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NOTE

From:	General Secretariat of the Council
To:	Delegations
Subject:	Council Implementing Decision setting out a recommendation on addressing the deficiencies identified in the 2022 evaluation of Spain on the application of the Schengen <i>acquis</i> in the field of return

In accordance with Article 15(3) of Council Regulation 1053/2013 of 7 October 2013, establishing an evaluation and monitoring mechanism to verify the application of the Schengen *acquis* and repealing the Decision of the Executive Committee of 16 September 1998 setting up a Standing Committee on the evaluation and implementation of Schengen, the Council hereby transmits to national Parliaments the Council Implementing Decision setting out a recommendation on addressing the deficiencies identified in the 2022 evaluation of Spain on the application of the Schengen *acquis* in the field of return¹.

¹ Available in all official languages of the European Union on the Council public register, doc. [9998/23](#).

RECOMMENDATION

on addressing the deficiencies identified in the 2022 evaluation of Spain on the application of the Schengen *acquis* in the field of return

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Council Regulation (EU) No 1053/2013 of 7 October 2013 establishing an evaluation and monitoring mechanism to verify the application of the Schengen *acquis* and repealing the Decision of the Executive Committee of 16 September 1998 setting up a Standing Committee on the evaluation and implementation of Schengen *acquis*², and in particular Article 15(3) thereof,

Having regard to the proposal from the European Commission,

Whereas:

- (1) A Schengen evaluation in the field of return was carried out in respect of Spain in February-March 2022. Following the evaluation, a report containing the findings and assessments, listing best practices and deficiencies identified during the evaluation was adopted by Commission Implementing Decision [C(2023) 150].
- (2) Recommendations should be made on remedial actions to be taken by Spain in order to address deficiencies identified as part of the evaluation. In light of the importance of complying with the Schengen *acquis*, in particular Directive 2008/115/EC, priority should be given to implementing recommendations 1, 2, 3, 7, 9 and 14 below.

2 OJ L 295, 6.11.2013, p. 27.

- (3) In order to ensure a uniform application of the Return Directive, following the relevant ECJ case law, implementation of Recommendation 2 is to be supported by the dedicated discussions in the Contact Group – Return Directive. That clarification of the interpretation of the said recommendation should be without prejudice to the implementation of the other Council recommendations addressing deficiencies identified in the evaluations carried out pursuant to Council Regulation (EU) 2022/922³.
- (4) This Decision should be transmitted to the European Parliament and to the national Parliaments of the Member States.
- (5) Council Regulation (EU) 2022/922 applies as of 1 October 2022. In accordance with Article 31(3) of that Regulation, the follow-up and monitoring activities of evaluation reports and recommendations, starting with the submission of the action plans, should be carried out in accordance with Regulation (EU) 2022/922.
- (6) Within two months of the adoption of this Decision, Spain should, pursuant to Article 21(1) of Council Regulation (EU) 2022/922, establish an action plan to implement all recommendations and to remedy the deficiencies identified in the evaluation report. Spain should provide that action plan to the Commission and to the Council.

RECOMMENDS:

that Spain should:

National return system

1. ensure that a return decision is issued without delay to any third-country national illegally staying in Spain, as required by Article 6(1) of Directive 2008/115/EC;

³ Council Regulation (EU) 2022/922 of 9 June 2022 on the establishment and operation of an evaluation and monitoring mechanism to verify the application of the Schengen *acquis*, and repealing Regulation (EU) N° 1053/2013, OJ L160 of 15.6.2022, p. 1.

2. amend the national law to ensure that third-country nationals illegally staying in Spain within the meaning of Directive 2008/115/EC are issued a return decision as required by Article 6(1) of Directive 2008/115/EC, and not just a fine ;
3. take all necessary measures in accordance with Article 8(1) of Directive 2008/115/EC to enforce return decisions, in particular by:
 - (1) ensuring a proactive case management of all third-country nationals who are subject to a return decision, including those who are not in detention;
 - (2) actively referring third-country nationals to return counselling;
 - (3) providing an effective combination of the measures available for preventing the absconding of illegally staying third-country nationals, including less coercive measures;
 - (4) allowing for a limited longer period of detention using the flexibility provided for by Article 15(5) and (6) of Directive 2008/115/EC, to provide sufficient time to carry out the removal of illegally staying third-country national;
 - (5) implementing a mechanism to swiftly deal with repeated asylum applications lodged for the apparent purpose of delaying or hampering a return procedure;

Procedures

4. ensure that return decisions that affect accompanied minors include an individual assessment of the specific situation of the minor concerned and of the best interests of the child;

5. state in all return decisions issued to illegally staying third-country nationals the obligation to leave the territory of all States of the Schengen area in order to reach a specific third country, in accordance with Articles 3(3) and 3(4) of Directive 2008/115/EC; take measures to ensure that, when the third country of return has not been specified in the return decision due to the impossibility to identify one in accordance with national law or national legal practice, the principle of *non-refoulement* is respected;
6. ensure that return decisions and entry bans clearly stipulate the obligation to leave and the prohibition to entry into the territory of the European Union and the Schengen area;
7. transpose Article 3(3) of Directive 2008/115/EC into Spanish legislation;
8. ensure that interviews preceding the issuance of return decisions systematically include questions concerning potential risks to the person's safety if return were to take place, so as to allow for a comprehensive assessment of the principle of *non-refoulement* in line with Article 5 of Directive 2008/115/EC;

Detention

9. amend the national legislation to bring it in line with Article 15(4) of Directive 2008/115/EC to ensure that third-country nationals are released from detention when there is no longer a reasonable prospect of removal;
10. ensure that detention facilities, including the holding facility of Madrid airport, provide for adequate detention conditions and reflect the administrative nature of deprivation of liberty, including by avoiding as far as possible any impression of a carceral environment;
11. provide systematically information, in a comprehensive manner, to third-country nationals in detention on the rules applying to solitary confinement as well as on their rights and obligations;

12. ensure that men and women detained at the holding facility of Madrid airport are accommodated separated, guaranteeing effective and adequate privacy;
13. ensure that family members are provided with separate accommodation guaranteeing adequate privacy as required by Article 17(2) of Directive 2008/115/EC;
14. ensure that third-country nationals in detention, including at the holding facility of Madrid airport, have the possibility to establish in due time contact with their legal representatives, family members or competent consular authorities as required by Article 16(2) of Directive 2008/115/EC; ensure the necessary privacy for visitors and detainees;

Forced return

15. provide a written confirmation that the return decision will temporally not be enforced in case the removal has been postponed, in accordance with Article 14(2) of Directive 2008/115/EC;
16. ensure the effectiveness of the forced-return monitoring system in accordance with Article 8(6) of Directive 2008/115/EC by dedicating sufficient resources to guarantee an adequate monitoring intensity.

Done at Brussels,

For the Council

The President
