Member State, the authorities of that Member State shall be satisfied that he or she will be returned to a member of his or her family, a nominated guardian or adequate reception facilities in the State of return.

*Article ~~1344~~*

**Entry ban**

1. Return decisions shall be accompanied by an entry ban:
  - (a) if no period for voluntary departure has been granted, or
  - (b) if the obligation to return has not been complied with.

In other cases return decisions may be accompanied by an entry ban ➞ **, including if the third country national benefits from reintegration assistance** ➞.

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↓ new

→ Council

2. Member States may impose an entry ban, which does not accompany a return decision, to a third-country national who has been illegally staying in the territory of the Member States and whose illegal stay is detected in connection with border checks carried out at exit in accordance with Article 8 of Regulation (EU) 2016/399, where justified on the basis of the specific circumstances of the individual case and taking into account the principle of proportionality →, **and avoiding as much as possible to postpone the departure of the third-country national concerned** ↻.
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↓ 2008/115/EC

⇒ new

→ Council

32. The length of the entry ban shall be determined with due regard to all relevant circumstances of the individual case and shall not in principle exceed ~~five~~ → **ten** ↻ years. It may however exceed ~~five~~ → **ten** ↻ years if the third-country national represents a serious threat to public ~~policy~~ → **order** ↻, public security or national security.



43. Member States shall consider withdrawing **➡, shortening** **⬅** or suspending an entry ban where a third-country national who is the subject of an entry ban issued in accordance with paragraph 1, second subparagraph, can demonstrate that he or she has left the territory of a Member State in full compliance with a return decision.

**➡ Member States may make the withdrawal or suspension of entry ban subject to the payment by a third-country national concerned of the costs resulting from the decision, taken in accordance with paragraph 7 of Article 10. ⬅**

Victims of trafficking in human beings who have been granted a residence permit pursuant to Council Directive 2004/81/EC of 29 April 2004 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities<sup>23</sup> shall not be subject of an entry ban without prejudice to paragraph 1, first subparagraph, point (b), and provided that the third-country national concerned does not represent a threat to public policy **➡ order** **⬅**, public security or national security.

Member States may refrain from issuing, withdraw or suspend an entry ban in individual cases for humanitarian reasons.

Member States may withdraw or suspend an entry ban in individual cases or certain categories of cases for other reasons.

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<sup>23</sup> Council Directive 2004/81/EC of 29 April 2004 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities (OJ L 261, 6.8.2004, p. 19).

~~54.~~ Where a Member State is considering issuing a residence permit or other authorisation offering a right to stay to a third-country national who is the subject of an entry ban issued by another Member State, it shall first consult the Member State having issued the entry ban and shall take account of its interests in accordance with Article 25 of the Convention implementing the Schengen Agreement<sup>24</sup> ~~⇒~~ in accordance with Article 27 of Regulation (EU) 2018/XXX<sup>25</sup> ~~↔~~.

~~65.~~ Paragraphs 1 to ~~54~~ shall apply without prejudice to the right to international protection, as defined in point (a) of Article 2(a) of Directive 2011/95/EU Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted<sup>26</sup>, in the Member States.

<sup>24</sup> ~~OJ L 239, 22.9.2000, p. 19.~~

<sup>25</sup> ~~Regulation (EU) 2018/... of the European Parliament and of the Council of [...] on the establishment, operation and use of the Schengen Information System (SIS) in the field of border checks, and amending the Convention implementing the Schengen Agreement, and amending and repealing Regulation (EC) No 1987/2006 [adoption pending].~~

<sup>26</sup> ~~Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted (OJ L 304, 30.9.2004, p. 12).~~

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↓ new

🔄 Council

## Article 14

### Return Management

1. Each Member State shall set up, operate, maintain and further develop a national return management system, which shall process all the necessary information for implementing this Directive, in particular as regards the management of individual cases as well as of any return-related procedure.
2. The national system shall be set up in a way which ensures technical compatibility allowing for communication with the ~~central system~~ ➞ **platform** ⚙ established in accordance with Article 50 of Regulation (EU) .../... [EBCG Regulation].
3. Member States shall establish programmes for ➞ **supporting the voluntary return of illegally staying third-country nationals who are nationals of third countries listed in Annex I to Regulation 2018/1806<sup>27</sup>** ⚙ ~~providing logistical, financial and other material or in-kind assistance;~~ ➞ **set up** ⚙ in accordance with ➞ **national laws, regulations and administrative provisions** ⚙ ~~national legislation, for the purpose of supporting the return of illegally staying third-country nationals who are nationals of third countries listed in Annex I to Council Regulation 539/2001<sup>28</sup>.~~

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<sup>27</sup> Regulation (EU) 2018/1806 of the European Parliament and of the Council of 14 November 2018 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement (OJ L 303, 28.11.2018, p. 39). ~~Council Regulation (EC) No 539/2001 of 15 March 2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement (OJ L 81, 21.3.2001, p. 1).~~

<sup>28</sup> ~~Council Regulation (EC) No 539/2001 of 15 March 2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement (OJ L 81, 21.3.2001, p. 1).~~

Such **➤** programmes may consist of logistical, financial and other material or in-kind assistance including support for reintegration in the third country of return **☞** ~~assistance may include support for reintegration in the third country of return.~~

The granting of such assistance, including its kind and extent, ~~shall be subject to~~ **➤** may take into account **☞** the cooperation of the third-country national concerned with the competent authorities of the Member States as provided for in Article 7 of this Directive **➤** and may be subject to conditions and grounds for exclusion as set out in national laws, regulations or administrative provisions, in particular concerning assistance for reintegration in the third country of return **☞**.

**➤** The assistance referred to in this paragraph shall not be granted as a rule to the third-country national who has already benefited from reintegration assistance provided by a Member State. **☞**

## CHAPTER III

### PROCEDURAL SAFEGUARDS

#### *Article ~~1542~~*

#### **Form**

1. Return decisions and, if issued, entry-ban decisions and decisions on removal shall be issued in writing and give reasons in fact and in law as well as information about available legal remedies.

The information on reasons in fact may be limited where national law allows for the right to information to be restricted, in particular in order to safeguard national security, defence, public security and for the prevention, investigation, detection and prosecution of criminal offences.

2. Member States shall provide, upon request, a written or oral translation of the main elements of decisions related to return, as referred to in paragraph 1, including information on the available legal remedies in a language the third-country national understands or may reasonably be presumed to understand.

3. Member States may decide not to apply paragraph 2 to third country nationals who have illegally entered the territory of a Member State and who have not subsequently obtained an authorisation or a right to stay in that Member State.

In such cases decisions related to return, as referred to in paragraph 1, shall be given by means of a standard form as set out under national legislation.

Member States shall make available generalised information sheets explaining the main elements of the standard form in at least five of those languages which are most frequently used or understood by illegal migrants entering the Member State concerned.

#### *Article ~~16~~<sup>13</sup>*

#### **Remedies**

1. ~~The~~ <sup>T</sup> ~~third-country national concerned shall be afforded an effective remedy to appeal against or seek review of decisions related to return, as referred to in Article ~~15~~<sup>12</sup>(1), before a competent~~ <sup>court or tribunal</sup> ~~judicial or administrative authority or a competent body composed of members who are impartial and who enjoy safeguards of independence.~~

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↓ new

The third-country national concerned shall be granted the right to appeal before a single level of jurisdiction against the return decision where that decision is based on a decision rejecting an application for international protection taken in accordance with Regulation EU) .../... [Asylum Procedure Regulation] that was subject to an effective judicial review in accordance with Article 53 of that Regulation.

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↓ 2008/115/EC

⇒ new

☞ Council

2. The ⇒ judicial ⇐ authority or body mentioned in paragraph 1 shall have the power to review decisions related to return, as referred to in Article 1512(1), including the possibility of temporarily suspending their enforcement, unless a temporary suspension is already applicable under national legislation.

☞ **2. To comply with the principle of an effective remedy, third-country nationals shall be granted the right to appeal against return decisions before at least one level of jurisdiction.** ☞

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↓ new

🔄 Council

3. The enforcement of the return decision shall be automatically suspended during the period for bringing the appeal at first instance and, where that appeal has been lodged within the set period, during the examination of the appeal, where there is a risk to breach the principle of non-refoulement. Should a further appeal against a first or subsequent appeal decision be lodged, and in all other cases, the enforcement of the return decision shall not be suspended unless a court or tribunal decides otherwise taking into due account the specific circumstances of the individual case upon the applicant's request or acting ex officio.

Member States shall ensure that a decision on the request for temporary suspension of the enforcement of a return decision is taken within 48 hours from the lodging of such a request by the third-country national concerned. In individual cases involving complex issues of fact or law, the time-limits set out in this paragraph may be extended, as appropriate, by the competent judicial authority.

Where no relevant new elements or findings have arisen or have been presented by the third-country national concerned which significantly modify the specific circumstances of the individual case, the first and the second subparagraphs of this paragraph shall not apply where:



(a) — the reason for temporary suspension referred thereto was assessed in the context of a procedure carried out in application of Regulation (EU) .../... [*Asylum Procedure Regulation*] and was subject to an effective judicial review in accordance with Article 53 of that Regulation;

(b) — the return decision is the consequence of the decision on ending the legal stay that has been taken following such procedures.

➔ **3. Member States shall provide in their national legislation for the shortest time limit to appeal against a return decision, which cannot exceed 14 days. Such time limits shall start to run from the date when the return decision is notified to the third-country national or to his or her legal representative, or from another date set in accordance with national law notably when the third-country national concerned absconded.** ☹

➔ **Where the return decision is based on or issued in the same act with a decision not granting a third-country national refugee status or subsidiary protection status in accordance with Regulation (EU) .../... [*Qualification Regulation*], the time limits to appeal the return decision shall be those laid down in national law in accordance with [Article 53(6) of *Asylum Procedure Regulation*].** ☹

➔ **Where the return decision is based on or issued in the same act with a decision ending or refusing a legal stay, by way of derogation from the first subparagraph, the time limits to appeal the return decision may be those laid down in national law, but which shall not exceed 30 days.** ☹

~~4. Member States shall establish reasonable time limits and other necessary rules to ensure the exercise of the right to an effective remedy pursuant to this Article.~~

~~Member States shall grant a period not exceeding five days to lodge an appeal against a return decision when such a decision is the consequence of a final decision rejecting an application for international protection taken in accordance with Regulation (EU) .../... [Asylum Procedure Regulation].~~

⇒ **4. Member States shall take measures to ensure that the court or tribunal concludes examination of the appeal within the shortest possible period of time.** ☹

⇒ **4a. Member States shall ensure that the compliance with the requirements arising from the respect of the principle of non-refoulement is verified by the court or tribunal, at the request of the third-country national or ex-officio, in the context of an appeal lodged in accordance with paragraph 1, unless such compliance had been verified by a court or tribunal in the context of a procedure carried out in application of Regulation (EU) /... [Asylum Procedure Regulation] and no new relevant elements or findings have arisen or have been presented by the third country national, in relation to the respect of the principle of non-refoulement which significantly modify the specific circumstances of the individual case.** ☹

⇒ **4b Member States may provide for administrative review proceedings prior to an appeal before a court or tribunal according to paragraph 1, provided that the administrative review does not affect the efficiency of the remedy.** ☹

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↓ 2008/115/EC

⇒ Council

53. The third-country national concerned shall have the possibility to obtain legal ~~advice~~  
⇒ **assistance** ⇐ , representation and, where necessary, linguistic assistance.

64. Member States shall ensure that the necessary legal assistance and/or representation is granted on request free of charge in accordance with relevant national legislation or rules regarding legal aid, and may provide that such free legal assistance and/or representation is subject to conditions as set out in ⇒ **Regulation (EU) .../... [Asylum Procedure Regulation]** ⇐  
~~Article 15(3) to (6) of Directive 2005/85/EC.~~

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⇐ Council

⇒ Council

⇒ **Article 16a** ⇐

⇒ **Suspensive effect** ⇐

⇒ **1. Member States shall provide for either the automatic suspension of the enforcement of a return decision or for the power of a court or tribunal to suspend the enforcement of a return decision at the request of the third-country national concerned or ex officio, during the appeal proceedings at first instance.** ⇐

- ⇒ 2. In any case, Member States shall provide that the enforcement of the return decision is suspended where there may be a risk of the breach of the principle of non-refoulement. ©
- ⇒ 3. In other cases Member States may decide to suspend the enforcement of a return decision during the appeal proceedings at first instance. ©
- ⇒ 4. Where the Member States provide for a possibility to suspend the enforcement of the return decision upon request, Member States shall provide in their national legislation for the shortest time limits to lodge a request to suspend the enforcement of a return decision, which in any case cannot exceed the time limits for lodging the appeal set out in Article 16. Member States shall ensure that a decision on the request for suspension of the enforcement of a return decision is taken within the shortest time possible from the lodging of such a request by the third-country national concerned. ©
- ⇒ 5. The enforcement of a return decision shall not be suspended when the third-country national lodges a subsequent appeal, except for cases for which Member States decide to grant such a suspension in national law. ©
- ⇒ In such cases Member States shall ensure that a decision on the request for suspension of the enforcement of a return decision is taken within the shortest time possible from the lodging of such a request by the third-country national concerned. ©

*Article ~~17~~<sup>14</sup>*

**Safeguards pending return**

1. Member States shall, with the exception of the situation covered in Articles ~~19~~<sup>16</sup> and ~~20~~<sup>17</sup>, ensure that the following principles are taken into account as far as possible in relation to third-country nationals during the period for voluntary departure granted in accordance with Article ~~9~~<sup>7</sup> and during periods for which removal has been postponed in accordance with Article ~~11~~<sup>9</sup>:
  - (a) family unity with family members present in their territory is maintained;
  - (b) emergency health care and essential treatment of illness are provided;
  - (c) minors are granted access to the basic education system subject to the length of their stay;
  - (d) special needs of vulnerable persons are taken into account.
2. Member States shall provide the persons referred to in paragraph 1 with a written confirmation in accordance with national legislation that the period for voluntary departure has been extended in accordance with Article ~~9~~<sup>7</sup>(2) or that the return decision will temporarily not be enforced.

## CHAPTER IV

### DETENTION FOR THE PURPOSE OF REMOVAL

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↓ 2008/115/EC (adapted)

⇒ new

*Article ~~1845~~*

#### Detention

1. Unless other sufficient but less coercive measures can be applied effectively in a specific case, Member States may ~~only~~ keep in detention a third-country national who is the subject of return procedures in order to prepare the return and/or carry out the removal process, in particular when:
    - (a) there is a risk of absconding ⇒ determined in accordance with Article 6; ⇐ ~~or~~
    - (b) the third-country national concerned avoids or hampers the preparation of return or the removal process; ~~or~~ ☒ or ☒
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↓ new

⇒ Council

- (c) the third-country national concerned poses a risk to public ~~policy~~ ⇒ order ⇐ , public security or national security.

All grounds for detention shall be laid down in national law.

Any detention shall be for as short a period as possible and only maintained as long as removal arrangements are in progress and executed with due diligence.

2. Detention shall be ordered by administrative or judicial authorities.

Detention shall be ordered in writing with reasons being given in fact and in law.

When detention has been ordered by administrative authorities, Member States shall

→ **ensure a judicial review of all relevant facts, evidence and observations submitted in the course of the proceedings by** →:

- (a) either ~~provide~~ → **providing** → for a speedy judicial review of the lawfulness of detention to be decided on as speedily as possible from the beginning of detention;
- (b) or ~~grant~~ → **granting** → the third-country national concerned the right to take proceedings by means of which the lawfulness of detention shall be subject to a speedy judicial review to be decided on as speedily as possible after the launch of the relevant proceedings. In such a case Member States shall immediately inform the third-country national concerned about the possibility of taking such proceedings.

The third-country national concerned shall be released immediately if the detention is not lawful.

3. In every case, detention shall be reviewed at reasonable intervals of time either on application by the third-country national concerned or ex officio. In the case of prolonged detention periods, reviews shall be subject to the supervision of a judicial authority.
4. When it appears that a reasonable prospect of removal no longer exists for legal or other considerations or the conditions laid down in paragraph 1 no longer exist, detention ceases to be justified and the person concerned shall be released immediately.

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↓ 2008/115/EC (adapted)

⇒ new

☞ Council

5. Detention shall be maintained for as long a period as the conditions laid down in paragraph 1 are fulfilled and it is necessary to ensure successful removal. Each Member State shall set a ~~limited~~ ⇒ maximum ⇐ period of detention, ~~which may not exceed~~ ⇒ of not less than three months and not more than ⇐ six months. ☞ **Where national law allows for detention of minors, shorter periods of detention can be foreseen in such cases.** ☹



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↓ 2008/115/EC

→ Council

6. Member States may not extend the period referred to in paragraph 5 except for a limited period not exceeding a further twelve months in accordance with national law in cases where regardless of all their reasonable efforts the removal operation is likely to last longer owing to:
- (a) a lack of cooperation by the third-country national concerned, or
  - (b) delays in obtaining the necessary documentation from third countries.

### Conditions of detention

1. Detention shall take place ~~as a rule~~ ➔ generally ⬅ in specialised detention facilities. Where a Member State cannot provide accommodation in a specialised detention facility and is obliged to resort to prison accommodation, the third-country nationals in detention shall be kept separated from ordinary prisoners.
2. Third-country nationals in detention shall be allowed – on request – to establish in due time contact with legal representatives, family members and competent consular authorities.
3. Particular attention shall be paid to the situation of vulnerable persons. Emergency health care and essential treatment of illness shall be provided.
4. Relevant and competent national, international and non-governmental organisations and bodies shall have the possibility to visit detention facilities, as referred to in paragraph 1, to the extent that they are being used for detaining third-country nationals in accordance with this Chapter. Such visits may be subject to authorisation.
5. Third-country nationals kept in detention shall be systematically provided with information which explains the rules applied in the facility and sets out their rights and obligations. Such information shall include information on their entitlement under national law to contact the organisations and bodies referred to in paragraph 4.

**Detention of minors and families**

1. Unaccompanied minors and families with minors shall only be detained as a measure of last resort and for the shortest appropriate period of time.
2. Families detained pending removal shall be provided with separate accommodation guaranteeing adequate privacy.
3. Minors in detention shall have the possibility to engage in leisure activities, including play and recreational activities appropriate to their age, and shall have, depending on the length of their stay, access to education.
4. Unaccompanied minors shall as far as possible be provided with accommodation in institutions provided with personnel and facilities which take into account the needs of persons of their age.
5. The best interests of the child shall be a primary consideration in the context of the detention of minors pending removal.

### **Emergency situations**

1. In situations where an exceptionally large number of third-country nationals to be returned places an unforeseen heavy burden on the capacity of the detention facilities of a Member State or on its administrative or judicial staff, such a Member State may, as long as the exceptional situation persists, decide to allow for periods for judicial review longer than those provided for under the third subparagraph of Article ~~18~~<sup>15</sup>(2) and to take urgent measures in respect of the conditions of detention derogating from those set out in Articles ~~19~~<sup>16</sup>(1) and ~~20~~<sup>17</sup>(2).
2. When resorting to such exceptional measures, the Member State concerned shall inform the Commission. It shall also inform the Commission as soon as the reasons for applying these exceptional measures have ceased to exist.
3. Nothing in this Article shall be interpreted as allowing Member States to derogate from their general obligation to take all appropriate measures, whether general or particular, to ensure fulfilment of their obligations under this Directive.

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↓ new

→ Council

## CHAPTER V

### BORDER PROCEDURE

#### Article 22

#### Border procedure

1. **→ Where a decision rejecting an application for international protection is taken by the determining authority by virtue of [Article 41 of Regulation (EU) .../... *Asylum Procedure Regulation*], Member States shall issue a return decision to the third country nationals concerned, without prejudice to paragraph 9. → Member States shall establish return procedures applicable to illegally staying third-country nationals subject to an obligation to return following a decision rejecting an application for international protection taken by virtue of Article 41 of Regulation (EU) .../... [*Asylum Procedure Regulation*].**
2. ~~Except where otherwise provided in this Chapter, the provisions of Chapters II, III and IV apply to return procedures carried out in accordance with paragraph 1.~~

3. **➡ The provisions of Chapters I, II, III and IV do not apply to procedures carried out in accordance with paragraph 1, except for articles [ 3, 4, 5, 7, 8(1), 8(6), 10, 11, 12, 13, 16, 16a, 17, 18(2) to (4), 19, 20 and 21].** **⬅ Return decisions issued in return procedures carried out in accordance with paragraph 1 of this Article shall be given by means of a standard form as set out under national legislation, in accordance with Article 15(3).**
4. **➡ Without prejudice to the possibility for the third-country national concerned to voluntarily comply with a return decision a period for voluntary departure shall not be granted. Member States may however grant an appropriate period for voluntary departure in accordance with Article 9 to third-country nationals holding a valid travel document and fulfilling the obligation to cooperate with the competent authorities of the Member States at all stages of the return procedures set out in Article 7. Member States shall require the third-country nationals concerned to hand over the valid travel document to the competent authority until departure.** **⬅ A period for voluntary departure shall not be granted. Member States shall however grant an appropriate period for voluntary departure in accordance with Article 9 to third-country nationals holding a valid travel document and fulfilling the obligation to cooperate with the competent authorities of the Member States at all stages of the return procedures established in accordance with Article 7. Member States shall require the third-country nationals concerned to hand over the valid travel document to the competent authority until departure.**

5. ➡ **Member States shall provide in their national legislation for the shortest time limits to lodge an appeal against a return decision referred to in paragraph 1, which shall be no shorter than 48 hours and no longer than one week.** ⬅ Member States shall grant a period not exceeding 48 hours to lodge an appeal against the return decisions based on a final decision rejecting an application for international protection taken by virtue of Article 41 of Regulation (EU) .../... [*Asylum Procedure Regulation*] at the border or in transit zones of the Member States.
6. ➡ **Member States shall take the measures to ensure that the court or tribunal concludes the examination of the appeal at the same time, or within the shortest possible period of time after the conclusion of the asylum appeal proceedings at first instance in accordance with [Article 41 of Regulation (EU) .../... *Asylum Procedure Regulation*].** ⬅ The enforcement of a return decision during the period for bringing the appeal at first instance and, where that appeal has been lodged within the period established, during the examination of the appeal, shall be automatically suspended where there is a risk of breach of the principle of non-refoulement and one of the following two conditions applies:
- (a) — new elements or findings have arisen or have been presented by the third-country national concerned after a decision rejecting an application for international protection taken by virtue of Article 41 of Regulation (EU) .../... [*Asylum Procedure Regulation*], which significantly modify the specific circumstances of the individual case; or
  - (b) — the decision rejecting an application for international protection taken by virtue of Article 41 of Regulation (EU) .../... [*Asylum Procedure Regulation*] was not subject to an effective judicial review in accordance with Article 53 of that Regulation.

Where a further appeal against a first or subsequent appeal decision is lodged, and in all other cases, the enforcement of the return decision shall not be suspended unless a court or tribunal decides otherwise taking into account the specific circumstances of the individual case upon the applicant's request or acting ex officio.

Member States shall provide that a decision on the request by the person concerned for a temporary suspension of the enforcement of a return decision shall be taken within 48 hours from the lodging of such a request by the third-country national concerned. In individual cases involving complex issues of fact or law, the time limits set out in this paragraph may be extended as appropriate by the competent judicial authority.

7. In order to prepare the return or carry out the removal process, or both, Member States may keep in detention a third-country national who has been detained in accordance with point (d) of Article 8(3) of Directive (EU) .../... [*recast Reception Condition Directive*] in the context of a procedure carried out by virtue of Article 41 of Regulation (EU) .../... [*Asylum Procedure Regulation*], and who is subject to return procedures pursuant to the provisions of this Chapter.

Detention shall be for as short a period as possible, which shall in no case exceed four months. It may be maintained only as long as removal arrangements are in progress and executed with due diligence.

When the return decision cannot be enforced within the maximum period referred to in this paragraph, the third-country national may be further detained in accordance with Article 18.



⇒ 8. In order to prepare the return or carry out the removal process, or both, the detention of a third- country national who has been detained in accordance with point d) of Article 8(3) of Directive (EU) .../... [*recast Reception Condition Directive*] in the context of a procedure carried out by virtue of [Article 41 of Regulation (EU) .../... *Asylum Procedure Regulation*], and who is subject to return procedures pursuant to the provisions of this Chapter, shall be for as short period as possible and shall in no case exceed four months. Detention may be maintained only as long as removal arrangements are in progress and executed with due diligence. ☹

⇒ 9. Member State that issue a refusal of entry in accordance to Article 14 of Regulation (EU) 2016/399 and have decided not to apply this Directive in application of Article 2, paragraph 2a shall ensure that the treatment and level of protection of the third-country national subject to a refusal of entry is equivalent to the one set out in the provisions of paragraphs 3 to 8 of this Article. ☹]

## CHAPTER ~~VII~~

### FINAL PROVISIONS

#### *Article ~~23~~<sup>49</sup>*

#### Reporting

⇒ 1. ☺ The Commission shall report every three years to the European Parliament and the Council on the application of this Directive in the Member States ~~and, if appropriate, propose amendments.~~

⇒ 2. The Commission shall report for the first time by [date] and focus on that occasion in particular on the need to facilitate mutual recognition of return decisions, including on the Union financial support necessary for that purpose. ☺

☺ This report shall be accompanied, where necessary, by appropriate proposals to amend relevant Union acts. ☺

~~The Commission shall report for the first time by 24 December 2013 and focus on that occasion in particular on the application of Article 11, Article 13(4) and Article 15 in Member States. In relation to Article 13(4) the Commission shall assess in particular the additional financial and administrative impact in Member States.~~

## ~~Article 20~~

### **Transposition**

~~1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive. In relation to Article 13(4), Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 24 December 2011. They shall forthwith communicate to the Commission the text of those measures.~~

~~When Member States adopt those measures, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. Member States shall determine how such reference is to be made.~~

~~2. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.~~

*Article ~~24~~<sup>24a</sup>*

**Relationship with the Schengen Convention**

This Directive replaces the provisions of Articles 23 and 24 of the Convention implementing the Schengen Agreement.

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👤 Council

👤 Council

👤 Article 24a 🗨️

👤 Relationship with the Visa Code 🗨️

👤 When the third country is considered not to be cooperating sufficiently with Member States with regard to readmission, Article 25a of the Visa Code shall apply. 🗨️



☞ Council

## Article 25

### Transposition

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with Articles 6 to 10, Articles 13 and 14(3), ~~Article 16~~, ☞ and ☹ Article 18 ~~and Article 22~~ by [~~six months~~ ☞ one year ☹ *after the day of entry into force*] and with Article 14(1) and (2) by [~~one year~~ ☞ two years ☹ *after the day of entry into force*].  
☞ Article 16, 16a and [Article 22] shall apply two years after the entry into force of [Asylum Procedure Regulation]. ☹ They shall immediately communicate the text of those measures to the Commission.

When Member States adopt those measures, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. They shall also include a statement that references in existing laws, regulations and administrative provisions to the Directive repealed by this Directive shall be construed as references to this Directive. Member States shall determine how such reference is to be made and how that statement is to be formulated.

2. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.

#### *Article 26*

### **Repeal**

Directive 2008/115/EC is repealed with effect from [...] [*the day after the second date referred to in the first subparagraph of Article 25(1)*], without prejudice to the obligations of the Member States relating to the time-limits for the transposition into national law of the Directive set out in Annex I.

References to the repealed Directive shall be construed as references to this Directive and shall be read in accordance with the correlation table in Annex II.

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↓ 2008/115/EC
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#### *Article ~~22~~ 27*

### **Entry into force**

This Directive shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.



Articles [...] [*articles which are unchanged by comparison with the repealed Directive*] shall apply from [...] [*the day after the second date referred to in the first subparagraph of Article 25(1)*].

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↓ 2008/115/EC (adapted)

*Article ~~28~~<sup>22</sup>*

**Addressees**

This Directive is addressed to the Member States in accordance with the ~~Treaty establishing the European Community~~ ☒ Treaties ☒ .

Done at Brussels,

*For the European Parliament*  
*The President*

*For the Council*  
*The President*