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**NOTE**

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From:	Presidency
To:	Delegations
No. prev. doc.:	13772/18
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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): revised Presidency compromise proposal on Articles 6, 7, 8, 9, 10, 13, 14, 16 and 18

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Delegations will find attached a revised Presidency compromise proposal as regards the following articles of the draft Regulation of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third-country nationals (recast): 6, 7, 8, 9, 10, 13, 14, 16 and 18.

New text compared to the Presidency compromise proposal outlined in doc. 13772/18 is indicated in **↻ bold ↻** for new text and ~~strike-through~~ for deleted text. Changes made previously compared to the Commission proposal (doc. 12099/18) are indicated in underline for new text and ~~strike through~~ for deleted text.

Delegation proposals and comments which were not integrated into the revised Presidency compromise proposal are indicated in footnotes.

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↓ 2008/115/EC (adapted)

2018/0329 (COD)

Proposal<sup>1</sup> 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*

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↓ new

☞ Council

*Article 6*

**Risk of absconding**

1. ☞ 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. ☹ The objective criteria referred to in point 7 of Article 3 shall include at least the following criteria:<sup>2</sup>

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<sup>1</sup> GENERAL SCRUTINY AND/OR PARLIAMENT RESERVES: AT, BE, BG, CH, CZ, DE, EE, EL, ES, FI, IT, HR, LT, LU, NL, PL, PT, SE, SI, SK

<sup>2</sup> One delegation cannot support or has doubts about the inclusion of the following points to the list: a, c, d, g, h, l.

- (a) lack of documentation proving the identity;
- (b) lack of residence, fixed abode or reliable address;
- (c) lack of financial resources;<sup>3</sup>
- (d) illegal entry into the territory of the Member States;
- (e) unauthorised movement to the territory of another Member State ➔ or attempt to move to the territory of another Member State or third country without authorisation ☹ ;
- (f) explicit expression of intent of non-compliance ➔ or actions clearly showing the intention not to comply ☹ with return-related measures applied by virtue of this Directive;
- (g) being subject of a return decision issued by another Member State;
- (h) non-compliance with a return decision, including with an obligation to return within the period for voluntary departure;

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<sup>3</sup> One delegation proposed to add a reference to the Schengen Border Code.

- (i) non-compliance with 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 conviction for a criminal offence, including for a serious criminal offence in another Member State <sup>4</sup> ➔ as referred to in Article 2(2) of Framework Decision 2002/584/JHA ☹;
- (l) ongoing criminal investigations and proceedings <sup>5</sup>;
- (m) using false or forged identity documents, destroying or otherwise disposing of existing documents, <sup>6</sup> ➔ using aliases with fraudulent intent, using false or forged documents justifying the purpose and conditions of entry, or the grounds for the residence permit, using falsified visa ☹ or refusing to provide ➔ biometric data ☹ fingerprints as required by Union or national law;
- (n) opposing violently or fraudulently the return procedures;

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<sup>4</sup> One delegation proposed the following amendment, so as to clarify that the offence has to have a certain impact on the legal order, and also show a current disrespect for the legal order rather than point out to a single misdemeanour committed possibly longer time ago: "existence of conviction for a *particularly serious* criminal offence in a Member State, *where the offence shows current disrespect for the legal order*"

<sup>5</sup> One delegation proposed the deletion of lit. "l", explaining that its inclusion to the list would constitute a form of pre-trial detention.

<sup>6</sup> **One delegation observed that account should be taken of the fact that smugglers sometimes destroy the existing documents or are responsible for destroying them.**

(o) not complying with a measure aimed at preventing the risk of absconding referred to in Article 9(3) <sup>7</sup>;

(p) not complying with an existing entry ban <sup>8</sup>.

(q) ➔ deliberate provision of false information in an oral or written form or concealment of essential information about the case prior to the return. ☹

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.~~

Member States shall <sup>9</sup> establish that a risk of absconding is presumed in an individual case, unless proven otherwise <sup>10</sup>, when one of the objective criteria referred to in points ➔ (e), (f), (g), (h), (i), (j), (l), ☹ (m), (n), (o) and (p) of paragraph 1 is fulfilled.

➔ 3. The existence of a risk of absconding shall be presumed when a third country national poses a risk to public policy, public security or national security. ☹

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<sup>7</sup> One delegation does not agree as regards the requirement to “deposit of an adequate financial guarantee”, foreseen in Article 9(3). The possibility of demanding such guarantee should be upheld, but the inability to provide this guarantee should not lead to detention.

<sup>8</sup> One delegation proposed to add the following text at the end of the phrase: "***which is not suspended and the third country national has prior knowledge of***".

<sup>9</sup> One delegation cannot support the proposal that the burden of proof of the third country national concerns only the criteria referred to in lit. (m), (n), (o) and (p) of paragraph 1, and propose that Member States should be free to decide whether they want to qualify certain objective circumstances as constituting a rebuttable presumption or not.

<sup>10</sup> **One delegation requested for deletion of the following phrase "*unless proven otherwise*"**

## Article 7

### Obligation to cooperate

1. <sup>11</sup> 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 <sup>12</sup>:

- (a) the duty to provide all the elements that are necessary for establishing or verifying identity ☹, and ~~where necessary to prove substantiate~~ the efforts made if requested ☹;

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<sup>11</sup> One delegation proposed to start this paragraph by the following addition: "*Without prejudice to the obligation of the third country national to leave the territory of the Member State on his own volition*".

<sup>12</sup> One delegation proposed the following amendment: "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, if it is necessary and required for this purpose and also reasonable for the third-country national*. That obligation shall include the following ~~in particular~~".

They consider „in particular“ not to be necessary when the wording „include“ is chosen.

- (b) the duty to provide information on the third countries transited<sup>13</sup>;
- (c) the duty to remain present and available throughout the procedures<sup>14</sup>;
- (d) the duty to lodge to the competent authorities of third countries a request for obtaining a valid travel document  $\Rightarrow$  and to provide all information and statements necessary to obtain a travel document<sup>15</sup>  $\ominus$  ;
- $\Rightarrow$  e) ~~the person has~~ the **duty obligation** to appear in person, if and where required for this purpose, before the competent national and third country authorities.  $\ominus$

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,  $\Rightarrow$  date of birth and place of birth  $\ominus$  age, country or countries and place or places of previous residence, travel routes and travel documentation  $\Rightarrow$  , as well as biometric data  $\ominus$  .

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<sup>13</sup> One delegation considers that this information is already included in subsection 2 in conjunction with subsection 1 (a). Another delegation noted that the information on travel routes and travel documentation should be removed from paragraph 2 since it is not connected to the establishment of identity. This information should be stated in a separate paragraph which would provide concrete elements for establishing information on the journey referred to in paragraph 1(b).

<sup>14</sup> One delegation proposed the following amendment so as to make this point more precise: "~~the duty to remain present and available throughout the procedures~~; ***the duty to provide his or her place of residence, fixed abode or reliable address with the competent authorities, in the form and within the timeframe required under the laws of the relevant Member State***";

<sup>15</sup> One delegation proposed to add the following text at the end of the phrase "***and duty to cooperate with these competent authorities***".

3. Member States shall inform the third-country nationals about ~~↻~~ their obligations referred to in paragraph 1 responsibilities and ~~↻~~ the consequences of not complying with ~~↻~~ them ~~↻~~ obligation referred to in paragraph 1 ↻ , including the penalties under national law provided for by Member States, consistent with the rule of law principles, notably in cases of obstruction of the return process or infraction to an entry ban including applicable penalties under national law, provided that such penalties do not compromise the application of this Directive ↻ .<sup>16</sup>

↓ 2008/115/EC (adapted)

⇒ new

↻ Council

## CHAPTER II

### TERMINATION OF ILLEGAL STAY

*Article ~~86~~*

#### Return decision

<sup>16</sup> One delegation proposed the following amendment: "*Member States shall inform the third-country nationals about **their obligations and the consequences of not complying with the obligation referred to in paragraph 1, including the penalties under national law provided for by Member States, consistent with the rule of law principles, notably in cases of obstruction of the return process or infraction to an entry ban***".

Another delegation proposed the following amendment: "*Member States shall inform the third-country nationals about **the obligations to cooperate and the consequences of not complying with the obligation referred to in paragraph 1. Member States shall regulate the time and form of such information, records about the fact that the information has been provided, and the language(s) which the information may be provided in***".



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<sup>17</sup> ☞ and to the situation referred to in Article 13(2) ☞ .
2. Third-country nationals staying illegally on the territory of a Member State and holding a valid residence permit or 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<sup>18 19 20</sup> .

**☞ If there is a risk that the third-country national concerned will not comply with this requirement or in the event of non-compliance by the third-country national concerned with this requirement the Member State may transfer that third-country national back to the Member State that issued a valid residence permit or other authorisation offering right to stay.**

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<sup>17</sup> One delegation proposed the following addition at the end of this paragraph "*The return decision shall state or declare that the duty to leave the territory can be fulfilled by entering another member state of the European Union or another Schengen state only if the third-country national's entry into and residence in such state is permitted.*"

<sup>18</sup> **Several delegations** proposed the following addition at the end of this paragraph: "*paragraph 1 shall may apply or Member states may apply a measure under national law to direct the third country national back to his Member State of residence*". In their view, this would make clear that removal to another Member State remains an option in accordance with legislation of the Member State, with a view of reducing secondary movements.

<sup>19</sup> **Several delegations** proposed the following addition at the end of this paragraph: "*The Member State which had issued a valid residence permit or other authorisation offering a right to stay shall be obliged to accept the return of the third-country national into its territory.*"

<sup>20</sup> One delegation observed that the current procedures prescribed in paragraph 2, as well as the addition of "non-compliance" with such requirements as an indication of a risk of absconding, may not be fully adequate to prevent the third country national from absconding before non-compliance can be observed. Hence, a redrafting of this process may be considered.

**The Member State which issued the third-country national concerned a valid residence permit or other authorisation offering right to stay shall be obliged to take back (or admit) this third-country national into its territory.**

**Where the third-country national's immediate departure is required for reasons of public order, public security 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 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 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 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:

☞ (a) either together with the decision ending 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) ☞ immediately after <sup>21</sup> the adoption of a decision ending 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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<sup>21</sup> One delegation proposed that the adoption of a single/combined decision would be set as a rule, and the adoption of separate decisions would be an exception. One delegation is hesitant about the proposal as the obligation to issue the return decision "immediately after" in their view might cause additional administrative burden. Another delegation proposed to replace "immediately" with "*as soon as possible*".

A few delegations requested to clarify that Article 8, paragraph 6 only applied to separate decisions. The following alternative wording was suggested: ***Without prejudice to the exceptions referred to in paragraphs 2 to 5, Member States shall immediately issue a return decision to any third-country national staying illegally on their territory, including after the adoption of a decision not granting a third-country national refugee status or subsidiary protection status in accordance with Regulation (EU) .../... [Qualification Regulation], 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.

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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

↻ Council

The length of the period for voluntary departure shall be determined ~~↻ taking into account in particular the prospect of return within the period for voluntary departure, while giving ↻ with~~ due regard to the specific circumstances of the individual case, ~~taking into account in particular the prospect of return.~~<sup>22 23</sup>

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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.

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<sup>22</sup> One delegation proposed to delete the whole paragraph, explaining that an additional obligation to further motivate the length of the period in individual cases is likely to complicate the assessments and add to the work load for the authorities to such an extent that goes beyond what might be gained in terms of efficiency in return.

<sup>23</sup> One delegation proposed to clarify in a recital that for example a person who has resided legally in the MS for some time will reasonably need more time to get his affairs in order and leave, while a person without significant ties to the Member State can be obliged to leave sooner.

4. ~~⇒~~ **Without prejudice to the possibility for the third-country national concerned to voluntarily comply with an obligation to return,** ~~☉~~ Member States shall <sup>24</sup> not grant a period for voluntary departure in ~~⇒~~ the ~~☉~~ following cases: ~~⇐~~

(a) ~~☒~~ where ~~☒~~ there is a risk of absconding ~~⇒~~ determined in accordance with Article 6 ~~⇐~~ <sub>33</sub>

(b) ~~☒~~ where ~~☒~~ an application for a legal stay has been dismissed as manifestly unfounded or fraudulent <sup>25 26</sup> <sub>33</sub>

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<sup>24</sup> **Several delegations** proposed to add "*as a rule*", so as to allow more flexibility as regards voluntary departure, for example for vulnerable groups such as families with children. A few other delegations proposed to replace "shall" with "*may*". A few other delegations also called for more flexibility as regards voluntary departures. Some delegations point out that in practice, in some cases voluntary departures would be possible, where forced returns would be impossible.

<sup>25</sup> One delegation would favour a more differentiated approach as regards the exclusion of voluntary returns for applicants whose applications have been rejected as manifestly unfounded. In their experience in particular applicants from save countries of origin are willing to return voluntarily, therefore such a provision would have a negative impact on the number of voluntary returns.

<sup>26</sup> A few delegations proposed to add "*or inadmissible*"

(c) ~~or if~~ where ~~the person~~ third-country national ~~concerned~~ poses a risk to, public policy, public security or national security <sup>27</sup> ~~Member States may refrain from granting a period for voluntary departure, or may grant a period shorter than seven days.~~

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<sup>27</sup> One delegation proposed to add "**public health**".

<sup>28</sup> A few delegations proposed to include new paragraphs 5 and 6 (below). A few delegations proposed to also outline an obligation for Member States to use Annex 39 of the Schengen Codex, a standard form for recognising a return decision for the purpose of transit by land, which is now a recommendation and is used by some Member States.

**5. If the return decision provides for the period for voluntary departure, and if the third-country national concerned does not pose a risk to public policy, public security or national security of other Member States, the third country national may, within that period and only for the purpose of implementing return decision, transit through the territory of a Member State, other than the one which issued that decision.**

**Member States may decide that such transit is subject to their prior authorisation.**

**Member States shall inform the Commission, and each other, of the introduction of the obligation to obtain their prior authorisation for the transit of a third-country national through their territories.**

**6. In the case of the apprehension of a third-country national on the territory of a Member State other than the one which issued the return decision, and:**

**a) the decision does not provide for a period voluntary departure,**

**b) the third-country national has not been granted prior authorisation for transit through the territory of that Member State, if such authorisation was required, or**

**c) the third-country national does not pursue the objective of executing the decision issued by other Member State, or**

**d) the third-country national is considered to pose a risk to public policy, public security or national security of that Member State, that Member State may act in accordance with the procedure laid down in Directive 2001/40/EC or transfer the third-country national concerned back to the Member State which issued the return decision."**

Article ~~108~~

**Removal**


1. Member States shall take all necessary measures to enforce the return decision <sup>29</sup> 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 ⇨, *inter alia*, ⇩ all 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 ⇨ **as well as, where applicable, penal sanctions including imprisonment where provided under national law** ⇩ ⇨ <sup>30</sup>
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.

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<sup>29</sup> One delegation proposed that it would be stated clearly in the text that "measure to enforce the return decision" refers to detention.

<sup>30</sup> **Several delegations** proposed the following addition at the end of the paragraph: "*as well as, where applicable, penal sanctions including imprisonment where provided under national law, in cases of intentional obstruction to the carrying out of the return decision or non-compliance with an entry ban.*"



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 or in accordance with Article 5(2)(b) Employers Sanctions Directive.**  <sup>31</sup>

*Article ~~13~~*

**Entry ban**

1. Return decisions shall be accompanied by an entry ban:
  - (a) if no period for voluntary departure has been granted <sup>32</sup>, or
  - (b) if the obligation to return has not been complied with.

In other cases return decisions may be accompanied by an entry ban.

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<sup>31</sup> One delegation proposed to link the payment of the abovementioned costs with the possibility of withdrawal of the entry ban.

<sup>32</sup> One delegation noted that this provision is too strict, and that not all applications for the international protection dismissed as manifestly unfounded, as a consequence of which no period for voluntary departure would be granted, should be linked to an entry ban.

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↓ new

2. Member States may impose an entry ban<sup>33</sup>, 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.<sup>34</sup>
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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 years. It may however exceed five years if the third-country national represents a serious threat to public policy, public security or national security.<sup>35</sup>

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<sup>33</sup> **One delegation requested for clarification on which form/action is requested by MS towards the TCN concerned.**

<sup>34</sup> One delegation considered that a possibility should be provided not to impose an entry ban and not to issue a return decision, as outlined in the Return Handbook.

<sup>35</sup> One delegation proposed to add a new subparagraph outlining that "*No time limit may be applied if a third country national shall be returned from the territory of a Member State account of a crime against peace, a war crime or a crime against humanity, or on the grounds of a return decision based on the assessment of facts, in order to avert a special danger to the security of the Member State or a terrorist threat. The Member State may permit exceptions in individual cases*".

43. Member States shall consider withdrawing, ~~or~~ 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.<sup>36</sup>

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>37</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, 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>36</sup> **One delegation observed that Member States shall 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 Article 10 para. 7.**

<sup>37</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>38</sup> ⇨ in accordance with Article 27 of Regulation (EU) 2018/XXX<sup>39</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>40</sup>, in the Member States.<sup>41</sup>

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<sup>38</sup> ~~OJ L 239, 22.9.2000, p. 19.~~

<sup>39</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>40</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).~~

<sup>41</sup> One delegation does not see the value added of this paragraph and therefore proposes to delete it.

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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.<sup>42</sup>
2. The national system shall be set up in a way which ensures technical compatibility allowing for communication with the central system established in accordance with Article 50 of Regulation (EU) .../... [*EBCG Regulation*].<sup>43</sup>

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<sup>42</sup> Some delegations requested more details/clarifications about the impact of establishing such return management systems, including on which data is to be stored in the national systems and communicated to the central system. Also, it has been observed that this provision is too general as regards transposition to national law.

<sup>43</sup> Some delegations also requested for clarifications on how this would work and what would be the added value compared to IRMA. One delegation had doubts about the requirement to adjust the national return management system to a given model of reference.

3. Member States shall <sup>44</sup> establish programmes for ~~☞ 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>45</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>46</sup>.~~

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

The granting of such assistance, including its kind and extent, ~~may shall~~ ~~☞ take into account ☹ be subject to~~ 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 imposed by the competent authorities ☹~~. <sup>47</sup>

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<sup>44</sup> A few delegations are against the establishment of an obligation to set up a national programme for voluntary returns and prefer to keep this as a recommendation. One delegation wonders why such a system would only be limited to third country nationals who are nationals of third countries listed in Annex I to Council Regulation 539/2001.

<sup>45</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).**

<sup>46</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).~~

<sup>47</sup> One delegation would like to delete this provision, provided that in practise they could not see the result from linking the obligation to cooperate with the assistance received.

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

**Remedies**

Article 16

**Remedies**

1. ~~The 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~~12~~(1), before a competent judicial or administrative authority or a competent body composed of members who are impartial and who enjoy safeguards of independence.~~

↕ new

↻ Council

~~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.~~

**⇒ 1. The 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 (1), before a competent judicial authority.**

**The judicial authority shall have the power to review decisions related to return, including the possibility of temporarily suspending their enforcement. ☺**

↓ 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 judicial remedy, the third-country national concerned shall be granted the right to appeal against the return decision before a single 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. Where a return decision is based on the rejection of an application for international protection, Member States shall ensure that the enforcement of the return decision shall be suspended as long as there is a right to remain according to Article 54 of Regulation (EU) .../... [Asylum Procedure Regulation]. If there is no right to remain according to Art. 54 of Regulation (EU) ... [Asylum Procedure Regulation] ... the enforcement of the return decision shall not be suspended, unless there is a risk of breaching the principle of non-refoulement, which has not been assessed in the context of APR. ☹~~

~~⇒ Member States may foresee in their national laws for certain cases that after a certain reasonable period of time, during which a judicial authority, after a close and rigorous scrutiny, shall have taken a decision whether to grant suspensive effect of an appeal, the non-granting of the suspensive effect of the appeal shall be presumed if the court remains tacit. ☹~~

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].~~

**⇒ 5. 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. The same shall apply where a further appeal has been brought in accordance with national law against a first or subsequent appeal decision.**

**Member States shall provide in their national legislation for the shortest time limits for appeal and for the appeals to be examined. After the time limits referred to above have expired, the suspensive effect of the appeal shall cease.**

**Member States may foresee in their national laws for certain cases that after a certain reasonable period of time, during which a judicial authority, after a close and rigorous scrutiny, shall have taken a decision whether to grant suspensive effect of an appeal, the non-granting of the suspensive effect of the appeal shall be presumed if the court remains tacit. ☹**

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↓ 2008/115/EC

53. The third-country national concerned shall have the possibility to obtain legal advice, 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 Article 15(3) to (6) of Directive 2005/85/EC.

## CHAPTER IV

### DETENTION FOR THE PURPOSE OF REMOVAL

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↓ 2008/115/EC (adapted)

⇒ new

*Article ~~18~~<sup>15</sup>*

**Detention**<sup>48</sup>

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:

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<sup>48</sup> One delegation would like to have the following wording of the “Return Handbook”, section 14.5 better reflected in the wording of Article 18:

“The maximum period of detention prescribed by the Return Directive must not be undermined by re-detaining returnees immediately, following their release from detention. Re-detention of the same person at a later stage may only be legitimate if an important change of relevant circumstance has taken place (for instance the issuing of necessary papers by a third country or an improvement of the situation in the country of origin, allowing for safe return), if this change gives rise to a “reasonable prospect of removal” in accordance with Article 15 (4) of the Return Directive and if all other conditions for imposing detention under Article 15 of that Directive are fulfilled.”

- (a) there is a risk of absconding ~~⇒ determined in accordance with Article 6;~~<sup>49</sup> ~~⇐~~
- (b) the third-country national concerned avoids or hampers the preparation of return or the removal process;~~⇒~~ ~~⇐~~ or ~~⇐~~
- 

↓ new

- (c) the third-country national concerned poses a risk to public policy, public security or national security.<sup>50</sup>

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

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↓ 2008/115/EC

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.

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<sup>49</sup> One delegation proposed to delete “~~determined in accordance with Article 6~~”, as Members States should have right to define additional criteria in their national law.

<sup>50</sup> One delegation proposed to align the terms with that of Asylum Procedure Regulation, where terms “*public order and national security*” are used. Another delegation proposed to underscore the importance of the aforementioned grounds for detention, including some guidance as to the understanding of “public policy” in recital 28.

Another delegation is sceptical about the grounds of detention as outlined in lit. (c) in particular with regard to “public policy”.

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.<sup>51</sup>

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

- (a) either provide 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 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.

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<sup>51</sup> One delegation proposed to make the following addition at the end of the phrase "***and be presented in full to the third country national in time for it to be taken into account in the speedy judicial review under subsection 2 of this article***". They consider that there is too much emphasis on the initial detention decision, creating a great administrative burden. The proposed amendment would stress the need for a comprehensive assessment of the decision by the judge, rather than procedural expedience of the initial decision by the police. Alternatively the delegation proposed to codify the ruling of the court in C-383/13 (M&G). This could replace paragraph 2. The wording of the addition could then be (sticking closely to the wording used by the court, in bold the material addition):

"Where the order to detain the third country national has been decided in an administrative procedure in breach of the right to be heard **or the obligation to submit the reasons in fact and in law**, 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 each case, that the infringement at issue actually deprived the party relying thereon of the possibility of arguing his defence better, to the extent that the outcome of that administrative procedure could have been different."

<sup>52</sup> One delegation requested to add the following text: "***The judicial authority must be able to take into account both the facts stated and the evidence adduced by the administrative authority and any observations that may be submitted by the third-country national. Furthermore, that authority must be able to consider any other element that are relevant for its decision should it so deem necessary, including facts not stated in the detention order issued by the authorities.***"

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

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. **Without prejudice to Article 20**, 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. <sup>53</sup>

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<sup>53</sup> One delegation proposed to clarify that the maximum period shall not be less than three months, and that the clause should not mean that the minimum period of a single detention should be three months. Therefore they propose the following addition to paragraph 5:  
*"This is without prejudice to the rule that any detention in a particular case does not have to be ordered for the maximum period of detention laid down by the Member State and shall be ordered only as long as necessary and only be maintained as long as removal arrangements are in progress."*

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.

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<sup>54</sup> One delegation proposed to foresee a possibility of additional detention for 30 days once the maximum period of detention is reached, while another delegation proposed additional detention of 1-6 months, in case of subsequent violations of the border regime.