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NOTE

From:	Presidency
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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 text

Delegations will find attached a revised Presidency compromise proposal as regards 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), prepared taking into account delegations' comments provided at and after the IMEX meeting on 3 December and JHA counsellors' meeting on 12 December 2018.

New text compared to the Presidency compromise proposal outlined in 14599/18 is indicated in **↻ bold ↻** for new text and ~~strike through/strike through~~ for deleted text. Changes made previously compared to the Commission proposal (12099/18) are indicated in **↻ underline ↻** for new text and ~~strike through/strike through~~ for deleted text.

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

Proposal¹ 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(3)(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:

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

↓ new

- (1) A number of amendments are to be made to Directive 2008/115/(EC) of the European Parliament and of the Council². 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 2015³.
- (3) On 28 June 2018, in its conclusions, the European Council underlined the necessity to significantly step up the effective return of irregular migrants, and welcomed the intention of the Commission to make legislative proposals for a more effective and coherent European return policy.

↓ 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.~~

↓ 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.~~

² Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals(OJ L 348, 24.12.2008, p. 98).

³ COM(2015) 240 285 final.

↓ 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':~~

↓ 2008/115/EC recital 4 (adapted)

⇒ new

- (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 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.

↓ 2008/115/EC recital 6

- (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.

↓ new

- (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 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.

↓ 2008/115/EC recital 7 (adapted)

- (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.

↓ 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*.

↓ 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~~⁴, 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.

↓ 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. ©⁵

⁴ 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).

⁵ **One delegation proposed to include a new recital 11a to elaborate on the meaning of lit. c of Article 6. and a new recital 11b to elaborate on the meaning of lit. a-d of Article 6.**

(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 to the access to programmes providing logistical, financial and other material or in-kind assistance.

↓ 2008/115/EC recital 10 (adapted)

⇒ new

(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 ⁶ dismissed as fraudulent or manifestly unfounded, or they pose a risk to public policy, public security or national security. ⇐ 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.~~

⁶ One delegation proposed to add an explanation on the meaning of “application for legal stay”.

↓ 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 legislation or procedures and is subject to conditions and grounds for exclusion set by the Member States competent authorities. This directive does not establish a subjective right for the third-country national to receive assistance for voluntary departure or reintegration. ◯

↓ 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.

↓ 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 to appeal against a return decision. 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 complying with the principle of effective remedy, Member States should provide that appeals against return decisions take place as much as possible before only one 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 impede the effectiveness of the return procedure.** ☹

⇒ (17b) **A body which is not a court or tribunal in the national system of a Member State but which may exercise judicial function, should qualify as tribunal for this purpose 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 an automatic suspensive effect only in cases where there 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 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.

(20) To improve the effectiveness of return procedures and avoid unnecessary delays, without negatively affecting the rights of the third-country nationals concerned, 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 procedure carried out prior to the issuing of the related return decision against which the appeal is lodged, unless the situation of the third-country national concerned would have significantly changed since.

↓ 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.

↓ 2008/115/EC recital 12

(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.

↓ 2008/115/EC recital 13

- (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~~⁷. Member States should be able to rely on various possibilities to monitor forced return.

↓ 2008/115/EC recital 14

- (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 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.

⁷ 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).

↓ 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.

↓ 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.

↓ 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.

↓ new

→ Council

- (28) Detention should be imposed, following an individual assessment of each case, 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 policy, public security or national security.⁸
- (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.

⁸ One delegation proposed to include the following recital 28a, drafted on the basis of the provisions of “Return Handbook”, section 14.5
"The maximum period of detention should not be undermined by immediate re-detention. Re-detention may only be legitimate if an important change of relevant circumstance has taken place, if this change gives rise to a reasonable prospect of removal and if all other conditions for imposing detention are fulfilled."

➔ (29a) **Where the order to detain the third country national has been decided in an administrative procedure, the national court responsible for assessing the lawfulness of that decision may take into account all relevant facts, evidence and observations which may be submitted by parties to the judicial authority in the course of the proceedings, unless the introduction into the proceedings has actually deprived the third country national of the possibility of arguing his defence better, 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.⁹

↓ 2008/115/EC recital 17

(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, take place in specialised detention facilities.

⁹ One delegation asked to clarify in the text that when a third country national who has been issued an entry ban and then re-enters from another Member State, even if he has not – or claims to have not - left the Schengen area in the meantime, he is violating migration rules, which, in accordance to the principles reflected in recital 30, should be within Member States' discretion to be punished, including by imprisonment.

- (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), 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.
- (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 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 in the context of the border procedure for a maximum period of four months and 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.

↓ 2008/115/EC recital 18 (adapted)

⇒ new

- (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) .../...¹⁰ [*Regulation on the use of the Schengen Information System for the return of illegally staying third country nationals*] and ⇐ 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)~~¹¹ ⇒ , including to facilitate mutual recognition of these decisions amongst competent authorities, by virtue of Council Directive 2001/40/EC¹² and Council Decision 2004/191/EC¹³ ⇐¹⁴.

¹⁰ [*Regulation on the use of the Schengen Information System for the return of illegally staying third country nationals*] (OJ L ...).

¹¹ 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).

¹² 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).

¹³ 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).

¹⁴ **Several delegations proposed the following amendments to recital 37:**

(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) .../... [*Regulation on the use of the Schengen Information System for the return of illegally staying third country nationals*] and 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)~~. ***The need to ensure greater effectiveness in enforcing return decisions entails mutual recognition of those decisions. Member States should make use of all available means of cooperation and of exchanging information in this regard, including to facilitate mutual recognition of these decisions amongst competent authorities, by virtue of Council Directive 2001/40/EC and Council Decision 2004/191/EC. In order to achieve uniform and consistent enforcement of return decisions and reduce the administrative burden on national authorities, the Commission should review Union legal***

acts on returns with the aim to submit legislative proposals, in particular with regard to the mutual recognition of return decisions.

↓ new

- (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 established by the European Border and Coast Guard Agency in accordance with Regulation (EU) .../... [EBCG Regulation].

↓ 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.

↓ 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.

↓ 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.

↓ 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.

↓ 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.

↓ 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.

↓ 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.

↓ new

- (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 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 Council¹⁵, or under Article 36 of Directive (EU) 2016/680¹⁶, 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.

¹⁵ 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).

¹⁶ 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~~¹⁷ ~~☒~~ Regulation (EU) 2016/399 of the European Parliament and of the Council¹⁸ ~~☒~~ — 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.

¹⁷ ~~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).~~

¹⁸ 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~~¹⁹. Moreover, in accordance with Articles 1 and 2 of ~~the~~ Protocol ~~the~~ No 21 ~~on~~ the position of the United Kingdom and Ireland ~~in~~ respect of the area of freedom, security and justice, ~~the~~ annexed to the Treaty on European Union and to the Treaty ~~the~~ on the Functioning of the European Union ~~establishing the European Community~~, and without prejudice to Article 4 of ~~the said~~ ~~that~~ ~~the~~ 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.

¹⁹ 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 ~~the~~ Regulation (EU) 2016/399 ~~the Schengen Borders Code~~, this Directive constitutes a development of ~~the~~ ~~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~~²⁰. Moreover, in accordance with Articles 1 and 2 of the Protocol ~~the~~ No 21 ~~the~~ on the position of the United Kingdom and Ireland ~~the~~ in respect of the area of freedom, security and justice, ~~the~~ annexed to the Treaty on European Union and to the Treaty ~~the~~ on the Functioning of the European Union ~~establishing the European Community~~, and without prejudice to Article 4 of ~~the said~~ ~~the~~ that ~~the~~ 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.

²⁰ 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 ~~⊗~~ Regulation (EU) 2016/399 ~~⊗~~ ~~the Schengen Borders Code~~ — a development of ~~⊗~~ 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 ~~⊗~~ ~~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/EC²¹ ~~on certain arrangements for the application of that Agreement.~~

²¹ 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*²², 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/EC²³ ~~on the conclusion, on behalf of the European Community, of that Agreement.~~

²² OJ L 53, 27.2.2008, p. 52.

²³ 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*²⁴, 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/EU²⁵ 2008/261/EC²⁶ on the signature, on behalf of the European Community, and on the provisional application of, certain provisions of that Protocol.~~

²⁴ OJ L 160, 18.6.2011, p. 21

²⁵ 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).

²⁶ OJ L 83, 26.3.2008, p. 3.

↓ 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,

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²⁷ One delegation proposed to clarify in the text that the transfer of the third country national to another Member State is not considered “return”, as is clarified in the Return Handbook.

²⁸ One delegation proposed to clarify that the return decision is counted from the moment when the person in question leaves factually, as is clarified in the Return Handbook and case law.

HAVE ADOPTED THIS DIRECTIVE:

CHAPTER I

GENERAL PROVISIONS

29

29 **Some delegations** proposed to include the following article to address the problem that small Member States have not many foreign representations on their territories, while third country nationals who have been issued a return decision but who do not hold a (valid) travel document have to apply for a (replacement) travel document with the diplomatic representation of his country and therefore many foreigners staying illegally in the Member State need to go to their diplomatic or consular representation located in the other Member State.

Article ...

Cooperation between Member States on obtaining travel documents

1. *In cases where an illegally staying third country national needs to travel to the other Member State to obtain a travel document, the Member States involved shall closely cooperate with each other by exchanging supplementary information and in accordance with the following rules:*

(a) *the Member State which has issued a return decision to the third country national concerned (hereinafter first Member State) shall request for permission to travel from the other Member State on which territory the diplomatic representation is located (hereinafter other Member State) and provide all necessary information relevant to the travel;*

(b) *the other Member State shall notify the first Member State about its decision within two days.*

(c) *the absence of a reply by the deadline referred to in point (b) shall mean that the other Member State does not object to the allowing third country national concerned to travel to the diplomatic representation located in its territory.*

2. *The other Member State shall allow the third country national concerned to travel to the diplomatic representation located in its territory unless there are other reasonable ways of obtaining a travel document.*

3. *The permission shall be valid for travel to and back from the diplomatic representation on the date agreed between the Member States. The other Member State shall refrain from issuing a new return decision to the third country national concerned.*

4. *If necessary, the other Member State shall provide escort assistance. The first Member State shall bear the costs related to the travel and escort assistance.*

5. *The first Member State shall immediately readmit without formalities the third country national who has not left the territory of the other Member State within the period granted in accordance with paragraph 3 of this Article.*

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 ~~1413~~ of 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 under Union law as defined in Article 2(5) of 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 ~~the~~ 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 ~~the~~ 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) ~~any third country, in which the third-country national will be accepted and where there is no risk of breaching the principle of non-refoulement~~ 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 person has the right to enter or reside;~~

➤ (e) **as a last resort, if the return to the country of origin or transit cannot be enforced due to lack of cooperation either of the third country in the return process or the third country national according to Article 7 and applicable national law, to any third country where the third country national is accepted and where there is no risk of breaching the principle of non-refoulement.** ☺

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'³⁰ means 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.

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³⁰ One delegation proposed to consider whether the definition of the term "vulnerable persons" should be harmonised with other legal instruments, or if the term should be used very specifically related to the context, as disabled persons might require special needs in some context, while they would not be more or less vulnerable than the average population in some other context.

³¹ One delegation proposed to add a definition of the term "decision ending legal stay", in order to clarify whether this term includes all asylum decisions.

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 ³²

³² One delegation proposed to delete lit a), noting that in their practise, in the context of mass immigration, during the suspension of the application of the Returns Directive (according to Article 2 (2)), only obligations deriving from Union and international law should be taken into account.

- (b) respect the principle of non-refoulement.

Article 5

Non-refoulement, 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,³³

and respect the principle of non-refoulement.

↓ new

↻ Council

Article 6

Risk of absconding

1. ↻ When applying this article 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 **and the principle of proportionality.** ↻ The objective criteria referred to in point 7 of Article 3 shall include at least ³⁴ the following criteria: ³⁵

³³ **One delegation requested for the addition of lit. d) "the principle of proportionality"**

³⁴ One delegation requested to delete "at least"

³⁵ 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;³⁶
- (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 State³⁷;
- (h) non-compliance with a return decision, including with an obligation to return within the period for voluntary departure;

³⁶ One delegation proposed to add a reference to the Schengen Border Code.

³⁷ One delegation proposed to add "if no autorisation has been granted for transit, in accordance with Art. 9 (5)"

- (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 7³⁸;
- (k) existence of conviction for a ~~serious~~ criminal offence, including for a **serious** criminal offence in another Member State³⁹ ~~such in particular~~ as referred to in Article 2(2) of Framework Decision 2002/584/JHA;
- (l) ongoing criminal investigations and proceedings⁴⁰;
- (m) using false or forged identity ~~or travel~~ documents, destroying or otherwise disposing of existing documents,⁴¹ ~~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, ~~notably by deliberately providing false information in an oral or written form or deliberately concealing essential information about the case prior to the return;~~;

³⁸ One delegation doubted if the principle of legal certainty was respected provided that Article 7 does not contain an exhaustive enumeration of the obligations.

³⁹ 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*"

⁴⁰ One delegation proposed the deletion of lit. "l", explaining that its inclusion to the list would constitute a form of pre-trial detention. **Another delegation proposed to delete it so as to clearly separate administrative and criminal procedures.**

⁴¹ 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) ⁴²;

(p) not complying with an ~~an~~ [⇒] valid ~~existing~~ entry ban [⇒] ~~which the third country national could have had prior knowledge of~~ ~~;~~ [⊖];

~~(q) [⇒] deliberate provision of false information in an oral or written form or concealment of essential information about the case prior to the return. [⊖]~~

~~⇒ (r) risk to public policy, public security or national security. [⊖]~~ ⁴³

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.~~

⁴² 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.

⁴³ **One delegation requested for the deletion of lit. r and outlining these provisions in Article 18.1, lit. c.**

Member States shall establish that a risk of absconding is presumed in an individual case, unless proven otherwise ⁴⁴, when one of the objective criteria referred to in points ~~(e), (f), (g), (h), (i), (j), (l)~~ ~~(f), (g)~~ (m), (n), (o) and (p) ~~(r)~~ 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), ~~(f), (g)~~, (h), (i), (j), (l) ⁴⁵ 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.~~

⁴⁴ One delegation requested for deletion of the following phrase "*unless proven otherwise*"

⁴⁵ **One delegation requested for the deletion of lit. l from the list.**

Article 7

Obligation to cooperate

1.  The third country national subject to return decision shall comply with this decision.  ⁴⁶

 2.  ⁴⁷ 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 ⁴⁸:

(a) the duty to provide all the elements that are necessary for establishing or verifying identity ⁴⁹ , ~~and where necessary to prove~~ substantiate the efforts made if requested ;

(b) the duty to provide information on the third countries transited ⁵⁰;

(c) the duty to remain present and available throughout the procedures ⁵¹;

⁴⁶ **One delegation proposed to delete paragraph 1.**

⁴⁷ 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***".

⁴⁸ **A few delegations 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.

⁴⁹ One delegation proposed to add "***according to national law***"

⁵⁰ 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).

⁵¹ 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***";

(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 a travel document~~ ⁵² ;

~~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.~~ ⁵³

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, ~~date of birth and place of birth~~ ~~age, 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 responsibilities and~~ the consequences of not complying with ~~them~~ ~~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 including applicable penalties under national law, provided that such penalties do not compromise the application of this Directive~~ . ⁵⁴

⁵² One delegation proposed to add the following text at the end of the phrase "*and duty to cooperate with these competent authorities*".

⁵³ One delegation proposed the following amendments: "to appear in person, if and where required for this purpose, before the competent national and ~~third country~~ authorities, *of the third country whose nationality the third country national really or putatively possesses*".

⁵⁴ 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*".

↓ 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 ⁵⁵, without prejudice to the exceptions referred to in paragraphs 2 to 5 ⁵⁶ ↻ and to the situation referred to in Article 13(2) ↻ .

⁵⁵ One delegation proposed to include the following phrase "*excluding applicants for international protection covered by the Dublin regulation and*"

⁵⁶ 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.*"

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 stay⁵⁷ 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^{58 59 60}.

~~61 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,~~ ~~62~~

~~a) the Member State may transfer the that third-country national back to the Member State that issued a valid residence permit or other authorisation offering right to stay, or~~ ~~62~~

⁵⁷ **A few delegations asked for a clarification on the term “other authorisation offering right to stay”.**

⁵⁸ 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.

⁵⁹ 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.*"

⁶⁰ 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.

⁶¹ One delegation proposed to add the following phrase at the beginning of the paragraph "*Without prejudice to procedures established by the Regulation (EU) 604/2013*"

⁶² **One delegation requested to have this paragraph brought back to the revised compromise proposal.**

➔ b) the Member State may **start a consultation with the Member State, which has issued a residence permit, before issuing** ~~issue~~ a return decision referred to in paragraph 1 ~~and start a consultation with the Member State, which has issued a residence permit, in accordance with Article 10 of Regulation (EU) 2018/... of the European Parliament and of the Council of [...] on the use of the Schengen Information System (SIS) for return of illegally staying third country nationals.~~ ☹⁶³

➔ ~~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.~~ ☹⁶⁴

➔ ~~Where the third-country national's immediate departure is required for reasons of public policy order, public security or national security, paragraph 1 shall apply.~~ ☹⁶⁵

⁶³ **One delegation requested to amend the paragraph as follows:**

*If the Member State **intends to** ~~may~~ issue a return decision referred to in paragraph 1 **it should** ~~and~~ start a consultation with the Member State, which has issued a residence permit, in accordance with Article 10 of Regulation (EU) 2018/... of the European Parliament and of the Council of [...] on the use of the Schengen Information System (SIS) for return of illegally staying third country nationals. **A return decision can be issued only, if the Member State, which has issued a residence permit, decides to revoke/cancel it.***

⁶⁴ **One delegation considered that such obligation already existed and there was no need to regulate it separately.**

⁶⁵ **One delegation proposed to add after this subparagraph the following subparagraph:**
"For the purpose of this paragraph, the document referred to in Art. 6 of Directive 2013/33/EU shall not be considered as a valid residence permit or other authorisation offering a right to stay."

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 as provided for in their national legislation:

(a) **in the same act either together** ⁶⁶ with the decision ending a legal stay ⁶⁷ 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) **as soon as possible and without undue delay** immediately after ⁶⁸ the adoption of a decision ending a legal stay of a third-country national **and in any case at the latest together or immediately after the adoption of a final 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.~~

⁶⁶ One delegation proposed to include "**or in a single administrative or judicial decision or act**"

⁶⁷ One delegation requested to clarify the meaning of the term "decision ending legal stay"

⁶⁸ 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.

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.***

↓ 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.

69

70

⁶⁹ Several delegations proposed to include the following paragraph on mutual recognition:

"7. Member States may recognize return decisions referred to in Articles 9 and 10, issued by competent authorities in other Member States. In such cases, the return is carried out according to the applicable legislation of the Member State which carries out the return procedure."

⁷⁰ Should the text contained in footnote 29 not be accepted, one delegation proposed an alternative of adding the following paragraphs 7 and 8 to Article 8:

(7) Member States may conclude bilateral agreements or arrangements to allow illegally staying third country nationals to enter their territories for the purpose of obtaining travel documents.

(8) If the third country national is authorised to enter the territory of the other Member State in accordance with the bilateral agreements or arrangements referred to in paragraph 7, the other Member State shall refrain from issuing a new return decision to the third country national concerned.

↓ 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.

↓ new

↻ Council

The length of the period for voluntary departure shall ⁷¹ 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.~~ ^{72 73 74}

↓ 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.

⁷¹ One delegation proposed to replace "shall" with "may" so as to avoid administrative burden
⁷² One delegation proposed to add "*as well as procedural efficiency*" at the end of this paragraph.

⁷³ 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.

⁷⁴ 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.

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 ⁷⁵ 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 ~~☞~~;

(e) ~~☞~~ (b) where the third-country national concerned poses a risk to public policy, public security or national security ⁷⁶. ~~☞~~

~~☞~~ Member States may grant a period for voluntary departure ~~☞~~ ~~(b)~~ ~~☞~~ ~~☞~~ ~~☞~~

~~☞~~ where ~~☞~~ an application for ~~☞~~ legal stay has been dismissed as manifestly unfounded or fraudulent; ~~☞~~ ~~☞~~ or inadmissible ~~☞~~ ⁷⁷;

⁷⁵ 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. **Several** delegations proposed to replace "shall" with "*may*" also calling 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.

⁷⁶ One delegation proposed to add "*public health*".

⁷⁷ 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.

~~(e) 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.~~

78

78 **Several** 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.

In the latter case the Member State that issued a return decision shall immediately readmit without formalities the third-country national concerned.

Article 10~~8~~

Removal

1. Member States shall take all necessary measures to enforce the return decision ⁷⁹ 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 ☉ including the penalties under national law where provided for by Member States, consistent with the rule of law principles as well as, where applicable, penal sanctions where provided by Member States in national law ☉** ⁸⁰
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.

⁷⁹ One delegation proposed that it would be stated clearly in the text that "measure to enforce the return decision" refers to detention.

⁸⁰ 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.~~ © ⁸¹**

Article ~~11~~

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 ~~16(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:

⁸¹ One delegation proposed to link the payment of the abovementioned costs with the possibility of withdrawal of the entry ban.

- (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.⁸²
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.

⁸² **One delegation would like to add the following lit. c "*family life and principle of proportionality*"**

Article ~~1344~~

Entry ban

1. Return decisions shall be accompanied by an entry ban:
 - (a) if no period for voluntary departure has been granted ⁸³, or
 - (b) if the obligation to return has not been complied with.

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

↓ new

2. Member States may impose an entry ban ⁸⁴, 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. ⁸⁵

⁸³ 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.

⁸⁴ One delegation requested for clarification on which form/action is requested by MS towards the TCN concerned.

⁸⁵ 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.

↓ 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 **↻ in principle be set at a minimum of ~~not in principle exceed~~ five years and a maximum of ten years.** **↻** It may however exceed **↻ ten** **↻ five** years if the third-country national represents a serious threat to public policy, public security or national security. ⁸⁶
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. ⁸⁷

⁸⁶ 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*".

⁸⁷ 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.

☞ 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 Article 10 para. 7. In this case, the entry ban shall not be withdrawn or suspended until the third-country national pays those costs. **If the costs are not paid until the end of the entry ban, its length shall be extended ex officio until the costs have been paid.** ☹

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~~⁸⁸ 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.

⁸⁸ 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~~⁸⁹ ⇨ in accordance with Article 27 of Regulation (EU) 2018/XXX⁹⁰ ⇐.

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 granted⁹¹, in the Member States.⁹²

⁸⁹ ~~OJ L 239, 22.9.2000, p. 19.~~

⁹⁰ 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].

⁹¹ ~~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).~~

⁹² One delegation does not see the value added of this paragraph and therefore proposes to delete it.

↓ 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.⁹³
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*].^{94 95 96}

⁹³ 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.

⁹⁴ The text in this paragraph will be aligned to the provisions of the EBCGA Regulation.

⁹⁵ 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.

⁹⁶ One delegation requested to clarify that the data would not be transferred automatically from the national system to the central system

3. Member States shall ⁹⁷ 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 539/2001⁹⁸, ~~☞~~ 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 539/2001⁹⁹.

~~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, shall ~~☞~~ may 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 Member States, in particular concerning reintegration assistance. ~~☞~~ competent authorities ~~☞~~.¹⁰⁰

~~☞~~ **Member States shall foresee an exclusion ground if the third-country national has already benefited from reintegration assistance.** ~~☞~~

⁹⁷ Several 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 delegations 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.

⁹⁸ 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).

⁹⁹ ~~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).~~

¹⁰⁰ 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.

CHAPTER III

PROCEDURAL SAFEGUARDS

Article ~~1542~~

Form¹⁰¹

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.

¹⁰¹ One delegation would like to have a standard simplified form for issuing return decisions, which could be annexed to this Directive.

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~~¹³

Remedies

- ⇒ **1. The third-country national concerned shall be afforded an effective remedy to appeal against decisions related to return, as referred to in Article 15 (1), before a competent court or tribunal.** ☺
- ⇒ **2. To comply with the principle of an effective remedy, the third-country national concerned shall be granted the right to appeal against the return decision before a single level of jurisdiction.** ☺

- ⇒ 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. When the third-country national is already detained according to Article 18, the time limit shall not exceed 5 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. ☹
- ⇒ When the return decision is based on a decision not granting a third-country national refugee status or subsidiary protection status in accordance with Regulation (EU) .../... [Qualification Regulation], the time limit to appeal the return decision shall be those laid down in national law in accordance with Article 53(6) of Asylum Procedure Regulation. ☹
- ⇒ Member States shall take the necessary measures to ensure that the court or tribunal concludes examination of the appeal within the shortest possible period of time, which as a rule cannot exceed 30 days or 14 days when the third-country national is already detained according to Article 18. ☹
- ⇒ 4. The third-country national concerned shall have the possibility to obtain legal advice, representation and, where necessary, linguistic assistance. ☹

⇒ **5. Member States shall ensure that the necessary legal advice 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 16a** ☹

⇒ **Suspensive effect** ☹

⇒ **1. Member States shall provide for:** ☹

⇒ **(a) either the automatic suspension of the enforcement of a return decision during the period for lodging an appeal at first instance and, where the appeal has been lodged within that period, during the examination of the appeal; or** ☹

⇒ **(b) the power of a court or tribunal to suspend the enforcement of a return decision, upon the applicant's request or acting ex officio where provided for by national law, taking into due account the specific circumstances of the individual case. Member States shall ensure that the return decision is not enforced until the time limit within which the request to suspend the enforcement of such a decision is lodged and, when a request has been lodged within the time limit, pending the decision on this request.** ☹

➤ 2. In the case referred to in point (b) of paragraph 1, 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 2 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. ☺

➤ Member States shall ensure that a decision on the request for suspension of the enforcement of a return decision referred to in point (b) is taken within the shortest time possible from the lodging of such a request by the third-country national concerned, which in any case cannot exceed 5 days. In individual cases involving complex issues of fact or law, this time limit may be extended, as appropriate, by the competent judicial authority. ☺

➤ 3. The enforcement of a return decision shall not be suspended when the third-country national lodges a subsequent appeal, where this is provided for by national law. ☺

- ⇒ **4. Where a return decision is based on a decision rejecting an application for international protection taken in accordance with Regulation (EU) .../... [Asylum Procedure Regulation], Member States shall ensure that the enforcement of the return decision is automatically suspended as long as the third-country national enjoys a right to remain according to Article 54 of Regulation (EU) .../... [Asylum Procedure Regulation].** ☺
- ⇒ **When the third-country national does not enjoy a right to remain according to Article 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 was not assessed in the context of procedures carried out in application of [Asylum Procedure Regulation].** ☺
- ⇒ **5. The authority issuing the return decision can decide to withdraw the suspensive effect, in particular if the departure of the third-country national is required for reasons of public policy, public security or national security.** ☺

⇒ Member States may foresee in their national law that the return decision shall become enforceable if the responsible court or tribunal, which has an obligation to decide on reasons for suspension after a close rigorous scrutiny, within a given period, has not decided within that given period, thus confirming that the reasons for suspension are not met. ☹

~~⇒ 1. The third country national concerned shall be afforded an effective remedy to appeal against decisions related to return, as referred to in Article 15 (1), before a competent court or tribunal.~~ ☹

~~⇒ The court or tribunal shall have the power to review decisions related to return.~~ ☹

↓-new

⇒ Council

~~⇒ 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.~~ ☹

⇒ 3. Member States shall provide in their national legislation for the shortest time limits to appeal against a return decision, which cannot exceed 7 days. When the return decision is based on a decision rejecting the application for international protection in accordance with Article 8(6), the time limit to appeal shall be laid down in national law in accordance with Article 53(6) of Asylum Procedure Regulation. Such time limits shall start to run from the date when the return decision is notified to the third country national or to his legal adviser or representative, or from another date set in accordance with national law notably when the third country national concerned absconded. ☹

⇒ Member States shall provide in their national legislation that the judicial authority shall conclude the examination of the appeal within the shortest possible period of time. ☹

⇒ 4. A judicial authority shall have the power to suspend the enforcement of a return decision, upon the applicant's request or where national law provides for acting ex officio, taking into due account the specific circumstances of the individual case. ☹

⇒ Without prejudice to paragraph 5, 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 2 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 legal adviser or representative, or from another date set in accordance with national law notably when the third country national concerned absconded. ☹

⇒ Member States shall ensure that the return decision is not enforced until the time limit within which the request to suspend the enforcement of such a decision and, when a request has been lodged within the time limit, pending the decision on this request. ☹

⇒ 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. In individual cases involving complex issues of fact or law, this time limit may be extended, as appropriate, by the competent judicial authority. ☹

⇒ Member States may foresee in their national law that the return decision shall become enforceable, if the responsible judicial authority, after a close rigorous scrutiny, has not decided within a certain reasonable period of time, thus tacitly confirming the decision of the responsible authority. ☹

⇒ The enforcement of a return decision shall not be suspended when the third country national lodges a subsequent appeal, where this latter is provided for by national law. ☹

⇒ 5. Where a return decision is based on a decision rejecting an application for international protection taken in accordance with Regulation (EU) .../... [Asylum Procedure Regulation], Member States shall ensure that the enforcement of the return decision is automatically suspended as long as the third country national enjoys a right to remain according to Article 54 of Regulation (EU) .../... [Asylum Procedure Regulation]. ☹

⇒ When the third country national does not enjoy a right to remain according to Article 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 that was not assessed in the context of a procedure carried out in application of Regulation (EU) .../... [Asylum Procedure Regulation]. ☹

~~6. The third country national concerned shall have the possibility to obtain legal advice, representation and, where necessary, linguistic assistance.~~

~~7. 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 ~~17~~4

Safeguards pending return

1. Member States shall, with the exception of the situation covered in Articles ~~19~~6 and ~~20~~7, 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~~7 and during periods for which removal has been postponed in accordance with Article ~~11~~9:
 - (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~~7(2) or that the return decision will temporarily not be enforced.

CHAPTER IV

DETENTION FOR THE PURPOSE OF REMOVAL

↓ 2008/115/EC (adapted)

⇒ new

Article ~~18~~¹⁵

Detention¹⁰²

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:

¹⁰² 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;¹⁰³ ⇐~~oe~~
- (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.~~¹⁰⁴

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

↓ 2008/115/EC
↻ Council

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.

¹⁰³ 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.

¹⁰⁴ 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.

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 **⇒ providing ⇐ 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 **⇒ granting ⇐ 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.

~~⇒ 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. ⇐~~

¹⁰⁵ The third-country national concerned shall be released immediately if the detention is not lawful.

¹⁰⁵ 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.*"

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.

↓ 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 ¹⁰⁶ and not more than ⇐ six months. ^{107 108}

¹⁰⁶ **One delegation is concerned about the request to establish a minimum period for detention.**

¹⁰⁷ 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."

¹⁰⁸ One delegation proposed to include *"National law may foresee shorter set periods of detention for minors"*.

↓ 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.

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¹⁰⁹ One delegation proposed to foresee a possibility of additional detention for 30 days once the maximum period of detention is reached, **by adding the following paragraph: 7. "Member States may re-detain a third-country national despite reaching the limit of the period referred to in paragraph 5 or 6, if after the release from the detention facility the circumstances allowing the enforcement of a return decision issued to that third-country national occur. The period of re-detention may not exceed 30 days."**

Another delegation proposed additional detention of 1-6 months, in case of subsequent violations of the border regime.

Conditions of detention

1. Detention shall take place as a rule in ~~☞ specialised~~ ☞ detention facilities ~~☞ which comply with the requirements set out in this Article~~ ☞ . ~~☞ 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 ~~☞ , but need not be detained in a separate building.~~ ¹¹⁰ ☞
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.

¹¹⁰ A few delegations noted that simplification with regard to the arrangement of detention should be envisaged, in particular with a view to the “separation principle”. Demanding separate facilities without any exception does not meet the practical requirements; the rules should not focus on the separation of buildings in every case, provided that the conditions of detention are arranged appropriately. The following addition at the end of the paragraph 1 was proposed *“unless particular grounds apply”*.

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.

Article ~~2017~~

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.

Article ~~2118~~

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 ~~1815~~(2) and to take urgent measures in respect of the conditions of detention derogating from those set out in Articles ~~1916~~(1) and ~~2017~~(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.

↓ new

↻ Council

CHAPTER V

BORDER PROCEDURE

↻ Article 22 ↻

↻ Border procedure ↻

- ↻ 1. Member States shall establish border procedures applicable to third-country nationals subject to a decision rejecting an application for international protection taken by virtue of Article 41 of Regulation (EU) .../... [*Asylum Procedure Regulation*]. ↻
- ↻ 2. Without prejudice to the possibility to issue a refusal of entry in accordance with Article 14 of the Schengen Border Code, Member States shall issue a return decision by means of a standard form as set out under national legislation in the context of procedures carried out in accordance with paragraph 1 of this Article. ↻
- ↻ 3. The provisions of Chapters II, III and IV do not apply to procedures carried out in accordance with paragraph 1, except for articles [7, 8(6), 11, 12, 13, 16, 16a, 17, 18, 19, 20 and 21]. ↻

- ⇒ **4. Without prejudice to the possibility for the third-country national concerned to voluntarily comply with a decision referred to in paragraph 2, 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 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 2, which shall at least be 48 hours and not exceed one week. Member States shall provide in their national legislation that the court or tribunal shall conclude the examination of the appeal within the shortest possible period of time, which in any case cannot exceed 30 days.** ☺
- ⇒ **6. Member States shall ensure that the enforcement of a return decision referred to in paragraph 2 is automatically suspended as long as the third-country national enjoys a right to remain according to Article 54 of Regulation (EU) .../... [*Asylum Procedure Regulation*].** ☺

⇒ When the third-country national does not enjoy a right to remain according to Article 54 of Regulation (EU) .../... [Asylum Procedure Regulation], or when a further appeal against a first or subsequent appeal decision is lodged where this is provided for by national law, the enforcement of the return decision shall not be suspended unless there is a risk of breaching the principle of non-refoulement [or other fundamental rights of the Charter on Fundamental Rights] that was not assessed in the context of a procedure carried out in application of Regulation (EU) .../... [Asylum Procedure Regulation]. ☹

⇒ 7. Member States shall take all necessary measures: ☹

⇒ (a) to ensure that a third-country national subject to a return decision referred to in paragraph 2 does not enter the territory of the Member State concerned; and ☹

⇒ (b) to enforce that decision. ☹

⇒ For this purpose, Member State may keep the third-country national in detention. Such detention shall be for as short a 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. ☹

⇒ When the return decision referred to in paragraph 2 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. When the procedures established by Article 41 of Regulation (EU) .../... [Asylum Procedure Regulation] are not concluded within the time limit set in that Article and the third-country national is no longer kept at the border or transit zone, the return decision referred to in paragraph 2 shall remain valid, unless new elements or findings arise or are presented by the third-country national concerned, which significantly modify the circumstances of the individual case. ☹

Article 22

Border procedure

1. Member States shall establish ~~border~~ return procedures applicable to illegally staying third country nationals ~~who have not been granted the right to enter the territory of the Member States~~ 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 1.¹¹¹
3. ~~In the context of procedures carried out in accordance with paragraph 1 of this Article, Member States shall issue:~~
 - ~~(a) either a~~ 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 ~~in the annex~~ under national legislation ~~or~~

¹¹¹ One delegation proposed the following drafting of the paragraph 2: When a decision is taken in accordance with this article, Except where otherwise provided in this Chapter, the provisions of Chapters II, III and IV as well as article 6 of this directive are not applicable apply to return procedures carried out in accordance with paragraph 1.

~~⊖ (b) — a refusal of entry in accordance with Article 14 of Regulation 2016/399; paragraph 4 8 shall not apply in this case. ⊖~~

~~⊖ Member States shall issue one of the decisions referred to in this paragraph as soon as possible, where possible under national law together with the decision rejecting an application for international protection taken by virtue of Article 41 of Regulation (EU) .../... [Asylum Procedure Regulation]. ⊖~~

4. ~~⊖ Without prejudice to the possibility for the third country national concerned to voluntarily comply with a decision referred to in paragraph 3, a ⊖ A period for voluntary departure shall not be granted. Member States ⊖ may ⊖ 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 ⊖ grant a period not exceeding 48 hours to lodge an appeal against the return decisions ⊖ referred to in paragraph 3a, which shall at least be 48 hours and not exceed one week. ⊖ 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. — \Rightarrow Member States shall ensure that \Leftarrow the enforcement of a return decision \Rightarrow referred to in paragraph 3 is \Leftarrow 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 \Rightarrow as long as the third country national enjoys a right to remain according to Article 54 of Regulation (EU) .../... [Asylum Procedure Regulation]. \Leftarrow~~

~~— where there is a risk of breach of the principle of non refoulement and one of the following two conditions applies :~~

~~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~~

~~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.~~

~~\Rightarrow When the third country national does not enjoy such a right, or when \Leftarrow where a further appeal against a first or subsequent appeal decision is lodged, \Rightarrow where this latter is provided for by national law \Leftarrow and in all other cases, the enforcement of the return decision shall not be \Rightarrow suspended \Leftarrow 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 shall take all necessary measures:

(a) to ensure that a third country national subject to a decision referred to in paragraph 3 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] does not enter the territory of the Member State concerned; and

(b) to enforce that decision, , and who is subject to return procedures pursuant to the provisions of this Chapter.

For these purposes, Member States shall keep in detention a third country national shall be for as short a period as possible, which shall in no case exceed four¹¹² months. Detention¹¹³ It may be maintained only as long as removal arrangements are in progress and executed with due diligence.¹¹³

¹¹² One delegation requested that the detention would not be longer than 3 months.

¹¹³ One delegations proposed that Member States shall define in their national law a detention regime aiming at preventing the entry

~~When the return decision referred to in paragraph 3 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. When the procedures established by Article 41 of Regulation (EU) .../... [Asylum Procedure Regulation] are not concluded within the time limit set in that Article and the third country national is no longer kept at the border or transit zones, the decision referred to in paragraph 3(a) shall remain valid, unless new elements or findings arise or are presented by the third country national concerned, which significantly modify the circumstances of the individual case.~~

↓ 2008/115/EC (adapted)

CHAPTER ~~VII~~ FINAL PROVISIONS

Article ~~23~~

Reporting

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.

~~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~~²¹

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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114 Several delegations would like to include the following new Article 24a:

Review Clause

In order to ensure effective, uniform and consistent enforcement of return decisions and reduce administrative burden on national authorities, not later than [the date of start of application of SIS returns regulation] the Commission shall evaluate the need for further improvements in the field of returns and, if appropriate, submit legislative proposals with a view to amending Union legal acts. This shall concern, in particular, the rules relating to the mutual recognition of return decisions, including Union financial support for their enforcement.



☞ 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 [☞ one year ☞ ~~six months~~ after the day of entry into force] and with Article 14(1) and (2) by [☞ two years ☞ ~~one year~~ after the day of entry into force] ¹¹⁵.
☞ **Article 16 and Article 22 shall apply 6 months 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.

¹¹⁵ Several delegations proposed that the usual transposition period of two years would apply to all provisions of the revised Return 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.

↓ 2008/115/EC

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)*].

Article ~~2823~~

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
