



The effectiveness of return in EU Member States

*Synthesis
Report for the
EMN Focussed
Study*

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This Synthesis Report is based on the [National Contributions](#) from the following Member States: Austria, Belgium, Croatia, Cyprus, Czech Republic, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Lithuania, Latvia, Luxembourg, Netherlands, Spain, Sweden, Slovak Republic, Slovenia, United Kingdom

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EXPLANATORY NOTE

This Synthesis Report was prepared on the basis of National Contributions from 22 EMN NCPs (Austria, Belgium, Croatia, Cyprus, Czech Republic, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Lithuania, Latvia, Luxembourg, Netherlands, Spain, Sweden, Slovak Republic, Slovenia, United Kingdom) according to a Common Template developed by the EMN and followed by EMN NCPs to ensure, to the extent possible, comparability.

National contributions were largely based on desk analysis of existing legislation and policy documents, reports, academic literature, internet resources and reports and information from national authorities. Statistics were sourced from Eurostat, national authorities and other (national) databases. The listing of Member States in the Synthesis Report results from the availability of information provided by the EMN NCPs in the National Contributions.

It is important to note that the information contained in this Report refers to the situation in the above-mentioned (Member) States up to and including September 2017 and specifically the contributions from their EMN National Contact Points. More detailed information on the topics addressed here may be found in the available National Contributions and it is strongly recommended that these are consulted as well.

EMN NCPs from other Member States could not, for various reasons, participate on this occasion in this Study, but have done so for other EMN activities and reports.

Table of Contents

EXECUTIVE SUMMARY.....	1
KEY POINTS TO NOTE.....	1
MAIN FINDINGS.....	2
1 INTRODUCTION.....	7
1.1 Study rationale.....	8
1.2 Study context.....	8
1.3 Study aims.....	9
1.4 Scope of the study.....	10
1.5 Structure of the report.....	11
2 CONTEXTUAL OVERVIEW OF THE NATIONAL SITUATION CONCERNING THE RETURN OF THIRD-COUNTRY NATIONALS.....	12
2.1 National measures implementing the Return Directive or equivalent standards.....	13
2.2 Return of irregularly staying third-country nationals as a priority in Member States.....	15
3 SYSTEMATIC ISSUANCE OF RETURN DECISIONS.....	18
3.1 Authorities involved in the issuance of a return decision.....	19
3.2 Issuance of return decisions.....	20
3.3 Timing, validity and scope of return decisions.....	22
3.4 Guarantees concerning the issuance of the return decision.....	23
4 RISK OF ABSCONDING.....	26
4.1 Objective circumstances constituting a rebuttable presumption of the existence of a risk of absconding.....	27
4.2 Measures aiming to avoid the risk of absconding.....	30
4.3 Challenges in determining the existence of a risk of absconding.....	32
5 EFFECTIVE ENFORCEMENT OF RETURN DECISIONS.....	33
5.1 Sanctions in case of non-compliance with the return decision.....	34
5.2 Mutual recognition of return decisions.....	35
5.3 Travel documents.....	36
5.4 Use of detention in the return procedure.....	38
5.5 Use of alternatives to detention in the return procedure.....	46
5.6 Challenges and good practices related to detention and alternatives to detention.....	48

6	PROCEDURAL SAFEGUARDS AND REMEDIES	51
6.1	Assessment of the <i>non-refoulement</i> principle in the context of return	52
6.2	Remedies against return decisions	53
6.3	Suspensive effect of appeals	55
6.4	Hearing of the third-country national	56
6.5	Good practices	58
7	FAMILY LIFE, CHILDREN, AND STATE OF HEALTH	59
7.1	Categories of third-country nationals' vulnerabilities in the context of Return and detention	60
7.2	Assessment of the Best Interests of the Child on Return Decisions	62
7.3	State of health of third-country nationals in the return procedure	65
7.4	Challenges and good practices	66
8	VOLUNTARY DEPARTURE	69
8.1	Period for voluntary departure	70
8.2	Challenges related to voluntary departure	73
8.3	Good practices related to voluntary departure	75
9	ENTRY BANS	76
9.1	Grounds for issuing an entry ban	77
9.2	Duration of an entry ban	79
9.3	Registration of entry bans in SIS II	82
9.4	Issuance of entry bans when illegal stay is detected on exit	82
9.5	Penalising breach of entry bans	83
9.6	Effectiveness of entry bans	84
10	CONCLUSIONS	86

Executive Summary

The return of illegally-staying third-country nationals is one of the main pillars of the EU's policy on migration and asylum. However, recent Eurostat data show that return rates at EU level have not improved despite the important increase in the number of rejected asylum applications and in the number of return decisions issued since 2014. In its 2015 EU Action Plan on Return and subsequently in its 2017 Communication on a more effective return policy and the accompanying Recommendation, the Commission emphasised the need for a stronger enforcement of EU rules on return in order to increase the overall effectiveness of the EU's return policy. The EMN conducted this study with the purpose of investigating good practices and challenges in Member States' application of EU rules on return and equivalent standards.

KEY POINTS TO NOTE

National debates increasingly focus on return, which is widely considered as a priority across Member States. National practices implementing the EU framework – or equivalent standards – vary between Member States, as a result of different administrative practices, different interpretations of rules, as well as EU case law. As shown by return rates in the EU in recent years, challenges remain to the effective implementation of returns, including regarding the implementation of EU rules and equivalent standards.

Challenges attached to the effectiveness of return relate primarily to the risk that a third-country national absconds – including during the asylum procedure and the granted period for voluntary departure; the difficulty in arranging voluntary departures in the timeframe defined in EU rules and standards or equivalent; the application of rules and standards, including CJEU case law, on detention; the capacity and resources needed to detain third-country nationals in the context of return procedures; the length of the return procedure, in particular when the decision is appealed.

While it is difficult in the absence of evaluative evidence to draw conclusions on the effectiveness of different national measures used by Member States to enhance the effectiveness of return, some good practices were identified in the study, for example:

- › Adopting a flexible approach to rules applicable to return and tailoring them to the individual merits of a case is also reported as a good practice to speed up some return procedures. This can be done by fastening the return process (e.g. shortening appeal deadlines or the period for voluntary departure) in cases where this is deemed necessary.
- › The involvement of civil society players, NGOs and international organisations in the handling of return cases and in detention centres helps fostering trust with third-country nationals and providing them with adequate, tailored support.
- › In the same vein, some Member States invest in the management of their detention facilities and training of staff, adopting a multidisciplinary approach to accommodate the needs of the detainee (in particular when s/he has special needs) and facilitate the return process.

MAIN FINDINGS

What recent changes were reported by Member States in their legal and/or policy framework?

Between 2015 and 2017, fifteen Member States (AT, BE, DE, EE, EL, FI, FR, HR, HU, IE, IT, LU, NL, SE, UK) reported recent changes in their national legal and/or policy framework (e.g. as a result of the migration situation in 2015–2016 or the European Commission Recommendation issued in March 2017), including amendments of asylum and migration laws and policies. In recent times, the focus of national debates has shifted towards the topic of return, involving both the institutional sphere (Ministries, governmental offices) and the public sphere, including NGOs and International Organisations working on migration as well as the media. Almost all Member States (with the exception of Croatia) reported that the return of irregularly staying third-country nationals was a national priority.

Do Member States systematically issue a return decision to irregularly-staying third-country nationals?

The Return Directive applies to all third-country nationals staying irregularly on the territory of an EU Member State bound by the Directive,¹ although Member States can refrain from applying the Directive to third-country nationals who are subject to a refusal of entry, who are apprehended/intercepted while irregularly crossing the external border of the Union and have not obtained an authorisation or right to stay, who are subject to return as a criminal law sanction or who are the subject of an extradition procedure (derogations provided under Article 2(2)(a) and (b) of the Return Directive). A majority of Member States make use of these derogations by refusing at borders or forcibly returning the third-country nationals concerned.

The majority of Member States issue return decisions when:

- The whereabouts of the third-country national concerned are unknown (AT, BE, CY, DE, EE, ES, FI, FR, HR, IE, IT, LU, NL, SE, SI, SK, UK);
- The third-country national concerned lacks an identity or travel document (AT, BE, CY, DE, EE, ES, FI, FR, HR, HU, IE, IT, LT, LU, LV, NL, SE, SI, SK, UK); or
- Irregular stay is detected during an exit check (AT, CZ, EE, ES, FI, HR, HU, LT, LU, LV, NL, MT, SE, SK). However, albeit Member States' legislation provide such possibility to issue return decisions, practices vary on this point.

In addition, nineteen Member States (AT, CY, CZ, DE, EE, EL, ES, FI, FR, HU, IE, IT, LT, LV, NL, MT, SE, SK and UK) have measures in place to effectively locate and apprehend irregularly staying third-country nationals whose whereabouts are unknown. In eighteen Member States (AT, CY, CZ, DE, EE, EL, FI, FR, HR, HU, IT, LT, LU, MT, NL, SE, SI and UK), the return decision is issued together with the decision to end the legal stay of a third-country national. Whether these are issued in the same document and/or simultaneously varies between responding Member States and on the procedure at hand.

Return decisions had unlimited validity in 12 Member States (BE, DE, EE, ES, FI, FR, IE, LT, LU, NL, SI and SK).

However, the legislation in a majority of Member States (AT, BE, CY, CZ, DE, EE, EL, ES, FR, HR, HU, IE, IT, LT, LU, MT, NL, SE, SI, SK and UK) foresees the possibility to grant a residence permit or other authorisation to stay for compassionate, humanitarian or other reasons to third-country nationals staying irregularly on their territory, in certain conditions. A majority of Member States also reported having mechanisms in place to take into account changes in the individual situation of third-country nationals concerned before enforcing a removal.

¹ Ireland and the United Kingdom are not bound by the Return Directive, thus the measures and practices implemented vary compared to other Member States. This is signalled throughout this Synthesis Report.

How is the risk of absconding assessed by Member States?

Most Member States have included objective criteria in their national legislation to assess whether a third-country national risks absconding, with the exception of two Member States (IE and UK).

Measures aiming to avoid the risk of absconding, as per Article 7(3) of the Return Directive, cover situations in which a potential risk of absconding may be prevented by imposing certain obligations on the third-country national during the period for voluntary departure. The most commonly used measures in Member States are the regular reporting to the authorities and the submission of documents to the authorities.

The assessment of the risk of absconding was mentioned as a particular challenge by a number of Member States, due to the difficulty in assessing it in practice on the basis of objective criteria, and/or the high standards imposed by national judicial authorities in some Member States.

How do Member States effectively enforce return decisions?

A number of Member States reported imposing sanctions against third-country nationals who did not comply with a return decision and/or intentionally obstructed the return process. These can take the form of a fine, imprisonment, residence restriction in case of obstruction of the return process, or benefits cuts. While it does not constitute a sanction as such, the possibility to resort to detention was also brought up by Member States as a way to encourage cooperation during the return process.

A majority of Member States indicated that their national legislation also offered the possibility to recognise a return decision issued against a third-country national by another Member State (AT, BE, CZ, DE, EL, ES, EE, FI, FR, HR, LT, LU, LV, MT, SI, SK) under certain conditions. However, in practice, several of these Member States indicated that they never or rarely enforced such a return decision. The main challenge invoked for mutual recognition is the difficulty in knowing whether a return decision has effectively been issued by another Member State and whether it is enforceable.

Several Member States reported that they could make use of EU travel documents for return in application of Regulation 2016/1953² (AT, BE, DE, EE, FI, FR, LT, LU, LV, NL, UK). On the other hand, eight Member States stated that they did not use EU travel documents at all (CY, CZ, EL, ES, HR, HU, IE, MT, SK). In practice, some Member States reported that the acceptance of EU travel documents by third-countries varied, with only a small number of third countries accepting them.

All Member States make use of detention under certain conditions during return procedures. The main grounds invoked by Member States to use detention in the context of return procedures are:

- Risk of absconding (AT, BE, CY, CZ, DE, EE, EL, ES, FI, FR, HR, HU, IT, LT, LU, LV, MT, NL, SE, SI, SK, UK);
- Third-country nationals avoiding/hampering the preparation of the return/removal process (AT, BE, CY, CZ, DE, EE, EL, ES, FI, FR, HR, HU, IE, LT, LV, LU, NL, SE, SI, SK, UK);
- Non-compliance with the period of voluntary departure or the terms of the return decision (AT, BE, EE, EL, FR, IE, LT, LU);
- Threat to public order/security and/or commission of a criminal offence (BE, CY, DE, EE, EL, FI, HU, IE, IT, LT, SE, SI, UK).

² Regulation (EU) 2016/1953 of the European Parliament and the Council of 26 October 2016 on the establishment of a European travel document for the return illegally staying third-country nationals and repealing the Council Recommendation of 30 November 1994.

A majority of the Member States transposed the maximum detention period allowed by the Return Directive into their national legislation. Indeed, the absolute maximum length of detention allowed was of 18 months, as per Article 15 of the Return Directive, in thirteen Member States (BE, CY, CZ, DE, EE, EL, HR, LT, LU, LV, MT, NL, SK). In other Member States, the following maximum detention periods were also reported: 12 months in four Member States (FI, HU, SE, SI), 10 months (AT), 6 months (HU, LU), eight weeks (IE), 90 days (IT), 60 days (ES), and 45 (FR). In the United Kingdom, which is not bound by the Return Directive, there is no statutory limit to the length of detention. Reviews of the lawfulness of the detention decision are available in all responding Member States, especially in cases where the decision was taken by an administrative authority, either *ex officio*, or upon the third-country national's request. In all Member States, the length and/or relevance of detention is also reviewed on a regular basis by an administrative authority, by a judicial authority, or both.

Third-country nationals who are ordered to leave the territory are accommodated in specialised facilities for third-country nationals in seventeen Member States (BE, CY, DE, EE, EL, ES, FI, FR, HU, IT, LT, LV, LU, NL, SE, SK, UK). A number of exceptions to this rule were signalled, such as irregularly staying third-country nationals imprisoned for criminal activities or posing threat to public security, risks for public order in the detention facility, or people with mental illness who could stay in a care facility.

What are the procedural safeguards and remedies available to third-country nationals during the return process?

In a majority of Member States, the respect of either the principle of *non-refoulement* or of Article 3 of the ECHR was systematically assessed as part of a decision taken on whether or not to return an irregularly staying third country national. Member States which reported not to be systematically assessing the principles above, nonetheless reported doing so at least during one step of the process.

Deadlines to challenge the return decision existed in all Member States, yet these varied quite significantly and some Member States had different deadlines according to different circumstances, going from one week to 75 days from the notification of the decision. In a majority of Member States, appealing a return decision had a suspensive effect, although in some Member States this effect could be lifted depending on the merits of the case.

Hearings of the third-country national on the return decision are available in a majority of Member States. The possibility of holding a return hearing in conjunction with other hearings was not possible in a number of Member States (CY, CZ, EL, FI, HR, HU, LV, LU and SK). However, the possibility of organising joint hearings for return was available in different procedures:

- During the asylum procedure if a rejection of the claim appears likely (AT, EE, EL, NL);
- During the procedure for the granting of a humanitarian residence permit (AT);
- During the procedure for the granting of a residence permit (EE, FI, SI).

In addition, the possibility for a joint hearing on return and detention was available in a few Member States (AT, MT and NL).

All Member States reported that they used some alternatives to detention in the context of return procedures. The most widely used means to locate and monitor a third-country national in view of his/her return was to impose the obligation to report regularly to the authorities upon the individual. In addition, a majority of Member States also required the third-country national to surrender his/her passports and/or travel documents, and/or to be accommodated in a given location.

Identified challenges related to the impossibility in practice to offer the release of a third-country national by bail as his/her financial situation would not enable it; the possibility of absconding of the individual while the alternative to detention is used; and the identification of a fixed address to place third-country nationals under home custody. Good practices highlighted by Member States included involving NGOs in taking care of detainees, to de-escalate conflicts and avoid incidents, as well as good management of specialised detention centres and open centres.

What specific measures were adopted by Member States to guarantee third-country nationals' family life and state of health, as well as adequate conditions for children in the return process?

A majority of Member States elaborated in their legislation a definition of vulnerable categories in the context of the return process.

The detention of minors is largely made conditional to specific circumstances and some Member States prohibited the detention of minors in any circumstance (CY, IE, IT, MT). More specifically, the detention of unaccompanied minors (UAMs) is allowed in a few Member States as a means of last resort to prevent absconding or for reasons of public security. The detention of accompanied minors is generally admitted but only in exceptional cases to maintain family unity, to prevent absconding, or only immediately before departure.

In some Member States, other vulnerable groups, for example victims of torture, psychological, physical or sexual violence can be detained with a few Member States also providing for special facilities taking into account their special needs. In other Member States, vulnerable groups are not detained unless it is necessary as a last resort or shortly before their return.

The obligation to take into account the best interest of the child (BIC) in return procedures was implemented by all Member States in their policy or legal framework. When performing the assessment of the BIC, the large majority of Member States took into account a combination of factors, notably the child's identity and family life, the child and parents' (or care giver's) view, protection and safety of the child, situation of additional vulnerability, the child's right to health and access to education. While the return of minors is generally accounted as a possible durable solution for both accompanied and unaccompanied minors (UAMs), some Member States reported to ensure the BIC by prohibiting the return of minors, mainly UAMs, in any circumstances, unless this serves to maintain family unity or follows a request for voluntary return by family members in the country of origin or by the legal guardian of UAM (BE, CY, CZ, FR, IT, MT, SK). In terms of guarantees for UAMs during the BIC assessment process, some Member States foresee the obligation to nominate a legal guardian for the minors, who is responsible for initiating the procedure to assess the BIC and for contributing to the assessment of the case (BE, CZ, EE, ES, FI, IT, LT, LV, HU, LU, NL). Other Member States also provide special dedicated accommodation facilities with access to specific services to assist UAMs during the entire BIC assessment period (EE, FI, HU). Generally, UAMs were not specifically targeted by Assisted Voluntary Return and Reintegration (AVR(R)) programmes or other form of support to return, however they were eligible to apply and hence to benefit of such assistance.

All the responding Member States, except for the Czech Republic, foresaw the possibility to postpone the removal of a third-country national based on health reasons. Such a suspension of the execution of the return decision was generally only permitted for a temporary period of time until the health situation allowed to travel.

How do Member States regulate the period for voluntary departure?

The period for voluntary departure is automatically granted with the return decision in the vast majority of Member States (AT, BE, DE, CY, EE, EL, FI, HR, IT, LT, LU, LV, NL, SE, SI, SK), while six Member States (CZ, IT, HU, LV, MT, UK) reported that the voluntary departure procedure started following a request submitted by the third-country national concerned.

In all Member States, the period granted to third-country nationals to depart voluntarily is between seven and thirty days. Nearly all Member States, with the exception of Italy and Slovenia, indicated that they, at times, shortened the period for voluntary departure to less than seven days. Some Member States foresee the possibility to both waive and shorten the period for departure while others only provided for a waiver of the period of voluntary departure.



Almost half of the Member States establish mechanisms to check whether third-country nationals irregularly staying in the EU has left within the period for voluntary departure. For this purpose, some Member States impose an obligation to declare the departure at the border crossing point through identification on site, to submit a crossing border certification previously handed over to the third-country national, or record the departure in the aliens register.



What are the grounds and conditions for entry bans in Member States?

A majority of Member States reported imposing automatically an entry ban in the cases foreseen by Article 11(1) of the Return Directive, while four Member States (CZ, EE, ES, HR and IT) automatically impose an entry ban with all return decisions issued. Ireland and the United Kingdom, which are not bound by the Return Directive, also impose an entry ban systematically with a deportation order.

An entry ban can be imposed in cases where:

- There is a risk of absconding (BE, CZ, EE, EL, FI, FR, HR, LU, MT, NL, SI, SE, SK);
- The third-country national poses a risk to public policy, public security or national security (AT, BE, CY, CZ, DE, EE, EL, FI, FR, HR, HU, IT, LV, LT, LU, MT, NL, SE, SI, SK, UK);
- The application for legal stay was dismissed as manifestly unfounded or fraudulent (AT, BE, CZ, DE, EE, EL, FI, FR, HR, LV, LT, LU, NL, SK, SE, UK).

National legislation in all Member States – with the exception of Ireland and Malta – provides for different durations of the entry bans depending on the grounds on which it was imposed. In most Member States, entry bans do not exceed five years in cases where a third-country national breached immigration laws (see also Annex I). Entry bans exceeding the duration of five years defined in the Return Directive are usually imposed in cases not related to the Directive and where it is determined that a third-country national posed a particularly serious threat to public policy or national security. The duration of the entry ban starts running on the day when the third-country national leaves the EU (AT, CY, DE, EE, ES, HR, HU, IT, LV, MT, SI, SK) or on the day when the third-country national left its territory (AT, DE, HU, NL, LT, UK).

A third-country national ignoring an entry ban is sanctioned or considered a criminal offence in most Member States (AT, BE, CY, CZ, DE, EL, ES, FI, FR, HR, IE, LV, LU, MT, NL, SK, SE).

The main challenges identified by Member States are related to compliance with entry bans on the part of the third-country nationals concerned. This can be due, in part, to Member States' national legislation where entry bans enter into force only at the time of notification of a return decision. This is an issue in particular as regards third-country nationals who were issued a return decision and an entry ban but remained on the territory of the EU, hence stripping the entry ban of any legal effect. Another challenge was monitoring the compliance with entry bans and cooperation with other Member States in the control of entry.



01

INTRODUCTION



Introduction

1.1 STUDY RATIONALE

The return of irregular migrants is one of the main pillars of the EU's policy on migration and asylum. However, in 2014, it was estimated that less than 40% of the irregular migrants who were ordered to leave the EU departed effectively.³ In addition, recent data made available to Eurostat show that the number of returns of third-country nationals within the EU have not improved despite the important increase in the number of rejected asylum applications and in the number of return decisions issued between 2014 and 2015.⁴ As a result, the European Commission has emphasised in its EU Action Plan on Return published on 9th September 2015,⁵ and, subsequently, in its Communication on a more effective return policy in the EU published on 2nd March 2017 and the attached Recommendation,⁶ the need for a stronger enforcement of EU rules on return in order to increase the overall effectiveness of the EU's return policy.

1.2 STUDY CONTEXT

The objective of the development of a coherent return policy was emphasised by the Hague Programme.⁷ The Stockholm Programme reaffirmed this need by calling on the EU and its Member States to intensify the efforts to return irregularly staying third-country nationals by implementing an effective and sustainable return policy.⁸

The main legal instrument regulating the EU return policy is the 2008 Return Directive.⁹ The Return Directive lays down common EU standards on return. It has a two-fold approach: on the one hand, it provides that Member States are obliged to issue return decisions to all third-country nationals staying irregularly on the territory of a Member State. On the other hand, it emphasises the importance of implementing return measures with full respect for the fundamental rights and freedoms and the dignity of the individual returnees, including the principle of '*non-refoulement*'. As a result, any return may only be carried out in compliance with EU and other international human rights' guarantees.¹⁰

The Return Directive provides for different types of measures. A broad distinction can be made between voluntary and forced return, with the logic of the Directive emphasising that voluntary return is preferred, while acknowledging the inevitable need for efficient means to enforce returns where necessary.

Following the dramatic increase in arrivals of migrants to the EU in 2014 and 2015, a European Agenda on Migration was adopted on 17th May 2015.¹¹ The Agenda set out actions in the areas of humanitarian response, international protection, border management, return and legal migration and encouraged Member States to step up their efforts to effectively return irregular migrants. Similarly, the European Council Conclusions of 25th-26th June 2015 called for all tools to be mobilised to increase the rate of

³ Communication from the Commission to the European Parliament and to the Council, *EU Action Plan on Return*, 9th September 2015, COM(2015) 453 final.

⁴ Communication from the Commission to the European Parliament and to the Council on a *More Effective Return Policy in the European Union – a Renewed Action Plan*, 2nd March 2017, COM(2017) 200 final.

⁵ Communication from the Commission to the European Parliament and to the Council, *EU Action Plan on Return*, *op. cit.*

⁶ Communication on a More Effective Return Policy in the European Union – *a Renewed Action Plan*, *op. cit.*, and Commission Recommendation on *making returns more effective when implementing Directive 2008/115/EC*, 2nd March 2017, C(2017) 1600.

⁷ *The Hague Programme: strengthening freedom, security and justice in the European Union*, OJ C 53, 3rd March 2005.

⁸ *The Stockholm Programme – An open and secure Europe serving and protecting citizens*, OJ C 115, 4th May 2010.

⁹ *Directive 2008/115/EC*, *op. cit.*

¹⁰ E.g. the EU Charter of Fundamental Rights, the 1950 Convention for the Protection of Human Rights and Fundamental Freedoms, the 1984 Convention against Torture and other Cruel, Inhuman and degrading treatment or punishment and the 1951 Geneva Convention related to the Status of Refugees as amended by the 1967 New York Protocol.

¹¹ Communication from the Commission to the European Parliament, the Council, the European Economic And Social Committee and the Committee of the Regions, *A European Agenda on Migration*, 13th May 2015, COM(2015) 240 final.

effective returns to third countries.¹² Subsequently, the EU Action Plan on Return of 9th September 2015 proposed measures across two strands: i) enhancing cooperation within the EU; ii) enhancing cooperation with third countries (origin and transit).

In order to increase the effectiveness of return, the Plan asked for enhancing efforts in the area of voluntary return, stronger enforcement of EU rules, enhanced sharing of information on return, increased role and mandate for Frontex as well as for the establishment of an “integrated system of return management”.¹³

In September 2017, the European Commission adopted a Recommendation updating the “Return Handbook” to provide guidance to Member States’ competent authorities for carrying out return related tasks.¹⁴ The handbook deals with standards and procedures in Member States for returning irregularly staying third-country nationals and is based on EU legal instruments regulating this issue, in particular the Return Directive. It does not establish, however, any legally binding obligations on the Member States.

After the Informal meeting of EU heads of state or government held in Malta on 3rd February 2017 highlighted the need for a review of the EU’s return policy,¹⁵ the European Commission published a Renewed EU Action Plan on Return, along with an Annex listing the actions to be implemented by Member States to complete as well as a Recommendation on making returns more effective when implementing the Return Directive.¹⁶ The Action Plan foresees the adoption of immediate measures by the Member States to enhance the effectiveness of returns when implementing EU legislation, in line with fundamental right obligations. The latest Communication from the European Commission on the Delivery of the Agenda on Migration of September 2017 encourages Member States to continue with the implementation of the Recommendation and the Renewed Action Plan, and to fully apply the flexibility available in the existing legislation on returns.¹⁷

Member States should continue with the implementation of the Recommendation and the Renewed Action Plan on Returns, fully applying the flexibility available in the existing legislation.

If the fragmentation and most importantly the unsatisfactory return rates continue, there might be a need to explore further convergence. This could concern standardising all aspects of the return process from identification/apprehension until the execution of return, approximation of rules on risk on absconding, grounds for detention and rules on issuing of entry bans and look into an increased coherence with the asylum procedures as well as facilitating the enforcement of Member States’ return decisions with an EU-wide validity, sharing the responsibility for their enforcement between Member States and the European Border and Coast Guard Agency.

1.3 STUDY AIMS

This study aims at analysing the impact of EU rules on return – including the Return Directive¹⁸ and related case law from the Court of Justice of the European Union (CJEU) – on Member States’ return policies and practices and hence on the effectiveness of return decisions issued across the EU. The study will present an estimation of the scale of the population of irregular migrants who have been issued a return decision but whose return to a third country has, as yet, not been carried out. The study will also seek to provide an overview of the challenges encountered by Member States in effectively implementing returns, as well as identify any good practices developed to ensure the enforcement of return obligations

¹² European Council meeting (25 and 26 June 2015), Conclusions, 26th June 2015, EUCO 22/15.

¹³ European Commission, Communication from the Commission to the European Parliament and to the Council, *EU Action Plan on Return*, *op. cit.*

¹⁴ European Commission, *Commission Recommendation of 27.9.2017 establishing a common “Return Handbook” to be used by Member States’ competent authorities when carrying out return related tasks*, 27th September 2017C(2017) 6505.

¹⁵ European Council, Malta Declaration by the members of the European Council on the external aspects of migration: *Addressing the Central Mediterranean route*, 3rd February 2017.

¹⁶ European Commission, Communication on a *More Effective Return Policy in the European Union – a Renewed Action Plan*, *op. cit.*, and Commission Recommendation on *making returns more effective when implementing Directive 2008/115/EC*, 2nd March 2017, C(2017) 1600.

¹⁷ European Commission, Communication on the *Delivery of the European Agenda on Migration*, COM(2017) 558 final, 27 September 2017.

¹⁸ Directive 2008/115/EC of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, OJ L 348, 24th December 2008.

in full respect of fundamental rights, the dignity of the returnees and the principle of *non-refoulement*. Such challenges and good practices may cover national implementing measures or interpretations of concepts used under EU law (e.g. risk of absconding) or of the conditions to implement certain EU provisions, such as Article 15 of the Return Directive on detention. Conversely, the aim of the study is not to make an overall assessment of whether return policies in general are an effective instrument to manage or address migration – be it in the view of EU Member States, the countries of origin or the third-country nationals themselves. Although references to the Commission’s 2017 Recommendation are made throughout the study, it does not aim to assess the implementation of the Recommendation by Member States.

1.4 SCOPE OF THE STUDY

In terms of scope, the study focuses on the way the EU standards and procedures on return have been interpreted and applied at the national level and, to the extent possible, on how their application has impacted on the effectiveness of return – bearing in mind the difficulty of drawing strong causal connections between specific policy measures and the number of implemented returns.

Other factors impacting the effectiveness of return, such as the challenges Member States face in cooperating with third countries and obtaining travel documents, have been documented in other studies and therefore are not covered. Member States that are not bound by the Return Directive (IE, UK) pointed out synergies with the EU legislative framework and potential challenges and good practices they have encountered in relation to their legislative framework.

The scope and added value of this study needs to be assessed in the context of other EMN studies and outputs also touching on the issue of the effectiveness of return of irregular migrants, such as:

- The 2016 EMN Study on the ‘Return of rejected asylum seekers’.¹⁹ The study investigated the specific challenges in relation to the return of rejected asylum seekers and Member State responses to these challenges. The study also investigated national measures to prepare asylum seekers for return during the asylum procedure to anticipate the possibility that their applications would be rejected.
- The 2015 EMN Study on ‘Dissemination of Information on Voluntary Return: how to reach irregular migrants not in contact with the authorities’.²⁰ The study looked into the different approaches followed by the Member States to ensure that irregular migrants were informed of options for return, with particular reference to voluntary and assisted voluntary return.
- The 2014 EMN Study on the ‘Use of detention and alternatives to detention in the context of immigration policies’.²¹ The study aimed at identifying similarities, differences and best practices with regard to the use of detention and alternatives to detention in the context of Member States’ immigration policies. The study also collected evidence of the way detention and alternatives to detention contributed to the effectiveness of return and international protection procedures.
- The 2014 EMN Study on ‘Good practices in the return and reintegration of irregular migrants: Member States’ entry bans policy and use of readmission agreements between Member States and third countries’.²² The study assessed the extent to which Member States used entry bans and readmission agreements to enhance their national return policies. Incentives to return to a third

¹⁹ Available at: https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/networks/european_migration_network/reports/docs/emn-studies/emn-studies-00_synthesis_report_rejected_asylum_seekers_2016.pdf, last accessed on 30th March 2017.

²⁰ Available at: https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/networks/european_migration_network/reports/docs/emn-studies/info_on_return_synthesis_report_20102015_final.pdf, last accessed on 30th March 2017.

²¹ Available at: https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/networks/european_migration_network/reports/docs/emn-studies/emn-study_detention_alternatives_to_detention_synthesis_report_en.pdf, last accessed on 30th March 2017.

²² Available at: https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/networks/european_migration_network/reports/docs/emn-studies/emn-study_reentry_bans_and_readmission_agreements_final_december_2014.pdf, last accessed on 30th March 2017.

country, while not being covered by a EMN Study, have been analysed in an EMN Inform updated in 2016 that provided an overview of the results of the review of 87 programmes implemented by 23 Member States and Norway to assist migrants to return and to support their reintegration.²³

Recent and ongoing work by the EMN Return Experts Group (REG), including on the use of detention in the return procedure and obstacles to return, were also taken into account to complete the relevant sections of this study. Sensitive information was not included in the public version of the Synthesis Report.

1.5 STRUCTURE OF THE REPORT

Following this introduction (Section 1), the present report is divided into a further seven sections (Sections 2-8):

- Section 2 on national measures implementing the Return Directive or equivalent standards in the EU;
- Section 3 on measures adopted at national level to ensure that a return decision is systematically issued against third-country nationals staying irregularly on the territory of EU Member States, in conformity with the Return Directive or equivalent standards;
- Section 4 on the way Member States assess the risk that a third-country national against whom a return decision was issued absconds;
- Section 5 on the measures adopted at national level to effectively enforce return decisions;
- Section 6 on the procedural safeguards and remedies applicable to third-country nationals in the return procedure;
- Section 7 on specific national measures applicable to third-country nationals' family life and state of health, as well as to minors in the return procedure;
- Section 8 on national measures applicable to voluntary departure; and
- Section 9 on entry bans.

²³ EMN Inform: Overview: *Incentives to return to a third country and support provided to migrants for their reintegration*, June 2016, available at: https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/networks/european_migration_network/reports/docs/emn-informs/emn-informs-emn_reg_inform_-_in-cash_in-kind_assistance_to_return_june_2016.pdf, last accessed on 30th March 2017.

02

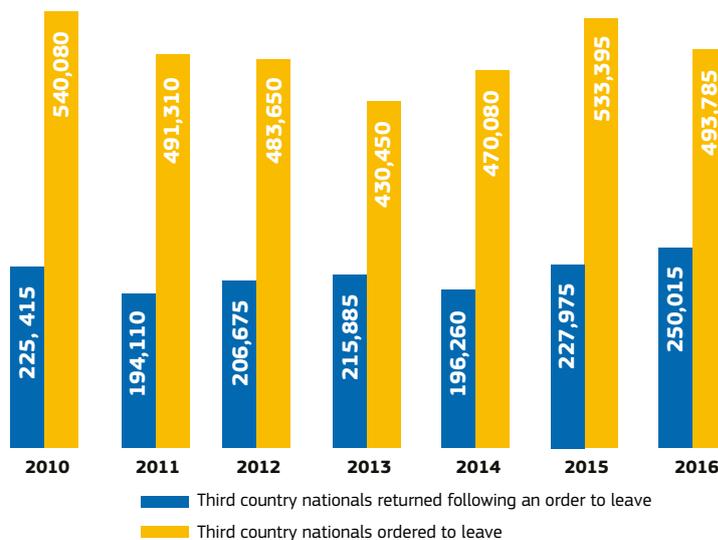
CONTEXTUAL
OVERVIEW OF THE
NATIONAL SITUATION
CONCERNING THE
RETURN OF
THIRD-COUNTRY
NATIONALS



2. Contextual overview of the national situation concerning the return of third-country nationals

As outlined in Figure 1, data made available to Eurostat show that the number of returns has not increased in proportion to the number of those who were ordered to leave, despite the significant increase in the number of rejected asylum applications and in the number of return decisions issued between 2014 and 2015.²⁴ Eurostat figures from 2016 show a slight increase in the number of return decisions issued and of returns of third-country nationals in comparison with previous years, although the proportion of effective returns remains at about half of the total of orders to leave the territory issued by Member States.

Figure 1: Number of third country nationals ordered to leave and of third country nationals returned following an order to leave (28 EU Member States)



Source: Eurostat (2010-2016), [migr_eirtn] and [migr_eiord], last accessed on 5 February 2018

This section provides a mapping of the recent changes in the national legal and policy framework and an overview of the main focus of debates on return in all EU Member States. It also reviews the national measures implementing the Return Directive²⁵ as well as different interpretations and equivalent standards applied by Member States.

2.1 RETURN OF IRREGULARLY STAYING THIRD-COUNTRY NATIONALS AS A PRIORITY IN MEMBER STATES AND RECENT POLICY AND LEGISLATIVE CHANGES

Almost all Member States (with the exception of Croatia) reported that the return of irregularly staying third-country nationals was a national priority. Debates took place in the majority of Member States both during and after the migration crisis started in 2015. More recently, the focus of national debates has shifted towards the topic of return, involving both the institutional sphere (Ministries, governmental offices) and the public sphere, including NGOs and International Organisations working on migration as well as the media. Some most common topics of debates related to the implementation of forced and voluntary returns, including the treatment of vulnerable groups or the consideration of family and individual circumstances such as children attending school (AT, CY, CS, DE, EE, FI, HU, IE, IT, LU, LV, NL, SK, SE, UK). Also, pre-removal detention was a topic widely discussed (BE, CY, IE, UK) together with individual cases (BE, IE, NL, UK) such as for instance the return of a minor from Kosovo who had arrived in Belgium when she was only a few months old and grew up there.

²⁴ European Commission, Communication on a More Effective Return Policy in the European Union – a Renewed Action Plan, 2nd March 2017, COM(2017) 200 final.

²⁵ Directive 2008/115/EC of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals. Denmark, Ireland and the United Kingdom have not participated in the adoption and are therefore not bound by the Return Directive.

Table 1 outlines the main focus of debates on return in Member States, including specific cases concerning third-country nationals from certain countries, as well as the key players involved in the debates.

Table 1: Overview of current national debates on return and key players involved

Member State	Focus of debate	Key players involved
Austria	<ul style="list-style-type: none"> › Removals to Afghanistan › Voluntary return › Harder sanctions for illegal residence › More efficient enforcement of return obligations 	<ul style="list-style-type: none"> › Federal Ministry of the Interior › NGOs
Belgium	<ul style="list-style-type: none"> › Possibility to detain families with minor children › Identification and forced return of irregularly staying Sudanese migrants in transit › Attempt to remove a minor from Kosovo who grew up in Belgium › Draft law on interception of irregularly staying persons at home 	<ul style="list-style-type: none"> › Government › Belgian State Secretary for Asylum Policy and Migration › NGOs › International Organisations (e.g. UNICEF) › Media
Cyprus	<ul style="list-style-type: none"> › Return of irregular migrants › Detention › Alternative measures to detention 	<ul style="list-style-type: none"> › N/A
Czech Republic	<ul style="list-style-type: none"> › Irregular migration › Readmission policy 	<ul style="list-style-type: none"> › N/A
France	<ul style="list-style-type: none"> › Irregular migration › Unaccompanied minors 	<ul style="list-style-type: none"> › Government › Municipalities › NGOs
Germany	<ul style="list-style-type: none"> › Forced return › Treatment of persons who might endanger public security › Removals to Afghanistan › Young people who are obliged to leave the country even though they are attending school or vocational training measures 	<ul style="list-style-type: none"> › Federal Ministry of Interior › Ministries and governments of the <i>Länder</i> › Civil-society organisations and welfare associations › Chambers of industry and commerce › Private sector
Greece	<ul style="list-style-type: none"> › Effectiveness of the return policy › Prioritisation of voluntary returns 	<ul style="list-style-type: none"> › Ministry of Interior (Police Headquarters) › Ministry for Migration Policy
Estonia	<ul style="list-style-type: none"> › Return of irregularly staying third-country nationals › Voluntary return 	<ul style="list-style-type: none"> › Ministry of the Interior
Finland	<ul style="list-style-type: none"> › Efficient enforcement of removal decisions › Return of rejected asylum seekers 	<ul style="list-style-type: none"> › Government › Other political parties › Civil Society
Hungary	<ul style="list-style-type: none"> › Implementation of humane, effective and sustainable return 	<ul style="list-style-type: none"> › N/A
Ireland	<ul style="list-style-type: none"> › Procedural issues › Detention › Individual Cases 	<ul style="list-style-type: none"> › NGOs › United Nations › Media
Italy	<ul style="list-style-type: none"> › Return of irregularly staying third-country nationals › Assisted voluntary return (AVR) › Expulsions for reasons of national security 	<ul style="list-style-type: none"> › Government › Ministry of Interior › Other political parties › International Organisations › Media › Civil-society organisations
Lithuania	<ul style="list-style-type: none"> › Return of third-country nationals to countries which do not cooperate 	<ul style="list-style-type: none"> › Government

Member State	Focus of debate	Key players involved
Luxembourg	<ul style="list-style-type: none"> › Voluntary return › Forced returns › Extension of the period of detention for families with children 	<ul style="list-style-type: none"> › Government › NGOs
Latvia	<ul style="list-style-type: none"> › Effective return of third-country nationals 	<ul style="list-style-type: none"> › Government › International Organisations
Malta	<ul style="list-style-type: none"> › Return of irregularly staying third-country nationals › Readmission 	<ul style="list-style-type: none"> › Government
The Netherlands	<ul style="list-style-type: none"> › Shelter for third-country nationals who have exhausted all legal remedies › Individual cases › Effective return of rejected asylum seekers causing nuisance/involved in petty crime 	<ul style="list-style-type: none"> › Media › NGOs
Slovak Republic	<ul style="list-style-type: none"> › Return of irregularly staying third-country nationals 	<ul style="list-style-type: none"> › Media › Government
Spain	<ul style="list-style-type: none"> › Banning detention of returnees › Closing of detention centres 	<ul style="list-style-type: none"> › Civil society
Sweden	<ul style="list-style-type: none"> › Return of unaccompanied minors and young adults (in particular to Afghanistan) › Voluntary returns › Efficient enforcement of return decisions 	<ul style="list-style-type: none"> › Government › Lobbying networks › NGOs › Political organisations
United Kingdom	<ul style="list-style-type: none"> › Numbers of irregularly staying third country nationals returned › Procedures used in the return process › UK's voluntary returns scheme › Individual cases 	<ul style="list-style-type: none"> › Government › Parliamentary groups › NGOs › Media

Between 2015 and 2017, fifteen Member States (AT, BE, DE, EE, EL, FI, FR, HR, HU, IE, IT, LU, NL, SE, UK) reported recent changes in their national legal and/or policy framework (e.g. as a result of the migration situation in 2015-2016 and/or the European Commission Recommendation issued in March 2017). Of these, six Member States adopted new measures concerning the detention of third-country nationals (DE, EE, IE, IT, LU, SE), four on enhancing their capacity for return (BE, DE, FI, SE), four on the risk of absconding (BE, EE, FR, DE) and voluntary return (AT, NL, SE). Other changes in national legal and policy frameworks included the conclusion of bilateral agreements (IT) or memorandums of understanding with third countries (BE). More details on the measures implemented by Member States are outlined in Annex 1.

2.2 NATIONAL MEASURES IMPLEMENTING THE RETURN DIRECTIVE OR EQUIVALENT STANDARDS

The Return Directive is the main legal instrument regulating return policy in Member States where it applies, and lays down common EU standards on return. It has a two-fold approach: on the one hand, it provides that Member States bound by the Directive are obliged to issue return decisions to all third-country nationals staying irregularly on the territory of a Member State.

On the other hand, it emphasises the importance of implementing return measures with full respect for the fundamental rights and freedoms and the dignity of the individual returnees, including the principle of *non-refoulement*. As a result, any return procedure may only be carried out in compliance with EU and other international human rights' standards. The Return Directive defines the different stages of the return procedure, with a main distinction between voluntary and forced return: voluntary return should be preferred over forced return, although efficient means to enforce returns in conformity with relevant safeguards are foreseen where necessary.

All participating EU Member States transposed the Return Directive into their national legislation,²⁶ while Ireland and the United Kingdom implemented broadly similar (but not directly equivalent) provisions as they are not bound by the Directive. Identified differences between the standards implemented in these two Member States and those applying in Member States bound by the Return Directive are highlighted whenever relevant in the study.

The scope of the Return Directive includes all third-country nationals irregularly staying on the territory of an EU Member State. However, Article 2(2) provides for four exceptions: Member States have the possibility not to apply the provisions of the Return Directive to (a) third-country nationals who are subject to a refusal of entry, and/or who are apprehended or intercepted while irregularly crossing the border and have not subsequently obtained an authorisation to stay in the Member State; and (b) third-country nationals who were subject to return as a criminal law sanction or a consequence of such a sanction, and/or who are the subject of an extradition procedure.

In its **Recommendation 8**, the European Commission calls for Member States to ‘make use of the derogation provided for under Article 2(2)(a) of the Return Directive when this can provide for more effective procedures, in particular when facing significant migratory pressure’.²⁷

Member States making use of the derogation:

16



Sixteen Member States (AT, BE, CY, CZ, DE, EL, ES, FR, HU, LT, LU, LV, MT, NL, SI, SE) make use of the derogations defined in Article 2(2), and therefore may decide not to apply the Directive to certain groups of third-country nationals as detailed in Table 2 below. Four Member States (EE²⁸, FI²⁹, HR³⁰, SK) reported not making use of the derogations.

Table 2: Member States using the derogations provided under article 2(2) (a) and (b)³¹

Member State	Third-country nationals who are...			
	subject to a refusal of entry	apprehended or intercepted while irregularly crossing the external border	subject to return as a criminal law sanction or as a consequence of a criminal law sanction	the subject of an extradition procedure
Austria ³²	✓	✓	✓	
Belgium	✓	✓	✓	✓
Cyprus			✓	
Czech Republic	✓	✓	✓	✓
France	✓	✓	✓	
Germany	✓	✓		✓
Greece		✓		

²⁶ National transposition measures communicated by the Member States concerning Directive 2008/115/EC, <http://eur-lex.europa.eu/legal-content/EN/NIM/?uri=celex:32008L0115>.

²⁷ European Commission, Commission Recommendation on making returns more effective, *op. cit.*

²⁸ In Estonia, the Return Directive partly applies to the categories of third-country nationals defined in Article 2(2), however Estonia does not apply the provisions about the return decision (e.g. no period of voluntary departure granted) to third-country nationals who are subject to return as a criminal law sanction (decision is taken by the court) and to third-country nationals who are subject to a refusal of entry (decision is taken based on the Schengen Border Code).

²⁹ In Finland, the Return Directive also applies to the categories of third-country nationals defined in Article 2(2), however, they are not granted a period of voluntary return. Moreover, no derogation is foreseen concerning third-country nationals subject to an extradition procedure, which is in line with Article 2(2)(b) of the Return Directive.

³⁰ Croatia will start making use of this derogation upon the entry into force of its new Foreigners Act, which was adopted in July 2017 and will become effective after October 2017.

³¹ Not applicable to Ireland.

³² In Austria, derogations are possible but the exclusion of these groups from the application of return decisions is not explicitly defined in the Austrian aliens' law.

Member State	Third-country nationals who are...			
	subject to a refusal of entry	apprehended or intercepted while irregularly crossing the external border	subject to return as a criminal law sanction or as a consequence of a criminal law sanction	the subject of an extradition procedure
Hungary		✓		
Lithuania	✓	✓	✓	✓
Luxembourg	✓		✓	✓
Latvia	✓	✓	✓	✓
Malta	✓	✓	✓	
The Netherlands	✓			✓
Slovenia		✓	✓	
Spain	✓	✓	✓	
Sweden	✓		✓	✓

By making use of the derogation, in general Member States refused at borders or forcibly returned the third-country nationals falling under Article 2(2) (a) and (b). However, two Member States reported exceptions regarding their practices. Cyprus still applied some of the principles defined in the Return Directive, i.e. the re-evaluation of detention and the maximum period of detention for persons who were convicted for a criminal offence. In Luxembourg, if a third-country national is being investigated because of a criminal offence, she or he cannot be returned during the duration of the investigation and of the trial and, if the individual is eventually convicted, during the execution of the sentence. If the third-country national is freed,³³ she or he has then to leave the territory.

³³ A third-country national can be freed if she or he is a first offender and has served at least three months of the sentence, in cases where the latter was less than 6 months or half of the sentence in other cases. In cases where the third-country national is a repeat offender, she or he has to serve at least six months if the sentence was less than nine months or two thirds of the sentence in other cases.

03

SYSTEMATIC
ISSUANCE OF
RETURN
DECISIONS



3. Systematic issuance of return decisions

This section presents the measures taken by Member States to guarantee that return decisions are systematically issued against third-country nationals found to be irregularly present on their territory. Section 3.1 provides an overview of the authorities in charge of the issuance of return decisions in Member States. Section 3.2 then analyses Member States' practices to issue return decisions in particular cases. Subsequently, Section 3.3 provides an overview of the timing and validity of return decisions in the Member States, while Section 3.4 examines the possibilities for Member States to renounce the enforcement of the return decision (e.g. for compassionate, humanitarian or other reasons, or in case the individual situation of the third-country national concerned changed before the decision is enforced).

3.1 AUTHORITIES INVOLVED IN THE ISSUANCE OF A RETURN DECISION

The responsibility of the issuance of return decisions laid with three main types of authorities in Member States:

- Ministry of Interior or equivalent (CY, HR, IT, MT, UK), Ministry of Justice (IE) or Ministry of Foreign Affairs (SI);
- Immigration and Asylum Authority (AT, BE, DE, EL, FI, HU, IE, LT, LV, NL, SE);
- Police forces, including border authorities (CZ, EE, EL, FI, HR, LT, LV, NL, SE, SK). In some Member States, border authorities are also responsible for the implementation of the return decisions (IE, LT³⁴, LU);
- Other authorities include: municipalities (BE, DE), judicial authority (HU, IT, SK³⁵), government delegate in the province (ES) and prefect (FR).

In Member States where there were multiple authorities responsible for the issuance of return decisions, the allocation of responsibility mainly depends on the circumstances of the third-country national concerned. For example, in cases where the migration authority is responsible for deciding on applications for asylum, the issuance of a return decision in case of negative asylum decision may also falls under its remit, while the authority is not competent to issue return decisions against other irregularly-staying third-country nationals found on the national territory. In Germany, the authority in charge of foreign nationals within municipalities is competent to issue return decisions to all categories of third-country nationals with the exception of asylum seekers whose application was rejected. In Slovenia, the Ministry of Foreign Affairs issues a return decision alongside the decision on the annulment or revocation of a visa to a foreigner already staying in the territory, issued by the police. In Finland, both police and border authorities, as well as the Immigration Service can issue the refusal of entry decisions, while only the Finnish Immigration Service can issue a deportation order. In the Netherlands, the Immigration and Naturalisation Service is responsible for the decision on an application for residence permit or its renewal, which encompasses the return decision, but officials in charge of border control or of locating and apprehending irregularly-staying third-country nationals can also issue a return decision against a third-country national staying irregularly on the territory.

³⁴ Including police.

³⁵ In the Slovak Republic, this is only the case in situations where the removal of a third-country national is due to the commission of a criminal offence.

3.2 ISSUANCE OF RETURN DECISIONS

Article 6(1) of the Return Directive sets an obligation for Member States to issue a return decision to any third-country national staying illegally on their territory, unless the individual has the right to stay in another Member State and goes back to that Member State, can be taken back by another Member State in application of a bilateral agreement, or obtains an authorisation or right to stay. However, in practice a number of factors may hinder the systematic issuance of return decisions, such as the lack of information on the individual's whereabouts or the absence of documentation.

For this reason, Recommendation 5³⁶ encourages Member States to (a) set up measures to effectively locate and apprehend third-country nationals staying illegally; and to (b) issue return decisions regardless of whether the individual holds an identity or travel document. In addition, Recommendation 24(d) calls for Member States to issue return decisions where illegal stay is detected during an exit check.

Member States issuing return decisions when whereabouts are unknown:

17

Member States issuing return decisions when lacking ID or travel document:

20

Member States issuing return decisions when irregular stay detected at exit check:

14

The majority of Member States (see Table 4 below) issue return decisions even when the whereabouts of the third-country national are unknown, the third-country national is not in possession of identity and travel documents, or the irregularity of the stay is detected during an exit check.

Table 4: Overview of challenging circumstances in which a return decision is issued

Circumstances	Yes	No
The whereabouts of the third-country national concerned are unknown	AT, BE, CY, DE, EE ³⁷ , ES, FI, FR, HR, IE, IT, LU, NL, SE, SI, SK ³⁸ , UK	CZ, EL, HU, IT, LT ³⁹ , LV, MT
The third-country national concerned lacks an identity or travel document	AT, BE, CY, DE, EE, ES, FI, FR, HR, HU ⁴⁰ , IE, IT, LT ⁴¹ , LU, LV, NL, SE, SI, SK, UK ⁴²	CZ, EL, IT, MT
Irregular stay is detected during an exit check ⁴³	AT ⁴⁴ , CZ, EE, ES, FI, HR, HU ⁴⁵ , LT, LU ⁴⁶ , LV ⁴⁷ , NL ⁴⁸ , MT, SE, SK	BE, CY, DE, EL, FR, IT, SI ⁴⁹ , UK

³⁶ European Commission, Recommendation on making returns more effective, *op. cit.*

³⁷ However the return decision can only be issued if the TCN was granted the right to be heard.

³⁸ A return decision may be issued and a period for voluntary departure granted in cases where the whereabouts of a third-country national in Slovakia are unknown until his/her departure; in other cases, for example where authorities learn from a different source about the overstay of a third-country national but they were not in direct contact with him/her then a return decision cannot be issued.

³⁹ With the exception of cases where the person represented a threat to national security or public policy.

⁴⁰ The enforcement of the return decision could be suspended until travel and identity documents were received.

⁴¹ If the alien did not have documents, the return decision was issued and documents were awaited; if the alien did not cooperate to establish his/her identity, (s) he could be detained to avoid absconding until his/her identity was established.

⁴² In the United Kingdom, they will not have the right to stay but their removal directions will not be set.

⁴³ This issue is further developed under Section 9 of this report.

⁴⁴ Although Austria reported that no cases are known.

⁴⁵ In practice, once detected, an irregularly-staying third-country national is "handed over" to the alien Policing Department of the Police County Head Quarters which has the responsibility to issue a return decision.

⁴⁶ In practice, the Airport Police (UCPA) contacts and reports to the Return Department of Directorate of Immigration which issues a return decision.

⁴⁷ Latvia actively applies "in absentia" procedure for issuing return decisions at the external border upon exit of a third-country national.

⁴⁸ Issuing a return decision and an entry ban is time-consuming and if this would cause a third-country national to miss his/her flight the return decision is not issued. The Dutch immigration authorities will initiate an experimental *in absentia* procedure in case of a longer overstay (14 days) on visa or visa free period if detected at Schiphol airport on exit.

⁴⁹ In such cases, the person is proceeded by an administrative sanction, namely a fine. No other circumstances occur.



In most cases, the return decision is issued but enforced only once the whereabouts are known, the identity is established and a valid travel document is available.

In Estonia, if the whereabouts of the third-country national are unknown and the return decision cannot be delivered, it is possible to publish the substance of the return decision in a national newspaper. In Austria, the decision can be published on the authorities' official notice board and is considered as having entered into force after two weeks. In Germany, it is possible not to issue a return decision if the residence title is withdrawn or revoked or if the person concerned has already been informed in writing about his or her obligation to leave the country, of the reasons for this decision and of the available legal remedies. In both cases, the authorities must have good reasons to suspect that the person concerned is planning to abscond or the person concerned must pose a serious danger to public safety or law and order. Similarly, to practices reported by Austria and Estonia, if the whereabouts of a third-country national are unknown, the return decision can be delivered by public notice and displayed at a place determined by the relevant national authority.

Other circumstances to refrain from issuing a return decision, in the Netherlands, include cases in which issuing a return decision obstructs the third-country national's departure.⁵⁰

Furthermore, in Austria, France, Lithuania and the Netherlands, a return decision is not issued if the third-country national staying irregularly on the territory was taken back by another Member State under bilateral readmission agreements or arrangements existing before the entry into force of the Return Directive.

Measures to locate third-country nationals whose whereabouts are unknown

Twenty Member States (AT, BE, CY, CZ, DE, EE, EL, ES, FI, FR, HU, IE, IT, LT, LV, NL, MT, SE, SK and UK) have measures in place to locate and apprehend irregularly staying third-country nationals whose whereabouts are unknown. The most common measures implemented by Member States in this context include:

- Regular identity checks, including via travel identity documents (AT, DE, FI, FR, IT, LV, NL, SE, SK);
- Property/residence checks (AT, BE, CY, CZ, DE⁵¹, EE, EL, FI, IT, NL, SK, UK);
- Physical checks at the last known residence or employment address (MT);
- Cooperation and exchange of information among authorities and stakeholders, such as local authorities, schools and employers (BE, DE⁵², EE, FI, IT, SK, UK);
- Through other random controls/checks, such as traffic violations, emergency calls, inspections for illegal labour, criminal investigations (BE, DE, EE, EL, ES, FI, FR, IT, LV, NL, SE, SK, UK);
- Issuance of a (detention) warrant, if considered necessary, for example if there is a risk of absconding (HU, IE, IT).

In Estonia, local authorities, educational institutions and employers are required to notify the Police and Border Guard Board. Employees must be registered in the Tax and Customs Board register to which the police has access to carry out migration controls.

In the United Kingdom, local Immigration, Compliance and Enforcement (ICE) teams, within the Immigration Enforcement department in the Home Office, are responsible for carrying out visits to locate and apprehend irregularly staying third-country nationals. ICE operations are informed by casework teams and immigration intelligence staff, which collect information from various internal and external sources, for example from housing staff and HM Revenue and Customs department. While the National Absconder Tracing Team (NATT) is responsible for initiating tracing action on all absconders, the Criminal Casework (CC) absconding team are responsible for locating absconding third country national offenders.

⁵⁰ For example, where s/he would miss their flight when leaving the Schengen Area.

⁵¹ Police checks may also occur under other conditions and these are governed by the law of the *Länder*.

⁵² In Germany, such cooperation takes place to apprehend a third-country national who is required to leave the country, rather than with the aim of issuing the return decision. Therefore, such measures take place after a return decision has been issued.

The work of NATT and CC prioritise removable cases (where there were no barriers to removal), highest harm cases (e.g. those who have been convicted of violent crimes, those who had overstayed for a long time or who had committed the most severe crimes), vulnerable adults and missing children. Once a new address is identified, both CC and NATT refer the case to the relevant Immigration Compliance and Enforcement (ICE) team for further action. Once located, the individual is placed on a weekly reporting regime, or detained if there is a significant risk that they will abscond again.

Luxembourg⁵³ reported that it did not have specific measures to locate third-country nationals.

3.3 TIMING, VALIDITY AND SCOPE OF RETURN DECISIONS

Recommendation 5(c) advises Member States to “make the best use of the possibility” to adopt the decision to end a third-country national’s stay together with a return/removal/entry ban decision, in application of Article 6(6) of the Return Directive. In addition, Recommendation 6 calls for Member States to ensure that return decisions have unlimited validity to facilitate their enforcement at any given time.

Member States issuing a return decision together with a decision to end legal stay:

17

Member States issuing return decisions of unlimited validity:

12



In seventeen Member States (AT, CY, DE, EE⁵⁴, EL, FI, FR, HR, HU, IT, LT, LU, MT, NL, SE, SI, and UK⁵⁵), the return decision is issued together with the decision to end the legal stay of a third-country national. Whether these are issued in the same document and/or issued simultaneously varies from one Member State to another and, at times, also depends on the procedure at hand.

For example, in Germany, a return decision is issued in the same document as the rejection of an asylum application; for third-country nationals overstaying their residence permit, this depends on the practice of local foreigners’ authorities. While Finland, France,⁵⁶ Greece, Lithuania,⁵⁷ Luxembourg,⁵⁸ the Netherlands⁵⁹ and Slovenia indicated that national authorities issue a return decision together with the decision to end the legal stay in the same document, Austria and Italy issue them at the same time but not in the same document.

In at least four Member States (ES, IE, LV and SK), the return decision is not issued together with the decision to end the legal stay of a third-country national. In Estonia and Latvia, the return decision is issued after the decision to reject an asylum application has entered into force. In the Slovak Republic, the return decision is issued after the third-country national failed to leave the country within the legal given period. In Ireland, a deportation order can only be issued after all asylum appeals are exhausted and the period for the voluntary departure has expired.

⁵³ Luxembourg reported that as it is a small country (2,586 km²) with no visible external borders (except for the Luxembourg International Airport), it is difficult to implement measures to effectively locate and apprehend those irregularly staying third-country nationals whose whereabouts are unknown.

⁵⁴ In Estonia, in case of rejected asylum seekers however, the return decision is issued after the final decision on asylum application has been issued.

⁵⁵ The United Kingdom does not issue return decisions as such but rather informed the individual of his/her liability for removal. Furthermore, there is no separate “return decision” issued. When an individual is informed that they do not have/no longer have the right to remain in the UK, their obligations regarding return are outlined at the same time.

⁵⁶ With the exception of asylum cases.

⁵⁷ In Lithuania, decisions are issued together, i.e. in the same document, where a decision to end the legal stay is issued together with a decision on expulsion.

⁵⁸ However, when a third-country national having legally resided in Luxembourg has not been able to renew his/her residence permit, the Returns Department will not issue a return decision if there is a possibility that the third-country national can regularise his/her documents.

⁵⁹ In the Netherlands, the return decision is issued in the same document as the decision to end the legal stay of the third-country national (e.g. by rejecting an application or by withdrawing a residence permit). The two decisions are interlinked: if the decision to end the legal stay of a third-country national should be revoked, this would also mean that the return decision is revoked.

In Belgium, the possibility to issue both decisions, first to end the third-country national's legal stay and then the return decision, depends on the circumstances of the case, e.g. if the appeal procedure has a suspensive effect, or medical or other reasons are preventing the issuance of a return decision.

Return decisions have unlimited validity in twelve Member States (BE, DE, EE, ES, FI, FR⁶⁰, IE, LT, LU, NL, SI, SK). On the other hand, in at least ten Member States (AT, CY, CZ, EL, HU, IT, LV, SE and UK), this is not the case. As an example, in Austria, Cyprus, Czech Republic and the United Kingdom⁶¹ a return decision is valid until the time for the third-country national to be returned has expired (CY, CZ, UK) or until he/she actually left the territory (AT). In Hungary, return decisions have a validity of minimum one year up to maximum ten years, while in Latvia and Italy, the maximum duration is set to five years, and in Sweden to four years.

In twenty-two Member States, the return decision included the information that the third-country national concerned must leave the territory of the Member State to reach a third country (AT, BE⁶², CY, CZ⁶³, DE, EE, ES, FI, FR⁶⁴, HR, HU, IE⁶⁵, IT, LT, LU, LV⁶⁶, MT, NL, SE, SI, SK⁶⁷, UK). Belgium, Cyprus, Greece, the Netherlands and Slovenia did not specify the country to which the third-country national had to return. Estonia, Germany, Finland, France,⁶⁸ Latvia, Lithuania, Sweden, Slovakia and United Kingdom⁶⁹ did specify in the return decision to which third-country the person had to return.

3.4 MEMBER STATES' DISCRETION TO GRANT A RIGHT TO STAY DURING THE RETURN PROCEDURE

Article 6(4) of the Return Directive offers the possibility for Member States to grant at any moment a right to stay for humanitarian, compassionate or other reasons, which leads to the impossibility of issuing a return decision or to the withdrawal of such a decision.

3.4.1 MEMBER STATES' POWER TO GRANT A RIGHT TO STAY FOR COMPASSIONATE, HUMANITARIAN OR OTHER REASONS

The legislation in twenty-one Member States (AT, BE, CY, CZ, DE, EE, EL, ES, FR⁷⁰, HR, HU, IE, IT, LT⁷¹, LU, MT, NL, SE, SI⁷², SK⁷³ and UK) foresees the possibility to grant a residence permit or other authorisation offering a right to stay for compassionate, humanitarian or other reasons to third-country nationals irregularly staying on their territory under certain circumstances.

⁶⁰ In France, return decisions have an unlimited validity but a new detention measure has to be pronounced after one year, if detention is needed for effective return.

⁶¹ In the United Kingdom, the return decision allows for removal to take place within three months and can be extended for further 28 days.

⁶² In Belgium, in a majority of cases, the return decision also mentions that the third-country national should leave the territory of all the States who apply the Schengen acquis, unless s/he can prove that s/he has the right to reside in one of those States.

⁶³ The decision on administrative expulsion takes into account the principle of *non-refoulement* and the possibility to travel to a particular country of origin. However, this information is not included in the statement of the decision on administrative expulsion.

⁶⁴ If the person is accompanying a minor who is a European citizen, he/she can only be requested to return to a EU Member State or a country where Schengen acquis is applicable.

⁶⁵ The deportation order requires the recipient to leave the State and to remain thereafter out of the State. No comment is made where the recipient should go.

⁶⁶ In decisions on forced return, but not in decisions on voluntary return.

⁶⁷ With the exception of cases when it is not possible to state the country of return.

⁶⁸ The mention of the country of return is *per se* a distinct decision, even if the return decision mentions the country of removal. If the country of removal cannot be mentioned in the decision of return, a distinct decision should be issued, before removal (Conseil d'État, N° 393591).

⁶⁹ For third country nationals, the refusal letters will also include the name of the Member States that has the responsibility on the basis of EURODAC.

⁷⁰ Under certain conditions, on a case-by-case basis.

⁷¹ If the reasons because of which the alien has not been returned or expelled no longer apply, return is implemented immediately.

⁷² Slovenia grants a permission to stay, which means that the third country national who should be deported might remain temporarily.

⁷³ The Slovak Republic grants tolerated status in these cases.

The most common grounds, apart from the respect of the principle of *non-refoulement*, for granting a residence permit or authorisation to stay include:

- Protection of private or family life, including medical reasons (AT, BE, DE⁷⁴, EL, ES, FI, FR, HU, IE, IT, LT⁷⁵, NL⁷⁶, SI, SE, SK);
- Residence for at least a number (3 or 5) of years (AT, ES) or special bonds with the country (EL, ES);
- Having had tolerated status for at least one year (AT⁷⁷, DE⁷⁸, HU⁷⁹);
- Victims of trafficking in human beings or of violence (AT, BE, DE, EE, EL, ES, FI, HR, IE⁸⁰, IT, LT, NL, SK, UK) or other vulnerabilities (EL, FI, HU⁸¹, IT, SK);
- Unaccompanied minors (BE, CY, EL, FI, HR, IT, LT);
- Humanitarian grounds of exceptional seriousness (FI, LU);
- Spouses or parents of minors or dependent family members of a Greek citizen (EL);
- Previous refugees status for at least ten years (HR);
- Cooperation in criminal proceedings (ES, HR);
- Paid employment (ES, FR);
- Other impediments to enforcement, including lack of travel documents (DE⁸², LT, SE, SI), minor attending primary school (SI), refusal of his/her nation of citizenship or last residence (SI), and reasons of national security and public interest (DE, ES);
- Victims of work accidents and other accidents for as long as the treatment lasts (EL).

In Finland and in the United Kingdom⁸³ a residence permit can be granted on humanitarian reasons, but this is seen as an autonomous permit on the basis of specific reasons and does not constitute a 'regularisation' of irregularly staying third country nationals.⁸⁴

3.4.2 CHANGES IN THE INDIVIDUAL SITUATION OF A THIRD-COUNTRY NATIONAL BEFORE ENFORCING REMOVAL

Twenty Member States (AT, BE, CY, CZ, EE, ES, FI, FR, HR, HU, IE, LT, LU, LV, MT, NL, SE, SI, SK, and UK) reported having a mechanism in place to take into account changes in the individual situation of third-country nationals concerned before enforcing a removal. This includes:

- New circumstances brought up by the third-country national at any time (BE, DE, ES, FI, FR, LU and UK), and potentially submitting a new application (ES, FI, SI, UK);

⁷⁴ A temporary residence permit may be issued on urgent humanitarian or personal grounds, including for health reasons, or upon recommendation of a hardship commission.

⁷⁵ Only for medical reasons

⁷⁶ Unlike for the preservation of family life, a postponement of departure can be granted for medical reasons.

⁷⁷ The stay of a third-country national can also be tolerated if removal is not permissible or is not possible due to reasons, which the person is not responsible. However, third-country nationals with a tolerated status do not have legal residence status in Austria.

⁷⁸ A temporary residence permit is issued after 18 months of tolerated status/suspension of removal as rule; however further conditions apply.

⁷⁹ For example, in the event of withdrawal of expulsion and entry ban orders, provided that the TCN does not have a criminal record, reported on a regular basis and cooperated with the immigration authority to carry out his/her expulsion. This residence permit is valid for one year.

⁸⁰ A suspected victim of human trafficking may be granted a "recovery and reflection" period of residence for up to 60 days. Renewable six-month permits may be issued under certain conditions thereafter.

⁸¹ Temporary residence permit is valid for three months and renewable for three months each time.

⁸² A temporary residence permit can be issued only if the third-country national is prevented from leaving Germany through no fault of his or her own; fault on the part of the third-country national concerned applies in particular if s/he provides false information, deceives the authorities with regard to his or her identity or nationality or fails to meet reasonable demands to eliminate the obstacles to departure.

⁸³ Only medical reasons and not family or private life reasons.

⁸⁴ For convenience, these Member States are included together with other Member States when the reasons apply, in the list above.

- Regular screenings are carried out by authorities after the decision has entered into force and before removal (EE, HU, SE, SK);
- Rapid processing procedures for asylum applications implemented at the border or in detention (FR).⁸⁵

Another example was provided by the Netherlands, where a specialised caseworker is assigned to a third-country national who has to return. The caseworker has several interviews with the third-country national concerned on his/her options to return and supervises him/her until the return decision is enforced. At defined moments, the caseworker also assesses the removability of the third-country national before his/her departure. A medical “fit-to-fly” test can also be undertaken shortly before departure to assess whether the person is fit to travel.

Finland and the United Kingdom do not have a mechanism as such in place: third-country nationals concerned are responsible for informing the authorities of new circumstances that might affect their situation, e.g. by submitting a (new) asylum application. In the United Kingdom, there is no limit for subsequent asylum applications, but asylum seekers are expected to disclose all relevant information at the earliest opportunity. Similarly, in Finland, where there is no limit for subsequent applications, but recurring applications from the same applicant, can ultimately be dismissed and the return of the applicant enforced despite of lodging a new application. France does not have systematic mechanism in place either. However, in order to ensure the respect of the principle of *non-refoulement*, a third-country national cannot be held in detention for longer than one year after the return decision concerning him/her was taken.⁸⁶ Furthermore, a quick medical assessment is carried out when a justified claim appears which is part of a specific procedure.

⁸⁵ For example, to avoid abuses of subsequent applications, a person in detention had a five-day period to present a new asylum request. If the application was considered to be a tactical delay, the individual was kept in detention. After this period, a new application had to be based on new elements.

⁸⁶ In France, maximum detention period is of 45 days. It is not possible to hold a third-country national in detention where his/her return decision has been issued more than one year before. If this happens, case law of national courts imposes a reassessment of the situation of the third-country national concerned. If the administrative authority does not assess the situation of the third-country national via the issuance of a new return decision, then the detention decision is interpreted by case law as a new return decision which gives the possibility to the third-country national to contest the decision on detention.

04

RISK OF
ABSCONDING



4. Risk of absconding

Article 3(7) of the Return Directive defines the risk of absconding as “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”. In the Return Directive, this notion is used both to refusing or limiting the period for voluntary departure (Article 7) and as a possible ground for pre-removal detention (Article 15).

This section examines Member States’ practices to prevent the risk of absconding of third-country nationals subject to a return decision. In particular, Section 4.1 analyses whether Member States use objective elements to determine whether there is a presumption of the existence of a risk of absconding. In addition, Section 4.2 provides an overview of the measures in place in Member States to avoid the risk of absconding. Finally, Section 4.3 examines the challenges faced by Member States in relation to the risk of absconding.

4.1 OBJECTIVE CIRCUMSTANCES CONSTITUTING A REBUTTABLE PRESUMPTION OF THE EXISTENCE OF A RISK OF ABSCONDING

According to Article 15(1) of the Return Directive, determining the existence or absence of a risk of absconding plays a key role in deciding on the need for detention. The assessment by Member States bound by the Directive of the risk of absconding should be based on a case-by-case basis and on objective criteria set in national legislation.⁸⁷ Indeed, a CJEU judgment of March 2017 ruled that such objective criteria should be established “in a binding provision of general application” and that “settled case-law confirming a consistent administrative practice [...] cannot suffice”.⁸⁸ The updated 2017 Return Handbook provides for an indicative list of such objective criteria.⁸⁹

The European Commission recommends in its Recommendation 15 and in the Return Handbook Member States to turn some of these objective criteria into rebuttable presumptions of a risk of absconding in their national legislation,⁹⁰ a rebuttable presumption meaning that the burden of proof is placed on third-country nationals concerned to demonstrate that no risk of absconding exists. These are the following:

Refusing to cooperate in the identification process, using false or forged identity documents, destroying or otherwise disposing of existing documents, or refusing to provide fingerprints;

Opposing violently or fraudulently the return operation;

- Not complying with a measure aimed at preventing absconding imposed in application of Article 7(3) of Directive 2008/115/EC, such as failure to report to the competent authorities or to stay at a certain place;
- Not complying with an existing entry ban;
- Unauthorised secondary movements to another Member State.

⁸⁷ Article 3(7) of the Return Directive and Return Handbook, Section 1.6.

⁸⁸ CJEU judgment of 15 March 2017, C-528/15, Al Chodor, ECLI:EU:C:2017:213.

⁸⁹ These are: lack of documentation; lack of residence, fixed abode or reliable address; failing to report to relevant authorities; explicit expression of intent of non-compliance with return-related measures (for instance return decision, measures for preventing absconding); existence of conviction for a criminal offence, including for a serious criminal offence in another Member State; ongoing criminal investigations and proceedings; non-compliance with a return decision, including with an obligation to return within the period for voluntary departure; prior conduct (i.e. escaping); lack of financial resources; being subject of a return decision issued by another Member State; non-compliance with the requirement to go to the territory of another Member State that granted a valid residence permit or other authorisation offering a right to stay; illegal entry into the territory

⁹⁰ European Commission, Recommendation on making returns more effective, *op. cit.*, and Return Handbook, *op. cit.*, Section 1.6.



In addition, Recommendation 16 adds that the following criteria should be taken into due account as an indication that a third-country national poses a risk of absconding:

- Explicit expression of the intention of non-compliance with a return decision;
- Non-compliance with a period for voluntary departure;
- An existing conviction for a serious criminal offence in the Member States.



Most Member States have included objective criteria determining a risk of absconding in national legislation with the exception of Ireland and the United Kingdom. Indeed, in the United Kingdom all detention decisions are taken on a case by case basis, taking into account all the factors arguing both for and against a person's detention. In Germany, this followed a Federal Court ruling on the grounds for detention, where the Court held that the criteria to determine whether there is a risk of absconding had to be defined by law, leading to the unlawfulness of detention in a number of cases.⁹¹

Table 5 provides an overview of the elements constituting rebuttable presumptions of a risk of absconding in Member States' legislation and practices. Indeed, in some Member States some of these criteria are not explicitly listed in national legislation but are taken into account when assessing individual circumstances.

Table 5: Objective criteria constituting a rebuttable presumption of a risk of absconding⁹²

Rebuttable presumption	(Member) States	Key players involved
Refusal to cooperate in the identification process	AT, BE, CY, CZ, DE, EE, EL, ES, FR, HR, IT, LT, LU, MT, NL, SI, SK, SE	E.g.: Refusal to cooperate in establishing identity (AT, CZ, DE, LT, NL); Provision of false information on identity or falsified identity documents (CZ, DE, EE, FR, LT, NL); Refusal to provide fingerprints (FR); Absence of an identity document (LT, NL); Refusal to cooperate in obtaining replacement travel document (AT).
Violent or fraudulent opposition to the enforcement of return	AT, BE, CY, CZ, EE, EL, ES, FR, HR, HU, IT, LT, LU, MT, SE, SI, SK	This rebuttable presumption is not explicitly provided in national legislation of Luxembourg and Lithuania but applied in practice. E.g.: Refusal to leave the territory of the Member State after the period of voluntary departure has expired (EE).
Explicit expression of the intention of non-compliance with a return decision	BE, CY, CZ, EE, EL, ES, FR, HR, IT, MT, LT, NL, SE, SI, SK	No additional information.
Non-compliance with a period for voluntary departure	BE, CY, CZ, EE, EL, ES, FR, HR, IT, MT, LT, NL, SE, SI, SK	This element was considered as proving a threat to public order and security and it was not taken into account for the assessment of the risk of absconding in Luxembourg. It would only be taken into account for the assessment of a risk of absconding if an alert was entered into SIS. In France, a conviction for a serious criminal offence is not sufficient for the presumption of a risk of absconding, although the nature and date of the act committed must be taken into consideration. In Germany, it is an element possibly constituting a rebuttable presumption if there are more factors suggesting that the third-country national will not be law-abiding in the future, such as previous instances of absconding, type of crime committed, etc. E.g.: Third-country nationals who repeatedly committed intentional criminal offences (EE); Third-country nationals who were sentenced to imprisonment (EE).

⁹¹ Federal Court of Justice, decision of 26 June 2014, V ZB 31/14.

⁹² All those criteria listed in the table and applicable in case of Slovakia are evidence/indicators laid down in the legislation or in practice. Slovak legislation does not use the term "rebuttable presumption".

Rebuttable presumption	(Member) States	Key players involved
Conviction for a serious criminal offence in the Member States	CY, CZ, DE, EE, EL, ES, HR, LT, MT, SE, SI, SK	This element was considered as proving a threat to public order and security and it was not taken into account for the assessment of the risk of absconding in Luxembourg. It would only be taken into account for the assessment of a risk of absconding if an alert was entered into SIS. In France, a conviction for a serious criminal offence is not sufficient for the presumption of a risk of absconding, although the nature and date of the act committed must be taken into consideration. In Germany, it is an element possibly constituting a rebuttable presumption if there are more factors suggesting that the third-country national will not be law-abiding in the future, such as previous instances of absconding, type of crime committed, etc. E.g.: Third-country nationals who repeatedly committed intentional criminal offences (EE); Third-country nationals who were sentenced to imprisonment (EE).
Evidence of previous absconding	AT, BE, CY, CZ, DE, EE, EL, ES, FR, HR, IT, LT, LU, MT, NL, SE, SI, SK	E.g.: The TCN changed in the past his or her place of assigned residence without notifying authorities of the change (DE, EE, FR). In Lithuania, such a criterion is not explicitly provided in national legislation, however national courts take into account all factual circumstances when deciding on the detention of a third-country national; evidence of previous absconding may be considered as a risk of absconding.
Provision of misleading information	BE, CY, CZ, DE, EE, EL, ES, FR, HR, IT, LT, LU, NL, MT, SE, SI, SK	This element is taken into account in the assessment of the refusal to cooperate in the identification process (AT, DE, LT) and if the misleading information was provided with the intent of deceiving the authorities in order to prevent removal (DE). E.g.: A third-country national used false or contradictory information in an application for legal stay concerning his/her identity, nationality or travel to a Member State (NL).
Non-compliance with a measure aimed at preventing absconding	AT, BE, CY, CZ, DE, EE, EL, ES, FR, HR, IT, LT, NL, SE, SK	E.g.: A third-country national did not respect obligations imposed during voluntary departure period (AT, FR) or of an alternative to detention (AT, EE, FR, LT), or violates the procedure for temporary absence from accommodation centre (LT). In Germany, only a breach of the duty to notify authorities about a change in the place of residence constitutes a criterion for the risk of absconding.
Non-compliance with an existing entry ban	AT, BE ⁹³ , CY, CZ, EE, EL, ES, FR, HR, HU, IT, LT, MT, NL, SE, SI, SK	E.g.: Existing entry ban, explicit expression of the intention of non-compliance with an entry ban, having returned despite an existing entry ban (BE). In Lithuania, while this criterion is not mentioned in national legislation, all relevant circumstances would be assessed when issuing a decision on return.
Lack of financial resources	AT, CZ, EL, ES, HR, HU, LT, LU, MT, SI, SK	E.g. This is one of the criteria demonstrating integration into society (AT). A risk of absconding also exists when there is no possibility for the third-country national to legally reside in the Member State, which includes having sufficient financial resources (SI ⁹⁴).
Unauthorised secondary movements to another (Member) State	AT, BE, CY, CZ, EE, EL, ES, FR, HR, HU, LT, SE, SK	It is not explicitly a rebuttable presumption laid down in national legislation but it is taken into account when assessing the individual circumstances of a third-country national in France and Lithuania.

⁹³ Also applies when the entry ban was issued by another Member State.

⁹⁴ If a third-country national does not have enough financial means to stay in Slovenia, this is defined as a lenient circumstance of a risk of absconding.

Three Member States also take into account situations where an abuse of the international protection or legal residence procedures is detected to frustrate return or removal as elements constituting a rebuttable presumption of a risk of absconding (AT, BE, LT). This is the case were for example:

- A third-country national is subject to an entry ban when he or she re-entered the country (AT);
- Following a final negative decision on a first application for international protection, a third-country national lodged a subsequent application for asylum, his or her protection against removal can be suspended or, under certain circumstances, he or she cannot be eligible for it (AT);
- A third-country national lodged multiple applications for international protection in several Member States (AT);
- A third-country national lodged an application for international protection or a residence permit immediately after an entry ban, a removal order or any other decision ending his or her residence right was issued (BE);
- A third-country national fails to cooperate with civil servants and employees of the competent authorities in the asylum procedure (LT);
- A third-country national lodged an application for international protection during the pre-trial investigation period to escape criminal liability for illegal border crossing (LT).

Other elements constituting rebuttable presumptions for the risk of absconding considered by Member States include cases where a third-country national previously resided irregularly on the territory of a Member State (SI), expressed interest to travel to another Member State (SK), or does not have a place of residence (LT), or has been issued an expulsion order as a criminal penalty, or as a consequence thereof (IT).

Following the Kadzoev ruling,⁹⁵ the Dutch judiciary considered that the commission of any criminal offence could not give rise to the assumption that the third-country national would abscond to avoid a sanction, and could therefore not justify the detention of the individual in view of his/her return.

The Slovak Republic underlined the following three factors as most effective in supporting national authorities with the determination of a risk of absconding:

- The person's identity cannot be established and the person refused to cooperate during the identification process;
- The person was repeatedly expelled before and there is evidence that they entered the Schengen area despite an entry ban;
- The person is an asylum seeker whose application was rejected, who repeatedly left the asylum facility without notifying the authorities and was returned by a Dublin transfer.

4.2 MEASURES AIMING TO AVOID THE RISK OF ABSCONDING

Measures aiming to avoid the risk of absconding, as per Article 7(3) of the Return Directive, cover situations in which a potential risk of absconding may be prevented by imposing certain obligations for the duration of the period for voluntary departure, such as regular reporting to the authorities, deposit of an adequate financial guarantee, and the submission of documents or the obligation to stay at a certain place. The availability of these measures by Member States is shown in Table 6 below. Member States make use of all the above-mentioned measures, with a preference for regular reporting to the authorities and the submission of documents.

⁹⁵ CJEU, C-357/09 PPU, Kadzoev, 30 November 2009

Table 6: Measures to prevent the risk of absconding⁹⁶

Preventive measures	(Member) States
Regular reporting to the authorities	AT, BE ⁹⁷ , CZ, DE, EE ⁹⁸ , EL, ES, FR, HR, HU, IT, LV, MT, NL, SE, SI, SK, UK
Deposit of an adequate financial guarantee	AT, BE ⁹⁹ , CZ, DE ¹⁰⁰ , EL ¹⁰¹ , HR, MT, NL, SK, UK
Submission of documents	AT, BE, CY, DE, EE, ES, FR, HR, HU, IT, LV, MT, NL, SE, UK
Obligation to stay at a certain place	AT, BE ¹⁰² , CY, CZ, DE, EE, EL, ES, FR, HR, IT, MT, NL, SI, UK

In addition to these, Member States reported other measures to prevent the risk of absconding. These are:

- The possibility to oblige persons to attend a return counselling session (DE);
- No notification of the removal date¹⁰³ (DE);
- Electronic surveillance of third-country nationals posing a specific danger to public order or security (DE¹⁰⁴, UK);
- Departure facilities which aim to promote the willingness to return voluntarily by offering support and advice (DE);
- Requirement to submit additional documents to authorities such as a travel ticket (NL, SE);
- Requirement to submit additional documents proving an adequate financial guarantee in the form of a statement by a third-party guarantor for the costs of the return (NL);
- Retention of identity documents presented to national authorities in the course of an asylum application if the application was unsuccessful; these documents would then be used to support the return process of the third-country national concerned (UK);
- Detention of a third-country national (UK), with alternatives to detention.

In contrast, no such preventive measures during the period of voluntary departure were reported in three Member States (FI, LT, LU). In Finland, all the interim measures mentioned in Table 6 are generally also applicable however not during the period of voluntary departure: a period of voluntary return is only granted where there is no risk of absconding, and therefore interim measures are not considered necessary. In Lithuania, measures available in the national legislation include the shortening of the voluntary departure period to less than seven days or not granting a voluntary departure at all. In Luxembourg, in case of a risk of absconding, detention or an alternative to detention can be imposed.¹⁰⁵

⁹⁶ The concept of an identified risk of absconding does not exist in legislation in Ireland.

⁹⁷ This is rarely used in practice.

⁹⁸ For example: notifying the Police and Border Guards of the chances of residence or of any prolonged absence from the usual place of residence.

⁹⁹ The Belgian authorities were still looking for an appropriate way to implement the deposition of an adequate financial guarantee.

¹⁰⁰ The national legislation provides for a potential obligation to save a certain amount of money to be used for return expenses. This sum is blocked on an account administered by the respective German foreigners' authority.

¹⁰¹ Legislation provides for such a measure (release on bail) however no relevant Joint Ministerial Decision was adopted fixing the amount of the financial guarantee. As a result, this measure is not implemented in practice.

¹⁰² This is rarely used in practice.

¹⁰³ In the case of persons whose removal has been suspended for more than one year, the enforcement of the removal must be announced at least one month in advance except for third-country nationals who intentionally provided false information on their identity or nationality or had not sufficiently cooperated during the removal process.

¹⁰⁴ This is only possible if it is necessary to counteract a considerable danger to domestic security or life and limb of others.

¹⁰⁵ Alternatives to detention can then include the regular reporting to authorities, submission of documents, house arrest which can be combined with an electronic surveillance and the provision of a financial guarantee of EUR 5,000, similar to the preventive measures in the other Member States.

4.3 CHALLENGES IN DETERMINING THE EXISTENCE OF A RISK OF ABSCONDING

The assessment of the risk of absconding was mentioned as a particular challenge by a number of Member States (CZ, DE, EE, EL, FI, FR, LU, NL, SK). In particular, four Member States mentioned the difficulty to objectively assess a risk of absconding before absconding actually happened (EE, FI, NL, SK): often, the first definite sign of the risk of absconding was the person's disappearance (FI). As another example, reducing the risk of absconding was also considered challenging where a third-country national opted to participate in assisted voluntary return programmes (EL). Additionally, in 'transit' Member States, such as Greece, i.e. which are not the final destination countries, it was noted that the risk of absconding was higher in cases where a period of voluntary departure was granted (EL). Finally, short deadlines during immigration detention to assess the existence of a risk of absconding were also mentioned as a factor adding to the challenges cited above (NL).

As outlined under Section 4.1, the assessment by Member States bound by the Return Directive of the risk of absconding should be based on a case-by-case basis and on the basis of objective criteria set in national legislation. The latter allows national authorities for a margin of discretion in assessing these objective criteria. In this regard, a few Member States reported that ensuing subjective nature of the assessment by national authorities resulted in high standards imposed by national judicial authorities regarding the motivation of the decision on the risk of absconding in certain Member States (DE, FR, NL, SI), which could represent an increase of the administrative burden (NL). For example, in the Netherlands, the Council of State ruled that the risk of absconding had to be motivated individually meaning that 'ticking boxes' of a number of objective criteria would not be enough to meet the motivation threshold. In this context, the application of Recommendation 15 may be challenging. In Slovenia, administrative courts ruled that the existence of a risk of absconding could not automatically result in a removal decision that national authorities should take into account all relevant circumstances and thoroughly motivate the issuance of removal decisions in such cases.

The use of a rebuttable presumption of a risk of absconding also created a challenge for the third-country national, as the burden of proof lied on him/her (LU). Certain situations could create an un rebuttable presumption as a third-country national was not always able to provide the relevant evidence. As an example, in Luxembourg, if the person was unable to indicate a fixed address (and reception facilities were not taken into account), proving the absence of a risk of absconding represented a challenge.¹⁰⁶

¹⁰⁶ A lack of residence may be considered as an objective criterion constituting a risk of absconding.

05

EFFECTIVE
ENFORCEMENT
OF RETURN
DECISIONS



5. Effective enforcement of return decisions

This section presents Member States' practices to ensure the effective execution of return decisions. First, Section 5.1 provides an overview of Member States' practices concerning third-country nationals who failed to comply with a return decision or obstruct the return process. Secondly, Section 5.2 analyses the application of the principle of mutual recognition on return decisions. Then, Section 5.3 examines whether and how Member States issue travel documents for the purpose of return. Finally, Sections 5.4 and 5.5 present the use of detention and alternatives to detention in a return procedure.

The 2014 EMN Study on the use of detention and alternatives to detention in the context of immigration policies and the 2016 EMN Ad-hoc Query on the use of detention in a return procedure (update) gathered information on several issues covered under the present section. This report focuses on policy and legal developments that have taken place since these two studies were published.

5.1 SANCTIONS IN CASE OF NON-COMPLIANCE WITH THE RETURN DECISION

Recommendation 11 encourages Member States to use effective, proportionate and dissuasive sanctions under national law against third-country nationals who intentionally obstruct the return process.

Member States imposing sanctions:

15

Fifteen Member States reported that they imposed sanctions in cases where the third-country national fails to comply with a return decision and/or obstructs the return process (AT, BE, CZ, DE, EE, FI, FR, IE, IT, MT, LU, NL, SE, SK, UK), while six Member States reported that they did not (CY, HR, HU, LT, LV, SI). In Germany, certain sanctions could be imposed against any third-country national staying irregularly on the territory after the period for voluntary departure expired, regardless of whether or not they intentionally obstructed the return process. The nature and severity of the sanctions varies from one Member State to another:

- Fine (AT, BE, EE, DE, FI, FR, IE, IT, LU, SK);
- Imprisonment (AT, BE, DE, FR, IE, LU, SK);
- Residence restriction in case of obstruction of the return process (DE, SE);
- Benefits cut (DE¹⁰⁷, SE¹⁰⁸).

In some Member States and, under certain circumstances, a fine and an imprisonment sentence can be cumulated. The level of the sanction imposed also varies significantly depending on the facts of the case and across Member States, with fines ranging from a minimum of EUR 251 in Luxembourg to a maximum of EUR 18,000 in Italy, and sentences for imprisonment ranging from a minimum of eight days in Belgium and Luxembourg¹⁰⁹ to a maximum of three years in France in cases where the

¹⁰⁷ In Germany, benefit cuts are imposed against persons who hamper their own removal, rather than all irregularly staying third-country nationals.

¹⁰⁸ In Sweden, adult third-country nationals without minor children are no longer entitled to accommodation and financial support if they have not left the country within the voluntary departure period.

¹⁰⁹ In Luxembourg, the Immigration Law provides that a third-country national can be subject to imprisonment from 8 days up to 1 year and a fine of 251 up to 1.250 € or only one of the sanctions, if without a justified ground for non-returning, s/he resides irregularly on the territory after her/his detention or house arrest period has expired without a removal having been carried out.



third-country national obstructs the procedure. In Austria, under a new law, the third-country national concerned can be sentenced to prison for a maximum of six weeks in the event s/he may not pay the fine. The high amounts of the fines (from EUR 5,000 to 15,000) raised concerns amongst Non-Governmental Organisations (NGOs) as many third-country nationals would likely not be able to afford the fine and be sentenced to imprisonment instead.

While it does not constitute a sanction as such, the possibility to adopt administrative decisions for the purpose of the return process was also reported by some Member States. In particular, some of them could resort to detention as a way to encourage cooperation with the return process (BE, CY, CZ, EL, HR, FI, HU, IE¹¹⁰, UK). Member States' practices regarding detention are described under Section 5.4.1. A number of Member States (FI, FR, NL, SE, SK) also evoked the imposition of entry bans as a way to sanction non-compliance with a return decision. The issue of entry bans is described in detail in Section 9 of the present report.

5.2 MUTUAL RECOGNITION OF RETURN DECISIONS

One of the obstacles to return highlighted by the 2015 Action Plan on Return¹¹¹ was the fact that it was possible for third-country nationals under the obligation to leave the EU to avoid return by moving to another Member State, due to the insufficient exchange of information about return and entry bans across Member States. The Action Plan stated that in such situations, Member States should either pass back the person to the Member State from which the third-country national arrived (if a bilateral readmission agreement is applicable), issue its own return decision, enforce the decision themselves in application of Council Directive 2001/40/EC¹¹² and Council Decision 2004/191/EC,¹¹³ or grant an authorisation or right to stay (according to Article 6(4) of the Return Directive).

Two years later, Recommendation 9(d) calls for Member States to mutually recognise return decisions in application of the above mentioned legal instruments, to ensure the swift return of irregularly staying third-country nationals.

17

A majority of the responding Member States indicated that their national legislation offered the possibility to recognise a return decision issued against a third-country national by another Member States (AT, BE, CZ, DE, EL, ES, EE, FI, FR, HR, IT, LT, LU, LV, MT, SI, and SK). On the other hand, three Member States stated that they had not transposed this provision into their national legislation (HU, NL, SE). Ireland did not have an equivalent provision in its national law.

The conditions for Member States who do recognise return decisions issued by other Member States to enforce the return decision are the following:

- Absence of residence permit in the receiving MS (AT);
- Violation of the issuing Member State's laws on entry and residence (AT, HR, LU, SK);
- Conviction for criminal offence or suspicion that s/he committed or intended to commit a serious criminal offence (HR, LU, SK);
- Record in the SIS (CZ);
- Real prospect of return (LU).

¹¹⁰ In Ireland, there is no general detention of holders of deportation orders, but there can be limited detention in relation to non-compliance with the deportation order.

¹¹¹ European Commission, Communication on an EU Action Plan on Return, *op. cit.*, p. 6.

¹¹² Council Directive 2001/40/EC of 28 May 2001 on the mutual recognition of decisions on the expulsion of third-country nationals

¹¹³ 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



However, in practice, several of these Member States indicated that they never (EE, LT) or rarely (BE, FI) enforced a return decision issued by another Member State. The main challenge invoked for mutual recognition was the difficulty in knowing whether a return decision had effectively been issued by another Member State and whether it was enforceable (BE, EE, FI, LT, NL, SK). Belgium and Finland indicated that the integration of return decisions into the SIS may have a positive effect on this issue in the future. In addition, Finland raised concerns about the ability to protect third-country nationals' rights in such a procedure, because of the variations between Member States' grounds and requirements for return, which may lead to breaches of the right to family life and/or the *non-refoulement* principle. In addition, third-country nationals' access to a remedy against the return decision is problematic. Similarly, France also stated that national legislation may limit the possibility to enforce such a decision, in particular in cases where the third-country national has the right to stay in France on grounds related to family life and/or *non-refoulement*. In addition, the Netherlands indicated that it was the competence of the Member States where the third-country national was present to determine whether his/her presence was irregular.

Belgium developed a bilateral project within EURINT with Spain to facilitate the return of third-country nationals who were convicted for a criminal offence and who have a residence permit in another Member State.

In such cases, the cooperation between the Belgian Immigration Office and the Spanish authorities is facilitated so that the residence permit in Spain can be revoked and third-country nationals can be systematically returned to their country of origin. Belgium now aims to expand this project across the EU. In 2015 and 2016, several workshops were organised with a dozen Member States and associated States, as well as Frontex.¹¹⁴

5.3 TRAVEL DOCUMENTS

Recommendation 9(c) encourages Member States to ensure that return decisions are followed without delay by a request to the third-country of readmission to deliver valid travel documents, or to make use of the European travel document for return in application of Regulation 2016/1953.¹¹⁵



Several Member States reported issuing such a request to deliver travel documents (AT, FI, LU, LV, NL). Austria indicated that the request to the authorities of the third country is made as soon as it can be anticipated that the third-country national concerned by the readmission procedure will not return voluntarily. Similarly, Luxembourg and Finland reported that the request to obtain valid travel documents was made without delay to the authorities of the third country. Latvia includes the request for a travel document in the readmission application. Where a third-country national does not have valid travel documents, an application for a *laissez-passer* is submitted by Dutch authorities to the authorities of the (presumed) country of origin.

Additionally, Member States reported that they could make use of EU travel documents (AT, BE, DE, EE, FI, FR, LT, LU¹¹⁶, LV, NL, SI¹¹⁷, and UK). As an example, Latvia issues a EU travel document once a positive reply on the readmission request from a country of return is received. In practice, Slovenia mostly issues EU travel documents in return procedures concerning Kosovar nationals. On the other hand, nine Member States stated that they did not use EU travel documents at all (CY, CZ, EL, ES, HR, HU, IE, MT and SK¹¹⁸).

¹¹⁴ [Annual Report on Asylum and Migration Policy in Belgium](#), Belgian Contact Point of the European Migration Network, published in June 2017, p. 82.

¹¹⁵ Regulation (EU) 2016/1953 of the European Parliament and the Council of 26 October 2016 on the establishment of a European travel document for the return illegally staying third-country nationals and repealing the Council Recommendation of 30 November 1994. The Regulation is applicable as of 8 April 2017.

¹¹⁶ Luxembourg indicated that when the third-country national is detained, the procedure is launched, and the third-country of origin is contacted without delay to obtain the travel documents.

¹¹⁷ Slovenia is already implementing Regulation 2016/1953. The authorities take decision to issuing EU travel document based on individual approach.

¹¹⁸ Since December 2017, it is possible to make use of European travel document; in practice, however, it has not been used yet.

Hungary and Spain reported that, while they did not use EU travel documents, they had used the former EU *laissez-passer* in the past. Greece, Hungary, Luxembourg and Sweden have not used the EU travel documents in practice, but are taking steps to implement this measure and still made use of the former *laissez-passer*, for instance with third-countries such as Kosovo or Montenegro.

In complement, in Germany and Hungary, bilateral cooperation was established with Afghanistan that enables them to issue travel documents to Afghan citizens on the basis of the Joint Way Forward on migration issues between Afghanistan and EU.

In practice, several Member States reported that the acceptance of EU travel documents by third-countries was variable (AT, BE¹¹⁹, DE, EE, FI, FR and UK), with sometimes only a small number only of third-countries accepting them (DE, EE). The Netherlands have not encountered issues with the acceptance of the documents as it uses an EU travel document only when it is established, through preparatory research, that the document will be accepted by the authorities of the third country. Finland indicated that the document in itself was generally not enough to enable the third-country national to enter the territory of the country of readmission. The EU travel documents are used with airlines but further steps needed to be taken once the third-country national arrives in the country of readmission. In September 2015, the German Federal government launched a diplomatic initiative with the goal of ensuring that an EU travel document is accepted for returns to the following countries of destination: Serbia, Bosnia and Herzegovina, Macedonia, Albania, Kosovo, Montenegro, Egypt, Algeria, Lebanon, Morocco, Ethiopia, Eritrea, Bangladesh, India, Pakistan, Benin, Burkina Faso, Ghana, Guinea, Guinea-Bissau, Mali, Nigeria and Niger. In the end, only the Western Balkan countries agreed to this procedure (in the case of Bosnia and Herzegovina only with the provision of a time limitation). The other countries still refuse to accept removals for which an EU travel document was used.

The following national authorities are responsible for the arrangement of travel documents for third-country nationals who are the subject of a return decision:

- Local or regional authorities (DE¹²⁰, FR);
- Central authority such as the Border Police (DE¹²¹, EL, FR¹²², LV, MT), services of the Ministry in charge of immigration matters (AT, BE, FR¹²³, HR, HU¹²⁴, IE, IT, LT¹²⁵, LV, NL, SE, and UK), the Ministry of Foreign Affairs (EE, EL, HR, MT), and police services (CY, CZ, EE, ES, FI, HU¹²⁶, SE, SK);
- Assistance by IOM (EL, FI¹²⁷, IE, LU, SK¹²⁸).

The procedure to obtain travel documents, as well as the average time frame under which this can take place very much varies on a case-by-case basis (BE, DE, EE, FI, IE, IT, SE, UK) and on the conditions of readmission agreements or MoUs in place (BE, EE, FI). Some Member States reported that the procedure can take around one month (FI, SE) up to 4 months (IT) or that this time frame varied depending on the location of the consulate of the third-country concerned.

¹¹⁹ Belgium indicated that EU travel documents were accepted by Afghanistan, Albania, and Kosovo, and on a case by case basis by Turkey and Brazil. In other countries, they could be used in very rare individual cases and, in some third countries, after authorisation of the authorities (e.g. Israel).

¹²⁰ In Germany, most *Länder* have established central foreign authorities to procure passports and organise removal operations on behalf of the local foreign authorities who are responsible in principle.

¹²¹ For certain third-countries.

¹²² For certain third-countries, the procedure is centralised with the central administration.

¹²³ For certain third-countries the procedure is centralised with the central administration.

¹²⁴ If there is no readmission agreement in place

¹²⁵ Usually the Foreigners' Registration Center

¹²⁶ If there is a readmission agreement in place

¹²⁷ Only in case of Assisted Voluntary Return.

¹²⁸ Only in case of Assisted Voluntary Return.

5.4 USE OF DETENTION IN THE RETURN PROCEDURE

Article 15 of the Return Directive defines the grounds and procedure for detention in the context of a return procedure. In particular, it limits the resort to detention, as a measure to last resort, to cases where there is a risk of absconding, or where the third-country national concerned avoids or hampers the preparation of return or the removal process. It also establishes the principle that detention for the purpose of return must be as short as possible and only maintained as long as removal arrangements are ongoing. In addition, a third-country national in detention must be released if there is no reasonable prospect of removal, according to Article 15(4) of the Return Directive. These conditions were further clarified in the CJEU case law.

Recommendation 10(a) encouraged Member States to make use of detention under the conditions defined in Article 15(1) of the Return Directive, in particular in cases where there is a risk of absconding (see Section 4 of the present report).



5.4.1 USE OF DETENTION IN THE RETURN PROCEDURE IN MEMBER STATES

Member States making use of detention under certain conditions:

23



All the responding Member States could make use of detention under certain conditions during the return procedure (AT, BE, CY, CZ, DE, EE, EL, ES, FI, FR, HR, HU, IE¹²⁹, IT, LT, LU, LV, MT, NL, SE, SI, SK, UK). In Austria, in complement to detention in the sense of the Return Directive, the authorities can also issue an “apprehension order” (*Festnahmeauftrag*). An apprehension order can be issued even where no risk of absconding exists and allows the detention of an individual for a maximum of 72 hours. It is issued in particular when the person concerned fails to comply with conditions applying to a period for voluntary departure or does not comply with the obligation to leave, or in preparation for a removal order. Since 2014, apprehension orders have been used more frequently than detention pending removal, particularly with asylum seekers whose application was rejected. Similarly, in Germany, third-country nationals may be placed in custody to facilitate their departure for a maximum of 10 days if the person’s behaviour suggests that s/he will try to make the removal procedure more difficult or impossible. In the Netherlands, a Return and Detention Act is currently being drafted, providing for a special regime for detainees under migration law.

However, a number of exceptions were observed in the Member States. Detention was either not used, or only used in exceptional circumstances, in the following situations:¹³⁰

- UAM (AT¹³¹, BE, CY, DE¹³², EE¹³³, EL, ES, FI¹³⁴, HU, IE, IT, LT¹³⁵, LU¹³⁶, LV¹³⁷, MT, SK, UK¹³⁸);
- Minors (IE, IT, UK)

¹²⁹ In Ireland, there is no general detention of holders of deportation orders, but there can be limited detention in relation to non-compliance with the deportation order

¹³⁰ The issue of detention of vulnerable persons is further explored under Section 7.

¹³¹ Under the age of 14

¹³² In practice rather than in law.

¹³³ In practice UAMs are not detained, but according to national legislation it is possible in exceptional cases.

¹³⁴ Below the age of 15.

¹³⁵ UAMs may be detained only in exceptional cases.

¹³⁶ UAMs may be detained only in exceptional cases.

¹³⁷ Under the age of 14.

¹³⁸ Only in exceptional cases.

- Family with minors (AT¹³⁹, BE¹⁴⁰, FR¹⁴¹, IT, LT¹⁴²) or single parents with minors (AT¹⁴³, CY, IT, LT¹⁴⁴, UK¹⁴⁵);
- Parents who are the sole provider for their family (CY);
- Victims of trafficking (EE, IT, LT¹⁴⁶, UK¹⁴⁷);
- Third-country national with health/mental issues that do not enable him/her to be detained (BE, IT, NL, UK);
- Advanced pregnancy with complications (BE, IT, UK);
- Contagious disease requiring the placement in a close hospital ward (UK).

Table 7 presents the grounds used by Member States to use detention in the context of a return procedure.

Table 7: Grounds used by Member States for the detention of third-country nationals in a return procedure

Grounds for detention	Member States
Risk of absconding ¹⁴⁸	AT ¹⁴⁹ , BE, CY, CZ, DE, EE, EL, ES, FI, FR, HR, HU, IT, LT, LU, LV, MT, NL, SE, SI, SK, UK
TCN avoiding/hampering the preparation of the return/removal process	AT ¹⁵⁰ , BE, CY, CZ, DE, EE, EL, ES, FI, FR, HR, HU, IE, LT, LU, LV, NL, SE, SK, UK
When necessary to ensure the effective removal of the TCN	AT ¹⁵¹ , EL, LT, LU, SK, UK ¹⁵²
Non-compliance with the period of voluntary departure or the terms of the return decision	AT ¹⁵³ , BE, EE, EL, FR ¹⁵⁴ , IE, LT ¹⁵⁵ , LU
Lack of cooperation with the authorities	EL, FR, HU, IE, IT, LU, UK
Threat to public order/security and/or commission of a criminal offence	BE, CY, DE, EE, EL, FI, HU, IE, IT, LT, SE, SI, UK
Serious and/or repeated violations of the code of conduct of the detention centre	HU
Lodging of an application for international protection for the purpose of hindering the return process	BE, FI, LT ¹⁵⁶ , LU

¹³⁹ Under the age of 14.

¹⁴⁰ Currently, in Belgium, families with underage children are detained in FITT-units and not in a detention centre. FITT stands for Family Identification and Return Team. FITT-units (or open family units) consist of individual houses and apartments. Residents have freedom of movement with certain restrictions and rules. They can leave their accommodation under strict regulations in order, for example, to take their children to school or buy groceries.

¹⁴¹ Specific conditions are imposed in order to ensure the best interest of the child and that the detention is a measure of last resort. France does not make distinction between family with minors or single parents with minors.

¹⁴² May be detained only in exceptional cases.

¹⁴³ Under the age of 14.

¹⁴⁴ May be detained only in exceptional cases.

¹⁴⁵ For a maximum of 72 hours, extendable in exceptional circumstances, and with Ministerial authorisation, to a maximum of one week.

¹⁴⁶ May be detained only in exceptional cases.

¹⁴⁷ The presumption is that these people will be regarded as "at risk" and therefore will not be detained in the UK, although this will be balanced against immigration control factors.

¹⁴⁸ A detailed overview of the elements taken into account in the assessment of the risk of absconding is provided under Section 4.

¹⁴⁹ Only if additional conditions exist.

¹⁵⁰ Only if additional conditions exist.

¹⁵¹ Only if additional conditions exist.

¹⁵² The UK makes the decision on whether or not to detain an individual on a case-by-case basis, taking all relevant factors into consideration.

¹⁵³ For a maximum of 72 hours.

¹⁵⁴ In case of absence of guarantee of representation, i.e. absence of identity or travel documents, withhold of travel documentation, residence place not declared.

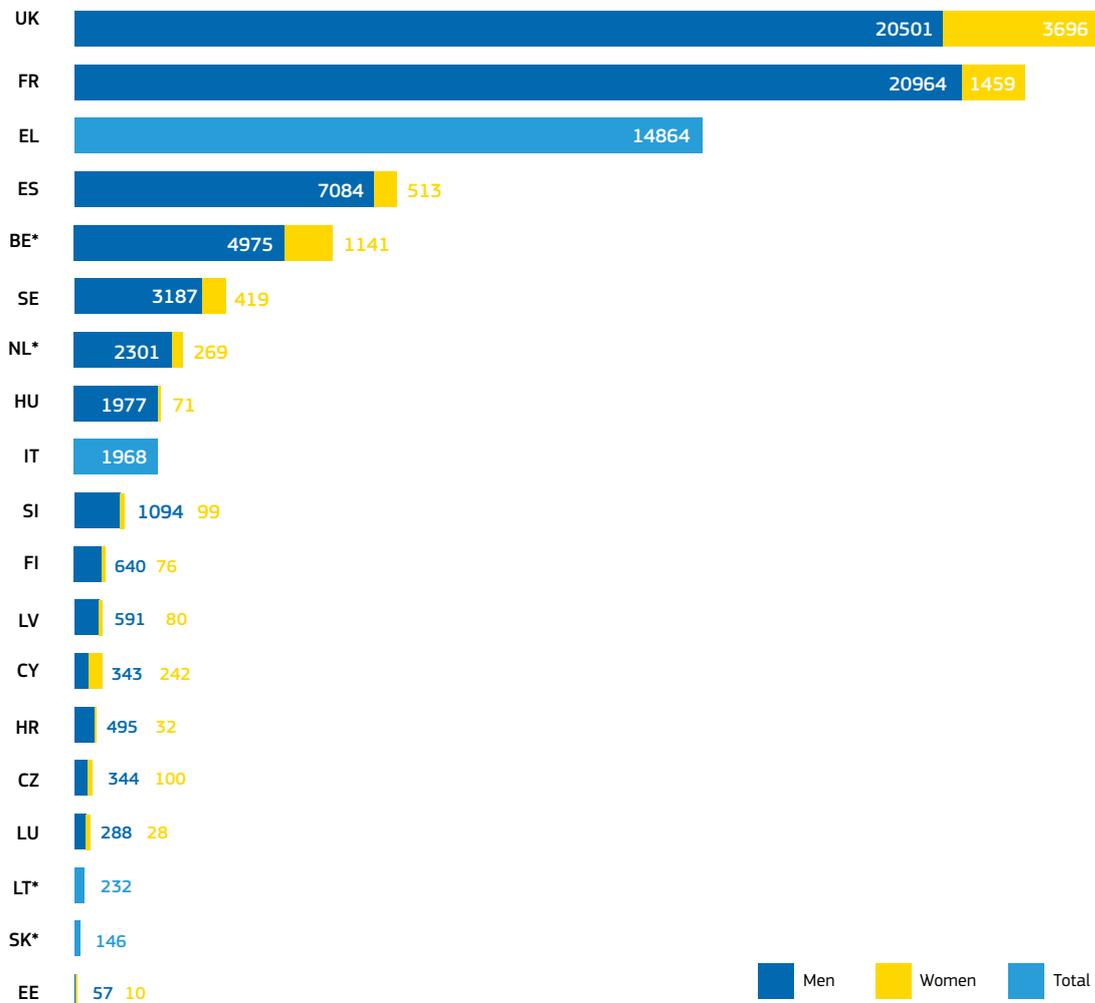
¹⁵⁵ This ground is considered as a risk of absconding and therefore a third-country national may be detained.

¹⁵⁶ This ground is considered as a risk of absconding and therefore a third-country national may be detained.

Grounds for detention	Member States
Procedural delays with the enforcement of the return	EE, HU
Intent to leave the State and enter another State without authorisation	AT ¹⁵⁷ , IE
Destruction of identity/travel documents or possession of forged documents, or absence of travel documents	EL, FR, IE, LT, LV
Unclear identity	FI, LT

As shown under Figure 2, in 2016, the United Kingdom is the Member State with the highest number of third-country nationals placed in detention in the context of a return procedure (24,197), followed by France (22,730) and Spain (7,597). Germany reported that until the 31st July 2016, 1,255 third-country nationals had been placed in detention in the context of a return procedure. This number was not included in the Figure below, as it concerns only half of 2016.

Figure 2: Total number of third-country nationals ordered to leave and subsequently placed in detention in 2016¹⁵⁸



Source: EMN NCP National Reports

¹⁵⁷ Only if additional conditions exist.

¹⁵⁸ In Belgium, illegally staying families with underage children can be accommodated in FITT-units. FITT stands for Family Identification and Return Unit. FITT-units (or open family units) consist of individual houses and apartments. Residents have freedom of movement with certain restrictions and rules. FITT-units are an alternative to detention, but from a legal point of view the family is however detained. The figures presented in this chart do not include the 528 persons placed in FITT units.

The figure presented for the Netherlands include Dublin cases.

Provided information for Lithuania include third-country nationals detained both for irregular entry and/or stay.

Slovakia reported estimated data (thus does not constitute official statistical data) calculated based on information obtained from IS MIGRA (national system).

5.4.2 LENGTH OF DETENTION

Article 15(1) of the Return Directive provides that the detention of third-country nationals must be as “short as possible”. In complement, Article 15(5) provides that detention must be maintained for as long as the conditions for it are fulfilled and it is necessary to ensure removal. The detention period cannot exceed six months, but, according to Article 15(6), Member States may extend it for another twelve months in cases where the removal operation is likely to take longer due to the third-country national’s lack of cooperation or delays in obtaining documentation from the third-country of readmission.

Recommendation 10(b) calls for Member States to provide in their national legislation for a maximum initial period of detention of six months that can be adapted by judicial authorities to the individual circumstances of the case, as well as for the possibility to further prolong detention until 18 months in the cases defined in Article 15(6) of the Return Directive.



A majority of the responding Member States transposed the maximum detention period allowed by the Return Directive into their national legislation. Indeed, the maximum length of detention was of 18 months, as per Article 15 of the Return Directive, in thirteen Member States (BE, CY, CZ, DE, EE, EL, HR, LT, LU, LV, MT, NL, SK). However, the following maximum detention periods were also reported in other Member States: 12 months in four Member States (FI, HU, SE, SI), 10 months in Austria, 6 months in Hungary and Luxembourg, eight weeks in Ireland,¹⁵⁹ 90 days in Italy, 60 days in Spain, and 45 days in France. In the United Kingdom, which is not bound by the Return Directive, there is no statutory limit to the length of detention. In Austria, this length was extended to 18 months in November 2017. The 45 days detention period in France cannot be extended; however, seven days after the detention ended, the third-country national can be placed in detention again if s/he refuses to cooperate with the authorities and there are changes in his/her legal or factual situation. The maximum length of detention may be exceeded in Cyprus for third-country nationals who committed a criminal offence.

In the Slovak Republic, in 2011 and 2012, national courts annulled a number of decisions on detention based on which third-country nationals were detained for the purpose of administrative expulsion for a six-month period. The courts pointed out that it is possible to detain a third-country national only for the necessary period of time, i.e. for the period of time required for the execution of the administrative expulsion. The practice was subsequently changed in relation to the determination of the length of the detention. In their decisions on detention, the administrative authorities started to determine the length of detention by stating the exact date until which the third-country national would be detained. At the same time, the length of detention was justified by the average period of time necessary for the arrangement of the emergency travel document for the specific third-country to which the third-country national should be returned.

5.4.3 PROCEDURE

Article 15(2) of the Return Directive provides that detention must be ordered by administrative or judicial authorities. In cases where this is done by an administrative authority, Member States have an obligation to either provide for a speedy judicial review of the decision on detention or grant the third-country concerned with the right to take proceedings so as to ensure that a speedy judicial review is carried out. In the latter case, third-country nationals must be informed of this possibility. If the detention is found to be unlawful, the third-country national must be released immediately.

¹⁵⁹ This period may be extended by the Courts under certain conditions.

Authorities in charge of ordering the detention

The placement of a third-country national in detention is ordered by an administrative authority in eleven responding Member States (AT, BE, CY, CZ, IE, IT, LU, NL, SI, SK, UK), and by a judicial authority in three Member States (DE¹⁶⁰, EE¹⁶¹, ES).

In Germany, in exceptional cases, detention can be ordered by the responsible authority without a prior judicial order, but a court decision has to be obtained as quickly as possible. Similarly, in Estonia, a detention can be ordered in exceptional cases without a prior judicial order; however, a court decision to confirm the detention has to be obtained within 48h.

In nine other Member States (EE¹⁶², EL, FI, FR¹⁶³, HR, HU, LT¹⁶⁴, LV, MT, SE), both administrative and judicial authorities are in charge of ordering the detention, which in general means that the decision on detention taken by an administrative authority has to be validated by a court.

Review of the lawfulness of detention ordered by an administrative authority

Reviews of the lawfulness of the detention decision take place in all the responding Member States, especially in cases where the decision was taken by an administrative authority. Such a review can be performed *ex officio* (BE¹⁶⁵, DE, EE, EL, FI, FR, HR, HU, IE, MT, NL, SI). The review *ex officio* is initiated within 24 hours in Finland,¹⁶⁶ after 48 hours in France, Estonia and Italy, one month or on an ad-hoc basis if circumstances relevant to the decision to detain change in the United Kingdom, eight weeks in Ireland, three months in Greece and Slovenia, and four months in Belgium.

In other cases, the review can be requested by the third-country national in detention (AT, BE, CY, CZ, DE, EL, FR, IE, LT, LU, LV, MT, NL, SE, SK). If a review is not requested, in the Netherlands a review *ex officio* will be launched at 28 days.

The Netherlands reported that CJEU case law had had an impact on the conditions to impose detention against a third-country national in the context of a return procedure. In particular, the *Mahdi* ruling led to changes in the obligation to motivate the adoption and the extension of detention measures. The detention order must also include the assessment of special facts or circumstances relating to the third-country nationals' individual circumstances that could make the detention measure disproportionate. The assessment could not be provided in a separate document and the order could not be updated at a later stage.

Member States apply different definitions of what constitutes a “speedy” review of the detention decision, which can take place within different time periods:

- Within four days from the placement in detention (FI¹⁶⁷);
- Within five working days from the notification to the court (BE, HR);
- Within a week from the notification to the court (AT, CZ, SK) or after the hearing of the third-country national (NL) which takes place 14 days after the notification to the court;
- Within a month from the placement in detention (CY).

¹⁶⁰ Upon application of an administrative authority.

¹⁶¹ Upon application of an administrative authority.

¹⁶² The Police and Border Guard Board takes the decision to place the third-country national in detention for up to 48 hours and in 48 hours the detention is decided by the Administrative Court.

¹⁶³ The local prefecture took the decision to place the TCN in detention and after 48 hours the detention was extended by a court.

¹⁶⁴ A third-country national may be detained for a period not exceeding 48 hours by the police or another law enforcement institution, for a period exceeding 48 hours - only by a court decision.

¹⁶⁵ Detention will be reviewed by the Immigration Office after two months. It can decide to prolong detention with two more months if certain conditions are met. When the detention is prolonged with a 5th, 6th, 7th or 8th month, the Court of first-instance is asked to review the legality to extend the detention by one month. A third-country national has also the right to appeal against his detention before this Court every month.

¹⁶⁶ Meaning that the court must be informed about the detention on the next day.

¹⁶⁷ Meaning that the court must make a decision on the legality of the detention within four days. In case of the detention of an UAM, review takes place within 24 hours.

Review of the stay in detention

Article 15(3) of the Return Directive provides that detention must be reviewed in every case at reasonable intervals of time, either on application by the third-country national concerned or *ex officio*. Such a review must be conducted by a judicial authority in cases where the period of detention is prolonged over time.

In all Member States, the length and/or relevance of detention is reviewed on a regular basis by an administrative authority (CY, CZ, DE, EL, LU, UK), by a judicial authority (AT, EL, FI, FR, HR, IT¹⁶⁸, LT, LV, SK), or both (BE, EE, ES, IE, NL, SE, SI). The frequency of the reviews varies across Member States, from every two weeks (FI¹⁶⁹), every month (AT, LU, NL, UK), every two months (BE, CY, LV), three months (SI), or two weeks to two months depending on the merits of the case (SE). In the United Kingdom, the detention can also be reviewed if there is a change of circumstances which would affect the decision to detain.

Even in those Member States where the review is automatic, in most cases the third-country national also has the right to appeal the decision to place him/her in detention (e.g. AT, BE, DE, EE, EL, HU, LV, NL, SE).

5.4.4 DETENTION CAPACITY

Recommendation 10(c) requests Member States to bring detention capacity in line with their actual needs, and encouraged them to make use of the derogation for emergency situations whenever needed, in application of Article 18 of the Return Directive.



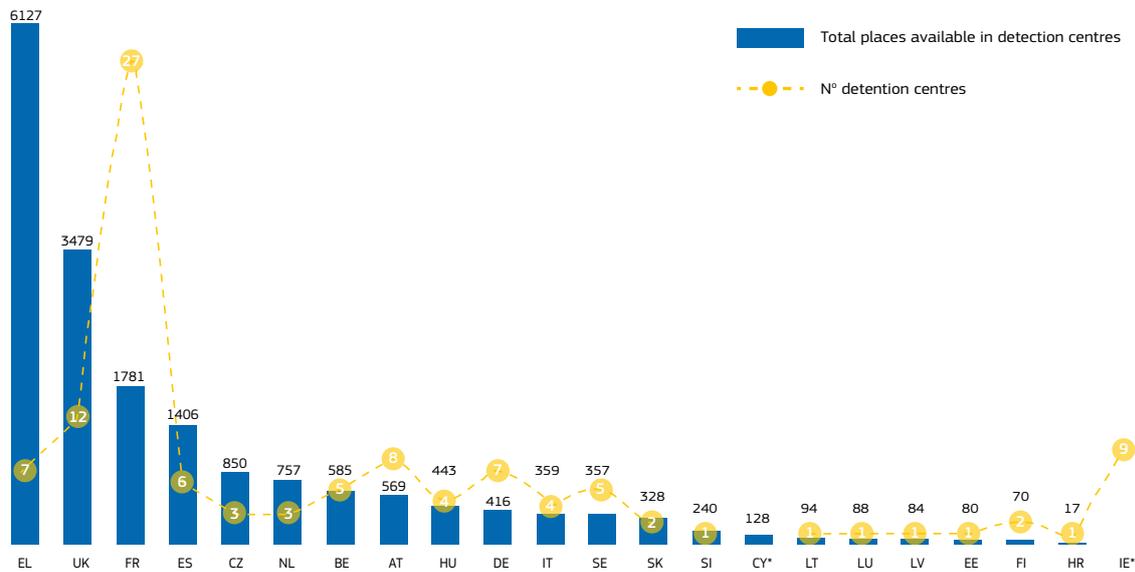
The fluctuations in Member States' capacity in the last few years can be explained by various factors, such as the fact that detention centres were closed for renovation (one centre in DE), the influence of EU case law (see Subsection on specialised detention facilities below) or that a stronger focus was given on return in national policies (AT, SE). In 2015, Belgium's detention capacity decreased because of a lack of staff and because of some necessary maintenance works. However, in 2016, this capacity increased substantially though issues with detention centres being full still occur occasionally. The capacity of closed centres will be further increased in coming years. The entry into force of new legislation in Italy prompted the set-up of additional centres to the four existing structures, and several more will be functioning in different regions during the 2018.

Figure 3 shows the number of detention centres and of detention places available in Member States as of the 31st December 2016. The number of detention centres in the Member States varies from one detention centre (EE, HR, LV, LT, LU, MT) to 27(FR). The capacity of detention centres in Member States is variable, ranging from 6127 detention places available in Greece to 17 in Croatia.

¹⁶⁸ In Italy the judicial authority in this case is the Peace Officer.

¹⁶⁹ In Finland, while the first review (lawfulness of detention) is *ex officio*, the review of the continuation of the detention is done upon request of the third-country national. This review is conducted every 2 weeks as national courts have an obligation to conduct the review every 2 weeks (or sooner if new facts has come to light since the previous review, which would necessitate a review before then).

Figure 3: Number of detention centres and of detention places available in Member States (as of 31st of December 2016)¹⁷⁰



Source: EMN NCP National Reports

Assessment of detention capacity

Member States measure the capacity in their detention centres by counting the number of beds available (AT, BE, CY, CZ, DE, ES, FI, FR, HU, IT, LU, NL, SE, SI, SK, UK) or the squared metres available per detainee (EE, EL, FR, HR, LT, LV).

Availability of specialised detention facilities

Article 16 of the Return Directive provides that, as a rule, detention must take place in specialised facilities. In cases where this is not possible and third-country nationals must be detained in prison accommodation while awaiting the enforcement of the removal, s/he must be kept separated from ordinary prisoners.

Fifteen Member States indicated that third-country nationals who had been ordered to leave the territory were accommodated in such specialised facilities for third-country nationals (BE, CY, DE, EE, EL, ES, FI, FR, HU, LT, LV, LU, NL, SE, UK). Following the *Bero and Bouzalmate* and *Pham* rulings of the CJEU in 2014,¹⁷¹ Germany, where the organisation of detention comes under the remit of the *Länder*, stopped placing third-country nationals who were ordered to leave the territory in prison accommodations. Instead, *Länder* which had previously used prisons for detention cooperated with other *Länder* and used their facilities in some cases. This explains why detention capacity decreased significantly in 2014 and 2015. A legislative amendment in 2017 reintroduced the option of accommodating irregularly staying third-country nationals for the purpose of return in regular prisons if they pose “a significant risk to life or limb or important areas of public safety”.¹⁷² Detention capacity has been increasing over the course of 2017 in Germany.

In the Netherlands, some detention facilities also accommodate criminal prisoners, but they are kept separated from third-country nationals placed in detention in the context of a return procedure. Similar to Germany, in the Netherlands the CJEU *Bero and Bouzalmate* and *Pham* rulings led to a confirmation

¹⁷⁰ Cyprus did not report figures on the number of detention centres. Ireland does not operate a separate immigration detention system, but instead uses the criminal detention system for immigration detention; 9 existing facilities may be used for this purpose. France also has 19 administrative detention facilities where detention for a short period of time is possible (i.e. 48h and, if necessary, up to 3 days while waiting for a detention judgement). Detention in such places may occur in either permanent or temporary structures that must, in all cases, respect strict accommodation norms and rights of persons detained set in legislation.

¹⁷¹ CJEU, Joined cases C-473/13, C-514/13 *Bero and Bouzalmate* and C-474/13, *Pham*, 17 July 2014.

¹⁷² Section 62a subs. 1 second sentence of the Residence Act.

of an earlier ruling by the Administrative Jurisdiction Division of the Council of State requiring a strict application of Article 16 of the Return Directive, according to which detention of third-country nationals in view of their return should take place in separate facilities. The Court ruled that this provision also applied to situations where detainees posed a threat to the order of the detention centre. While it used to be possible in the Netherlands to transfer extremely unruly prisoners from an immigration detention centre to a regular penal institution, this can no longer be done.

Still, a number of exceptions to this rule were signalled:

- Some irregularly staying third-country nationals imprisoned for criminal activities (BE, FR, SE, UK) or who pose a threat to public security (DE¹⁷³, LV, UK);
- Risk for public order in the detention facility (SE, UK);
- People with mental illness who could stay in a care facility (BE);
- Unforeseen increase in the number of places needed (EE, FI, HU). In Estonia and Finland, third-country nationals can be detained in police detention facilities in such cases, though minors cannot be placed in such facilities in Finland.

In addition, several Member States indicated that CJEU rulings had impacted their national practices on detention. For instance, Luxembourg amended its national legislation in line with the CJEU *Achughbabian* ruling¹⁷⁴ on the criminalisation of illegal stay. The Court concluded that the Return Directive did not preclude a Member State from classifying illegal stay as an offence and from laying down criminal sanctions to deter and prevent such an infringement of the national rules on residence. On the other hand, the Court ruled that a national regulation allowing the imprisonment of a third-country national who, though staying irregularly and not willing to leave the territory, had not been subject to any of the coercive measures foreseen by the Directive and had not been placed in detention in order to enforce a return decision, was contrary to EU law.

Similarly, the Dutch practice was influenced by the *Sagor*, *Achughbabian*, and *El Dridi* CJEU rulings.¹⁷⁵ currently, the Dutch legal system only criminalises irregular stay after an entry ban or former pronouncement of undesirability has been issued. There have been proposals to extend the possibilities for criminalisation of irregular stay but all were assessed against the background of the CJEU case law. As a consequence, the Dutch Supreme Court demanded that in order to be allowed to prosecute, the Public Prosecution Service had to prove that all the steps of the return procedure had been completed, through the submission of statements describing the reasons why the return had not been effective. Following the *El Dridi* ruling, the Court of Appeal introduced a gradation in the severity of return measures, leading to an increase of the use of alternatives to detention as well as length of periods for voluntary return. Additionally, detention orders should be motivated individually.

Six Member States specified that their detention facilities were not specialised for third-country nationals in the context of a return procedure, but could also accommodate other type of detainees in other immigration procedures (AT, CZ, FI, IE, SE, SK). As such, they can accommodate other types of detainees. In Austria for example, detention centres accommodated other types of detainees, although a specialised centre opened in 2014.

¹⁷³ This possibility was introduced in Germany in July 2017 and concerns third-country nationals who pose a significant risk to life or limb or important areas of public safety.

¹⁷⁴ CJEU, C-329/11, *Achughbabian*, 6 December 2011

¹⁷⁵ CJEU, C-430/11, *Sagor*, 6 December 2012, C-329/11, *Achughbabian*, 6 December 2011, C-61/11 PPU, *El Dridi*, 28 April 2011.



Challenges related to detention capacity

According to Article 18, Member States may allow for longer periods for judicial review and to take urgent measures with respect to the conditions of detention. Member States have an obligation to inform the European Commission when resorting to such exceptional measures. Recommendation 10(c) encourages Member States to bring their detention capacities in line with their actual needs, including by making use of this provision.

Only two of the responding Member States reported having faced challenges regarding their detention capacity in recent years that required them to trigger the application of this provision (CZ, HU¹⁷⁶).

Even amongst Member States who have never resorted to Article 18 of the Return Directive, exceptionally high number of other categories of third-country nationals needing to be accommodated in their Member States could create particular challenges. This was particularly true regarding the detention of asylum seekers and/or third-country nationals in transit during the migration crisis (CZ) and of third-country nationals under a Dublin procedure (LU). As a consequence, in the Czech Republic, a new detention centre was opened, and one of the existing detention centres was transformed into a specialised facility for families and single women. In Luxembourg, a new structure was established as a temporary facility in response to the high number of Dublin cases and rejected applicants for international protection accommodated within regular reception facilities. Likewise, in Slovenia, additional detention facilities were opened to accommodate rejected applicants for international protection and Dublin cases. In Greece, the situation was handled with the cooperation and joint efforts of all the competent state bodies, international organisations and collaborating Non-Governmental Organisations (NGOs).

5.5 USE OF ALTERNATIVES TO DETENTION IN THE RETURN PROCEDURE

The resort to detention in the context of a return procedure is strictly framed by Articles 15 and 16 of the Return Directive. In this context, the 2015 Return Action Plan encouraged Member States to explore new alternatives to detention and less coercive measures, notably to avoid situations where the likelihood of removal was undermined by a premature ending of detention. The 2017 Recommendation and Communication made reference to alternatives to detention concerning minors, for whom such alternatives should be favoured but not considered as the only possibility to ensure the success of the return procedure, depending on the individual circumstances of the case.

This section examines Member States' different practices concerning alternatives to detention. A more detailed account of these practices can be found in the 2014 EMN Study on the use of detention and alternatives to detention in the context of immigration policies.

All the responding Member States reported that they used some alternatives to detention in the context of a return procedure. The most widely used means to locate and monitor a third-country national in view of his/her return is to impose the obligation to report regularly to the authorities upon the individual. In addition, a majority of Member States also require the third-country national to surrender his/her passports and/or travel documents, and/or to be accommodated in a given location. The latter can be a specialised, open centre for irregularly staying third-country nationals in some Member States (e.g. AT, BE, DE, NL). Table 8 provides an overview of the different alternatives to detention available in Member States.

¹⁷⁶ Until the first half of 2016.

Table 8: Overview of the alternatives to detention available in Member States

Alternatives to detention	Member State
Reporting obligations	AT, BE, CY, CZ, DE, EE, EL, ES, FI, FR, HR, HU, IE, IT, LT, LU, LV, MT, NL, SE, SI, SK, UK
Obligation to surrender a passport or travel documents	CY, DE, EE, ES, FI, FR, HR, HU, IT, LU ¹⁷⁷ , LV, MT, NL, SE, UK
Residence requirements	AT, BE, CY, CZ, DE, EE, EL, ES, FI, FR, HR, HU, IE, IT, LU, MT, NL, SI, UK
Release on bail	AT, CY ¹⁷⁸ , CZ ¹⁷⁹ , FI, LU, NL, MT, SK, UK
Electronic monitoring	DE ¹⁸⁰ , LU ¹⁸¹ , UK ¹⁸²
Guarantor requirements	HR, HU, LT, NL, UK
Release to case worker or under a care plan	HR ¹⁸³ , UK ¹⁸⁴
Participation in an NGO project on voluntary return	NL
Other	BE: A "Return Path" is foreseen for asylum seekers whose application was rejected. From that moment, they leave reception centres and move to other reception centres which have open return places where counselling on voluntary return is intensified. ¹⁸⁵ FR: Since mid-2015, France has deployed return preparation measures (DPAR) which are destined as a priority to people subject to an order to leave French territory. This scheme's main aim is to facilitate the removal of rejected asylum seekers by placing them under house arrest in its centres. These centres offer assistance for preparing the return (presentation of voluntary return aid measures, administrative support...) and provide accommodation to the people concerned.

Source: EMN NCPs' National Reports

Concerning reporting obligations, in most cases the regularity of the obligation varies depending on the individual merits of the case. Several Member States indicated that the failure to report to the authorities could lead to the placement in detention if the third-country national had not absconded (AT, CY, IE, LT, LV) or to his/her deregistration from the national administrative systems (NL).

Residence requirements are imposed in a variety of cases, in particular when vulnerable persons (families, minors, persons with disabilities) are involved (AT, BE, HU, NL). In the Netherlands, third-country nationals can be placed in a freedom-restricting facility if they are demonstrably willing to cooperate during the return procedure and if their return in principle can be facilitated within 12 weeks.

In such facilities, they are allowed to leave the site, but they are required to stay within the territory of the municipality. Hungary reported that this measure could also be requested when the individual was released from detention but there were still grounds to monitor his/her whereabouts. Similarly, in

¹⁷⁷ Rarely used in practice.

¹⁷⁸ Not used in practice.

¹⁷⁹ Not used in practice.

¹⁸⁰ In Germany, this is only possible if it is necessary to counteract a considerable danger to domestic security or life and limb of others.

¹⁸¹ Only in relation with home custody.

¹⁸² For individuals presenting a high risk of absconding.

¹⁸³ For UAMs.

¹⁸⁴ For UAMs.

¹⁸⁵ In case a rejected asylum seeker, who is staying in an open return place, does not take a formal decision to voluntarily return, the Belgian Immigration Office may organize a forced return. In that case, s/he will be brought from the open return place to a detention centre. In the 'Return Path', asylum seekers receive, from the outset of their application for international protection and at specific key moments in their asylum procedure, information about the voluntary return option, the possibility of reintegration support, and the risk of detention and forced return when staying irregularly in Belgium.

Luxembourg, such alternatives are considered in cases where the enforcement of the return decision is postponed, in order to prevent the absconding of the person.

The release of the third-country national on bail is also possible in some Member States. The amount to be deposited varies depending on the Member State, and in some cases depending on the individual merits of the case. The deposit is refunded when the grounds cease to exist (e.g. if the third-country national was granted a residence permit) and/or when the return is carried out. On the other hand, it is not refunded in cases where the third-country national absconded before the return took place. In Austria, the deposit needs to be appropriate and proportionate to the individual case. Examples of deposits requested range from EUR 1,500 (NL), to EUR 5,000 (LU) or £5,000 (UK).¹⁸⁶

5.6 CHALLENGES AND GOOD PRACTICES RELATED TO DETENTION AND ALTERNATIVES TO DETENTION

5.6.1 CHALLENGES

The following challenges with the enforcement of return decisions were identified by Member States:

- Complexity of the grounds and requirements for detention: the large scope of applicable legislation and case law makes the subject difficult to navigate for officials (AT, BE), and makes the drafting of decisions complex and time consuming (BE). In Belgium, this is further complicated by the fact that the applicable law is interpreted differently by French-speaking and Dutch-speaking courts. Three Member States (BE, DE, SK) also mentioned a large proportion of detention decisions being quashed by national courts. In Germany, lack of cooperation on the part of the countries of destination or delays during the issuance of travel documents by their diplomatic missions in Germany may result in detention becoming inadmissible as the prospect of a swift return no longer exists.
- Grounds for detention: Several Member States reported difficulties in identifying the real risk of absconding when determining whether or not to order detention (DE, EE, EL, FI, LV, NL, SK).
- Standards and safeguards: Maintaining high standards in detention facilities is identified as a particular challenge and a costly process (AT, NL, in particular for minors (CY, LU). In the Netherlands, the resort to detention was hindered by the Kadzoev ruling by the CJEU according to which a third-country national cannot be detained solely on the ground of his/her criminal background. In Sweden, concerns related to capacity to detain people.
- Length of detention: The maximum length of detention (18 months according to the Return Directive and eight weeks in Ireland) do not always allow the effective enforcement of the return, especially when appeals are lodged by the third-country national (EE), when the third-country national hampers the return process (FR), when cooperation with consular authorities is difficult (FR) or when travel arrangements are complex (IE).
- Alternatives to detention: Difficulties relate to the impossibility in practice to offer the release of a third-country national by bail as his/her financial situation would not enable it (AT, LU); the possibility of absconding of the individual while the alternative to detention is used (HR, LU, NL, UK); the identification of a fixed address to place third-country nationals under home custody (LU); and the costs of certain measures in terms of resources (e.g. reporting obligations in Belgium) and material costs (e.g. electronic monitoring in the United Kingdom). In France and Slovenia, alternatives to detention can only be used if the identity of the concerned third-country nationals is confirmed and s/he has a real prospect to return.

¹⁸⁶ The figure is assessed on an individual basis, but a figure of between £2,000 and £5,000 will normally be considered to be appropriate

5.6.2 GOOD PRACTICES

The following good practices were identified by Member States:

- Some Member States launched initiatives to study the issue of detention and look for solutions to improve detention conditions. Austria set up a working group on detention conditions in 2014. The group is composed of representatives of the Austrian Ombudsman Board and delegated committees, together with the Federal Ministry of the Interior and discusses how to improve detention conditions and standards. In Sweden, the publication of a study on the health of detainees by the Faculty of Medicine in Uppsala revealed the negative consequences of detention on health, which contributed to ongoing efforts at national level to improve the medical care provided to detainees.
- Several Member States praised the involvement of NGOs in taking care of detainees, to de-escalate conflicts and avoid incidents (AT, BE, HU, NL).
- Good management of specialised detention centres and open centres (AT, BE, FR, HR, NL). In Austria, the Vordernberg detention centre was cited as example providing high standards of care. The European Committee for the Prevention of Torture (CPT) reportedly welcomed the high standards observed at that centre. Also, the Zinnergasse centre in Vienna for families functions well because it employs staff who are not in uniform and have some psychological training. In Belgium, from the perspective of both family and children rights, and costs compared to detention centres, FITT-units¹⁸⁷ were regarded by the authorities and NGOs as a good practice. For this reason, the Belgian Secretary of State announced that closed family units would be built within detention centres.¹⁸⁸ Similarly, in the Netherlands, the Closed Family Centre (GGV) was noted as a good practice to accommodate families prior to their return. In Hungary, support provided includes individual consultation opportunities, community programmes, internet access, psychological and psychiatric assistance, which was widely acknowledged as good practice by NGOs and international organisations.
- Since mid-2015, France has deployed return preparation measures (DPAR) which are destined as a priority to people subject to an order to leave French territory. This scheme's main aim is to facilitate the removal of rejected asylum seekers by placing them under house arrest in its centres. These centres offer assistance for preparing the return (presentation of voluntary return aid measures, administrative support, etc.) and provide accommodation to the people concerned. The first results recorded by these measures are encouraging, with 60% of the exits based on a voluntary return to the person's country. This scheme is being progressively extended.
- In Belgium, a detained third-country national has the possibility to file an appeal with suspensive effect within 5 or 10 days. Within this period, he can't be removed against his will. However, if the detained third-country national wants to return immediately, s/he can sign a form by which s/he declares to renounce his right to appeal against the return decision. In this case, his/her return to their country of origin can be organised immediately.
- In Belgium still, where it is possible to arrange the early release of third-country nationals in prison serving a sentence for a criminal offence in order to swiftly return them. Under the Belgian legislation, prisoners serving a sentence of more than three years could be released after 1/3 or 2/3 of their sentence, provided that they cooperated with their identification and return. If so the removal could be organised up to 6 months before the foreigner is in the conditions for early release. A similar practice exists in the Netherlands, where the sentence can be suspended for

¹⁸⁷ FITT stands for Family Identification and Return Team. Please see section 5.4.1 for more information on FITT-units.

¹⁸⁸ The FITT-units are also associated with challenges as about 35% of the families placed in FITT units in 2016 absconded (38% were returned and 27% were 'set free'). For this reason, the Belgian Secretary of State announced that closed family units would be built within detention centres. The closed family units, which will be ready in 2018, will be adapted to the needs of families with minor children. They will be used for families that have fled their FITT-unit, or did not follow the rules.

an indefinite period of time on the condition that the third-country national leaves the territory and does not come back. If s/he does, the execution of the sentence will be resumed. This has proved a strong incentive for third-country nationals to cooperate with the authorities and 79% of convicted third-country nationals had demonstrably left the Netherlands in 2016.

- In Luxembourg the commitment to detain unaccompanied minors as well as families with minors solely as a measure of last resort and for the shortest period possible was flagged as a good practice.

06

PROCEDURAL SAFEGUARDS AND REMEDIES



6. Procedural safeguards and remedies

This section presents Member States' practices regarding the safeguards and remedies available to third-country nationals in the context of a return procedure. Section 6.1 examines the way the respect of the principle of *non-refoulement* is applied in Member States. Subsequently, Section 6.2 analyses the remedies available against the return decision across the Member States.

6.1 ASSESSMENT OF THE *NON-REFOULEMENT* PRINCIPLE IN THE CONTEXT OF RETURN

Several provisions of the Return Directive recall the obligation for Member States to respect the principle of *non-refoulement*. In particular, Article 5 provides that Member States shall take due account of the principle when implementing the Directive.

In practice, the 2017 Commission Recommendation on the implementation of the Return Directive¹⁸⁹ stated that a large number of Member States conducted repetitive assessments of the risk of refoulement during the asylum and return procedures, leading to delays in the effective return of irregularly staying third-country nationals.

Recommendation 12(d) encourages Member States to avoid such repetitive assessments in cases where the risk for refoulement had already been assessed in a previous procedure and there was no change to the person concerned.

Member States making efforts to avoid repetitive assessments:

6

A large majority of Member States (AT, CY, CZ, DE, EE, EL, ES, FI, FR, HR, HU, IE, IT, LT, LU, LV, MT, SE, SI and SK) reported that the respect of either the principle of *non-refoulement*¹⁹⁰ or of Article 3 of the European Convention on Human Rights (ECHR)¹⁹¹ was systematically assessed as part of a decision taken on whether or not to return an irregularly staying third-country national. Of these, six Member States (DE¹⁹², ES, FI, IE, LT and LV) reported to be avoiding repetitive assessments of the principle of *non-refoulement* while three (CZ, SE¹⁹³ and LU¹⁹⁴) reported to be assessing the principle more than once.

Those Member States (BE, NL, SI and UK) that reported not to be systematically assessing the principle above, reported nonetheless doing so at least during one step of the process, in line with the Recommendation 12(d). Belgium reported that the principles would always be assessed before a decision was enforced and that possible violations of the principles of *non-refoulement* or Article 3 ECHR were more thoroughly examined when the Immigration Office considered issuing a return decision with detention, than when a return decision without detention was considered. Similarly, in the United Kingdom,

¹⁸⁹ European Commission, Recommendation on making returns more effective, *op. cit.*

¹⁹⁰ "No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his [or her] life or freedom would be threatened on account of his [or her] race, religion, nationality, membership of a particular social group or political opinion". Article 33(1) of the 1951 Convention Relating to the Status of Refugees.

¹⁹¹ "Prohibition of torture: No one shall be subjected to torture or to inhuman or degrading treatment or punishment".

¹⁹² In Germany, in both asylum and non-asylum related cases, the Federal Office for Migration and Refugees assesses the risk of refoulement and of a breach of Art. 3 ECHR, whereas the foreigners' authority assesses practical impediments to return (such as the inability to travel).

¹⁹³ In Sweden, the principle of *non-refoulement* is assessed before and after a decision of return.

¹⁹⁴ In Luxembourg, this principle is assessed during the international protection procedure; then it can be at the moment the return procedure begins (in case individual circumstances of the individual could have changed) and if there is any other change before the enforcement of the return decision a new assessment can be made. In this case the assessment is not a repetition because it is done in different procedures (international protection and return), under different procedures and legal framework (asylum law and Immigration law), different departments (Refugee department and Returns department) so there is no repetition *per se*.



the principles are assessed but as part of the asylum application rather than the return decision, while in Slovenia this happens either in the event of an appeal or as part of an ex-officio police procedure for the issuance of permission to stay. The Netherlands reported that the assessment of the principles was performed in two instances:

- If a decision on return is also part of a decision upon an application for an asylum residence permit and only after the substantial assessment of the application.
- In a situation in which a third-country national is found to be staying irregularly and received a return decision, they would be heard on grounds of the *Boudjlida* ruling¹⁹⁵ (C-249/13) on matters such as their health situation, children's best interest, family life, and the principle of *non-refoulement*.
- In addition, if the third-country national, whose departure is imminent, would claim that his return would be in violation of the principle of *non-refoulement*, this would be interpreted as a request for protection and handled under the Asylum Procedure Directive.

6.2 REMEDIES AGAINST RETURN DECISIONS¹⁹⁶

According to Article 13 of the Return Directive, third-country nationals subject to a return decision must be granted an effective remedy against it, either in the form of an appeal or a review.¹⁹⁷ The authority responsible for the remedy has the power to suspend the enforcement of the decision, unless a temporary suspension is applicable under national law.

6.2.1 AUTHORITIES RESPONSIBLE FOR REMEDIES AGAINST THE RETURN DECISIONS

In all Member States consulted for this study, remedies against the return decision are available before a judicial authority.

In eleven Member States, such a challenge may also be brought in front of an administrative authority (CZ, DE¹⁹⁸, EL, ES, FR, HR, LV, NL¹⁹⁹, SE, SI, SK and UK) or a competent body composed of members who are impartial and who enjoy safeguards of independence (e.g. in Greece, the Ombudsman).

In the United Kingdom, Ireland and Hungary, the challenge takes the form of judicial review and not of an appeal as such. Thus, in all three Member States the return decision cannot be appealed *per se*, however in the United Kingdom, an applicant can also appeal their asylum decision or present fresh evidence in support of their asylum claim after the return decision was issued. In ten Member States, challenges to return decisions may not be brought before administrative authorities (AT, BE, CY, DE²⁰⁰, EE, FI, HU IT, LT, LU).

6.2.2 DEADLINE TO CHALLENGE THE DECISION

Recommendation 12(b) encourages Member States to provide for the shortest possible deadline for lodging appeals against return decisions established by national law in comparable situations, to avoid misuse of rights and procedures, in particular appeals lodged shortly before the scheduled date of removal.

¹⁹⁵ CJEU Judgement of 11 December 2014, *Boudjlida* (C-249/13), ECLI:EU:C:2014:2431.

¹⁹⁶ A detailed account of procedures applicable in Member States can also be found in the 2016 EMN Focussed Study on 'The Return of Rejected Asylum Seekers: Challenges and Good Practices'.

¹⁹⁷ Appeals are brought to challenge the outcome of a decision by the authority concerned while reviews analyse whether this decision was lawful or not. See the 2016 EMN Focussed Study on 'The Return of Rejected Asylum Seekers: Challenges and Good Practices'.

¹⁹⁸ Depending on the law of the Land.

¹⁹⁹ Only where a return decision is part of a decision on an application for a non-asylum residence permit.

²⁰⁰ Only in relation to return decisions following asylum applications.



Member States with a deadline of one month or less from notification:

19



Deadlines to challenge the return decision exist in all Member States, yet these vary quite significantly and some Member States have various deadlines according to different circumstances.

In most Member States, the deadline is one month (BE, DE, FI, FR, HR, LU, NL) from the notification of a decision. In some Member States (BE, DE, FI and FR) the deadline may vary according to the circumstances, suggesting that they are aiming to implement the shortest possible deadline for lodging an appeal.²⁰¹

- In Belgium, if the return decision is notified to the third-country national while he or she is in a detention centre, in a Family Identification and Return Unit (FITT) or if the third-country national is at the government's disposal,²⁰² the deadline is reduced from one month to 15 days.
- In Finland, the deadline for first instance appeals is 21 days when the return decision is made in the asylum procedure and 30 days when the return decision is not related to an asylum claim. For second instance appeals, the deadline for asylum related cases is 14 days and 30 days when the return decision is not related to an asylum claim.
- In France the deadline can be as short as 48 hours where the third-country national did not benefit from a period for voluntary departure or when he or she is imprisoned, two weeks when the third country national is staying irregularly or as long as one month when the order to leave is issued against someone with the right to residence or movement or who has filed a residence permit application.
- In Germany, where an asylum claim is involved, the deadline is two weeks and may be reduced to one where an application for asylum was rejected as manifestly unfounded.
- In Italy the deadline for the third-country national concerned to appeal the return decision is 30 days if he/she is in Italy, 60 days if abroad.

Two weeks is also the standard deadline for the lodging of an appeal in three Member States (AT²⁰³, FR, LT) and 15 days in the Slovak Republic.

In Sweden the deadline for an appeal is three weeks. Shorter deadlines are foreseen in the Czech Republic and in Estonia, where they amount to 10 days. In Greece and Latvia, a third country national has one week to lodge an appeal with either the judicial or administrative authority. In Malta the deadline is of three working days. The longest period allowed for the submission of an appeal is in Cyprus and amounting to 75 days from the date of the decision, as per the Constitution.

The deadline for the submission of a request for judicial review is three months in the United Kingdom, however the Home Office is under no obligation to wait three months before enforcing the return decision and the date for return will be dictated by the removal itself, unless the court orders that removal be suspended. In Ireland such a petition is to be lodged within 28 days while the deadline is eight days in Hungary and three days in Slovenia.

²⁰¹ See section 3.2 on measures implemented by Member States to locate third-country nationals whose whereabouts are unknown.

²⁰² Such as when the TCN is considered a threat to society.

²⁰³ On 26 September 2017, the Austrian Constitutional Court revoked the shortened two-week deadline for the lodging of an appeal in cases of combined decisions on international protection and measures terminating residence (G 134/2017, G 207/2017). Now the deadline is four weeks.

6.3 SUSPENSIVE EFFECT OF APPEALS

Recommendation 12(c) encourages Member States to ensure that the automatic suspensive effect of appeals against return decisions is granted only when this is necessary to comply with Articles 19(2)²⁰⁴ and 47²⁰⁵ of the Charter of Fundamental Rights.



A suspensive effect entails that the appeal authority must have the power to suspend the enforcement of a return decision in individual cases and within the frame of the procedure.²⁰⁶ Following ECtHR case law and Rules, Member States have obligation to grant automatic suspensive effect in case of a risk of refoulement.²⁰⁷ Furthermore, an obligation to grant automatic suspensive effect in case of risk of grave and irreversible deterioration of state of health was confirmed by CJEU in the *Abdida* case.²⁰⁸

In eleven Member States, appealing a return decision has an automatic suspensive effect (AT, CY, CZ, DE²⁰⁹, EL, FI, FR, LV, SE, SI and SK). In almost all cases however there were exceptions:

- The person's immediate departure is necessary in the interests of public policy or security, the person has violated an entry ban or there is a risk of the person absconding (AT, LU²¹⁰, SK);
- There is a risk that such suspension may incur irreparable damage to a party to the proceedings (SK);
- If an asylum application was rejected as manifestly unfounded, the appeal does not have a suspensive effect (DE, FI, NL);
- In Finland, although the general principle is that first instance appeals of return decisions have an automatic suspensive effect, there are a number of exceptions to it.²¹¹

In the Netherlands, the appeal has no suspensive effect if the return decision is the result of the rejection of a non-asylum application. However, an injunction (provisional measure) can be requested and, depending on the circumstances, it can have a suspensive effect. In Luxembourg, the appeal must be filed together with an injunction request in order to suspend the execution of the return decision. The execution of the return decision cannot be carried out until the injunction request has been decided upon,²¹² except if the return decision is based on serious grounds of public security.²¹³

There are also cases in which an appeal does not have an automatic suspensive effect, however:

- In Estonia, although an appeal does not have an automatic suspensive effect, in compliance with Articles 19(2) and 47 of the Charter of Fundamental Rights, the court may order interim relief and suspend the enforcement of the return decision if it is considered to violate the principle of *non-refoulement*. Furthermore, if the person concerned asks for asylum, the return procedure is suspended until a decision on the application has been made at a first instance court.
- In Belgium, in order for an appeal to be suspensive, a special appeal must be lodged and this can be done only if it is demonstrated that the normal procedure would take too long. Similarly, in

²⁰⁴ "No one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment."

²⁰⁵ "Right to an effective remedy and to a fair trial"

²⁰⁶ European Commission, Return Handbook, *op. cit.*, p.61.

²⁰⁷ *Ibid.*

²⁰⁸ CJEU, Case C-562/13, judgement of 18 December 2014, *Abdida*, ECLI:EU:C:2014:2453.

²⁰⁹ In Germany, only appeals against rejected asylum claims (except the manifestly unfounded ones) have an automatic suspensive effect. This generally is not the case for appeals against other return decisions. This, however, depends on the law of the respective Land (see chapter 7.2.2 of the German National Report for this Synthesis Report).

²¹⁰ An appeal could be filed together with an injunction request in order to suspend the execution of the return decision.

²¹¹ For more detailed information, please see the Finnish national report for this study.

²¹² Article 114 of the Law of 29 August 2008.

²¹³ Article 114 of the amended law of 29 August 2008.

Germany, persons can request an order for a suspensive effect if the appeal does not have such an effect (e.g. in the case of manifestly unfounded asylum applications or removal warning issued by foreigners' authority of a given Land).

- In Austria, an appeal does not generally have a suspensive effect if the return decision is combined with a rejection of an asylum application due to a safe third country.

In Latvia, only first instance appeals generate a suspension of the removal order. This is the case also in Finland, where a second-instance appeal to the Supreme Administrative Court will not have a suspensive effect on a return decision.²¹⁴ Likewise, as reported by the Netherlands in the 2016 study on The Return of Rejected Asylum Seekers,²¹⁵ a final instance appeal would not generally have a suspensive effect, although the final appeals court does have the authority to rule that removal should be halted.

In Italy, appeal against a return decision does not have an automatic suspensive effect. Suspension must be specifically requested by the interested person, and allowed by the judicial authority within 5 days.

As mentioned in Section 6.4 below, a return decision may not be appealed in the United Kingdom, although the individual may request a judicial review. If an application for judicial review is made and acknowledged by the court, this has a suspensive effect if the application is new and submitted by a person who has not had a judicial review claim or an appeal refused on the same grounds in the previous six months. In Ireland, when a deportation order is challenged by means of judicial review, while judicial review does not itself have a direct suspensive effect, the return proceedings will be suspended until a decision on the judicial review is reached. When granting leave to take judicial review proceedings in relation to deportation orders, the judge may also choose to grant an injunction restraining deportation.

6.4 HEARING OF THE THIRD-COUNTRY NATIONAL

In order to speed up the effective carrying out of the return, Recommendation 12(a) encourages Member States to merge into one procedural step the different administrative hearings conducted for different purposes, whenever possible. The Commission also called for Member States to diversify the ways of holding the hearing and make use of technologies such as video-conferencing, so as to make the process more efficient.

Member States with administrative hearings:

9



6.4.1 AVAILABILITY OF THE HEARING

Administrative hearings are provided in nine of the responding Member States (AT, BE, CZ, DE, EE, ES, HU, LT, LV, NL, and SK). In five Member States (CY, DE, HU, IE, and UK), hearings are not always required. In Germany, the right to a hearing does not apply to all return decisions. In the case of a return decision which is not linked to an asylum procedure, it is up to the third-country national to request the organisation of the hearing and put forward any circumstances in their favour which are not evident or known, which might be an obstacle to removal. In Finland, a hearing can be held during the asylum procedure.²¹⁶

²¹⁴ For those appeals that do not have an automatic suspensive effect, it is possible to make a separate application for the suspension or prohibition of the enforcement of the decision.

²¹⁵ EMN Synthesis Report for the EMN Focussed Study 2016, The Return of Rejected Asylum Seekers: Challenges and Good Practices. Page 22.

²¹⁶ In Finland, an asylum applicant's opinion on a potential return decision is already asked during the asylum interview. This is to ensure that as soon as the interview is finished, the decision can be made (whether it will be positive or negative), and there is no need for arranging an additional hearing. This question is asked to all asylum applicants upfront and thus does not create an uncomfortable situation by asking it just when it is thought that the applicant will receive a negative decision.

In Slovenia, it is seen as a duty of the police to gather a statement from the third country national but there is no obligation on administrative or judicial authorities to provide a hearing. In the United Kingdom, it is also up to the third-country national to request a Judicial Review.

In some instances, Member States can remove hearings even when these are originally envisaged in a procedure. In Austria, for example, an oral hearing before the Federal Administrative Court will not take place if it is not expected to further contribute to clarifying the case, because for example the documents provided on file are sufficiently clear and do not require further investigation, or if the claims made by the person concerned are obviously false. In Hungary, the court can opt to not hold a hearing if the third-country national is unable to attend due to being treated in a medical institution, or if the complaint or the motion does not originate from a party entitled to do so. Where the return decision is issued with urgency on the grounds of national security, public policy or a threat to the community, Latvian and Lithuanian authorities can also forego the hearing.

6.4.2 POSSIBILITY OF JOINT HEARINGS

The possibility of holding a return hearing in conjunction with other hearings is not possible in a nine Member States (BE, CY, CZ, FI, HR, HU, LV, LU, SK).

The possibility of organising joint hearings for return is available in different procedures:

- During the asylum procedure, if a rejection of the claim appears likely (AT, EE, EL, NL);
- During the procedure for the granting of a humanitarian residence permit (AT);
- During the procedure for the granting of a residence permit (FI, SI).

In addition, the possibility for a joint hearing on return and detention is available in Austria, Malta and the Netherlands. In the Netherlands this is the case when the return decision is taken by the police or the Royal Dutch Marechaussee in cases where they have found a third-country national staying irregularly.

In Belgium and France, while the possibility of joint hearings during the return procedure is not envisaged, the same court can deal with multiple appeals at once, including the appeal on the return decision.

In the United Kingdom, a Judicial Review may challenge a number of decisions. During a Judicial Review the court can be asked to consider any issues that may be relevant to any administrative decisions under challenge. These include the return decision, any underlying decision – usually a refusal of leave to remain – and any decision to detain.

6.4.3 CONDITIONS OF THE HEARING

In six Member States, the hearing on return has to be attended by the third-country national concerned in person (CZ, HR, LT, MT, SI and SK). However, in the Czech Republic, exceptions are possible and video conferencing systems can be used where necessary.

In Austria, while there is no systematic obligation for the third-country national to attend the hearing, the Federal Office for Immigration and Asylum can require him/her to do so. Failure to attend can result in coercive penalties being imposed or to the person being forcibly brought to the hearing. In the UK there is no obligation for the third-country national to attend unless the court so orders.

Alternatives to attendance in person are provided in the following forms:

- Video conference (EE, FR²¹⁷, IT, HU²¹⁸, UK²¹⁹);
- Attendance by the legal representative on behalf of the third-country national (EE, EL, LU, UK²²⁰);

²¹⁷ When the person is in detention and in appeal procedures.

²¹⁸ When the person is in detention.

²¹⁹ During the hearing for judicial review.

²²⁰ During the hearing for judicial review.

- Telephone hearing (NL);
- Provision of written comments (FI, FR, LV).

6.5 GOOD PRACTICES

Four Member States (BE, FI, FR and DE) set a deadline for appeals that varies according to the circumstances of the case, which enables them to ensure that the third-country national is granted with the chance to appeal the decision while adapting the time needed depending on the individual case.

In eight Member States (AT, DE, EE, EL, FI, NL, MT and SI), administrative hearings connected to a return decision have been merged to some extent. In nine Member States (EE, EL, FI, FR, IT, HU, LV, LU and the UK) alternative methods are available during the hearings on the return decision.

07

TAKING ACCOUNT
OF FAMILY LIFE,
CHILDREN, AND
VULNERABILITIES



7. Taking account of family life, children, and vulnerabilities

This section provides an overview of Member States' practices in application of EU standards relating to vulnerable third-country nationals subject to a return decision. Section 7.1 first describes the categories of vulnerable people recognised by Member States in the context of the return procedure. Subsequently, Section 7.2 provides an overview of Member States' practices to assess the best interest of the child (BIC) in the context of the return procedure, as well as practices applying specifically to unaccompanied minors (UAM). Section 7.3 then analyses how Member States assess the state of health of third-country nationals in the return procedure, and how their special needs are accommodated. Finally, Section 7.4 analyses the challenges and good practices identified in relation to family life, children and the state of health of third-country nationals in the return procedure.

7.1 CATEGORIES OF VULNERABLE THIRD-COUNTRY NATIONALS IN THE CONTEXT OF RETURN

7.1.1 DEFINITION OF VULNERABLE PERSONS

Article 3(9) of the Return Directive provides a definition of the categories of vulnerable persons in the return process, i.e. “minors, unaccompanied minors (UAMs), 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”. The Directive mandates that the special needs of vulnerable persons should be taken into account during the granted period for voluntary departure and during periods in which removal has been postponed (Article 14), as well as in detention (Article 16(3)).

A majority of the responding Member States (BE, EE, EL, ES, FR, HR, HU, IT, LT, LV, LU, SE, SK²²¹, UK) indicated that they had elaborated in their legislation a definition of vulnerable persons in the context of the return process which is in line with the EU Return Directive. Spain's categorisation of vulnerable person is more restrictive than the one contained in the Return Directive, not including elderly people, single parents, and victims of torture.

Conversely, other Member States do not have a definition of vulnerable persons in the context of return in their legislation (AT, CY, CZ, DE, FI, IE, SI, and NL). However, these Member States foresee special measures when dealing with some persons belonging to vulnerable groups in the context of return, in particular minors, unaccompanied minors, single parents and people with medical needs (for details on measures applied see the following sections). For instance, in Finland, authorities take vulnerabilities into account when deciding on granting a residence permit for compassionate reasons, or in Ireland, albeit in the absence of a specific legal provision, in practice, unaccompanied minors have never been repatriated forcibly.

7.1.2 DETENTION OF VULNERABLE THIRD-COUNTRY NATIONALS

Generally, vulnerability is not considered *per se* as a ground for prohibiting the detention of third-country nationals in view of their removal, and a case-by-case assessment approach is used across Member States. However, some practices are largely applied towards certain categories of vulnerable third-country nationals.

Recommendation 14 encourages Member States to not preclude in their national legislation the possibility to place minors in detention, where this is strictly necessary to ensure the execution of a



²²¹ In Slovakia, the same definition applies to vulnerable persons for different contexts not just in the context of return (e.g. detention).

final return decision insofar as Member States are not able to ensure less coercive measures than detention that can be applied effectively in view of ensuring effective return.

Member States which allow for detention of UAMs:

7

Member States which allow for detention of UAMs:

16



Country reports show that the detention of minors is largely prohibited and a few Member States prohibit the detention of minors in any circumstance (CY, IE, IT, MT).

The detention of UAMs is allowed in a few Member States (AT, DE, FI, LU, NL, SE, SI) as a means of last resort to prevent absconding or for reasons of public security. In Germany and in Luxembourg, albeit the detention of UAMs is not formally forbidden by law, in practice, the detention of UAMs happens very rarely. In Finland, national legislation prohibits the detention of UAMs under 15 years old. Likewise, in Austria, only minors above the age of 14 can be detained and only if no alternative to detention was found.

The detention of accompanied minors is generally admitted only as a measure of last resort if other less coercive measures cannot be applied effectively and in exceptional cases, to maintain family unity, to prevent absconding, or only immediately before departure (AT²²², BE, DE, CZ, EE, FI, FR, HR, HU, LV, LT, LU, NL, SE, SK, UK). When the detention of families with minor children occurred, it is under specific conditions, notably:

- Pending the assessment of the BIC (HU, LV);
- Limited to short periods of time (AT, EE²²³, FR, HR, LU, NL, SE, UK), for example between 72 hours (UK²²⁴) and 3 months (AT, EE);
- Minors and families are detained in special facilities i.e. family units with access to assistance services e.g. education and healthcare facilities; additional leisure time etc. (AT, BE, CZ, ES, FI, FR, HR, HU, LU, SI, NL, UK).

Persons with health vulnerabilities and women during late pregnancy were generally not detained or detained for limited periods of time in facilities providing services to address their special needs (AT, CY, IT, LU, NL²²⁵, UK).

In some of the Member States, other vulnerable groups such as victims of torture, psychological, physical or sexual violence can be detained (AT, CY, CZ, ES, IE, HU, LV, SI, NL), with a decision on their detention made on a case-by case basis. Other Member States also reported providing special facilities taking into account their special needs (CZ, LU). In others, vulnerable groups are not detained unless it is necessary as a last resort if the immigration control factors in their case outweigh the vulnerability factors, or shortly before the return (DE²²⁶, EE, FI²²⁷, HR, LT²²⁸, LU, SE, SK, UK).

²²² In Austria, only minors above the age of 14 can be detained and only if no alternative to detention is possible.

²²³ In Estonia, the detention period is decided and assessed by the Administrative Court.

²²⁴ In the United Kingdom, minors can only be detained up to 72 hours, extendible in exceptional circumstance to a week upon Ministerial authorization.

²²⁵ In the Netherlands, restriction to detention only applies to women in late pregnancies. The detention of persons with health vulnerabilities is not restricted to limited periods of time if adequate care can be provided in the detention centre.

²²⁶ In Germany, several *Länder* have additional legislation in place which limits the detention of vulnerable groups or provides for specific rules and access to services for those groups.

²²⁷ In Finland detention is admitted only when necessary and based on a case-by-case assessment.

²²⁸ Only in exceptional cases.

Finally, according to the German Federal Court,²²⁹ the guarantees of Article 17 of the Return Directive on the detention of minors and families also apply to adults with family members for whom no detention is ordered.

7.2 ASSESSMENT OF THE BEST INTERESTS OF THE CHILD IN RETURN DECISIONS

Article 5 of the Return Directive further requires that the best interest of the child, family life and the state of health of the third country national should be given due account throughout the implementation of the return procedure. The sections below summarise how Member States implement these provisions.

7.2.1 PROCEDURE TO ASSESS THE BEST INTEREST OF THE CHILD

The 2017 Commission Recommendation on effective returns (13) encourages Member States to take the best interest of the child (BIC) into account during the return process. Suggested measures include the establishment of clear rules on the legal status of unaccompanied minors, ensuring that return decisions are taken on the basis of a systematic and individual assessment of their best interest by authorities on the basis of a multi-disciplinary approach, that the UAM is heard and the legal guardian is duly involved.²³⁰



All responding Member States reported that they implemented to a certain extent the obligation to take into account the BIC in their policy or legal framework on return. Member States adopted various institutional solutions to assess BIC and take decisions concerning the return of minors.

In terms of the authorities responsible to assess the BIC before a return decision was taken, depending of the Member State, this responsibility belonged to:

- The police (CZ, EE, EL, HR, SK);
- The Prefect (FR);
- Ministry of Justice (EL);
- Reception authority (MT);
- Appointed legal custodian (LU, SI) or representative (LV²³¹);
- Immigration and asylum authorities (AT, BE, DE, FI, EL, HR, IE, LU, LV, NL, SE, UK) in certain cases, in cooperation with social services or youth welfare office (FI, DE, HR, IE, LT, LU, UK);
- Foster care authorities under the control of the administrative Court (FR);
- Public prosecutor specialised in minors and by social services (ES).

Regarding BIC assessment procedures, practices differ widely among Member States. Common practices include a family assessment,²³² in consultation with experts (e.g. social services workers, child protection experts etc.), parents or legal guardians.

In Belgium authorities undertake an individual family assessment which can also entail contacting the families of UAM in the country of origin. Spain developed a specific return procedure for minors which foresees the involvement of the Government delegation, the Prosecutor specialised in minors, the National Police, the Ministry of Foreign Affairs and the regional social services. The Netherlands assesses

²²⁹ File No. V ZB 218/11, 06.12.2012.

²³⁰ European Commission, Recommendation on making the returns more effective, *op. cit.*

²³¹ Latvia a legal representative also assesses the BIC. However, s/he is just a legal representative without duty of custody.

²³² With the exception of Austria and Germany where a family assessment is not conducted and where there is no obligation to consult the youth welfare authority.

the BIC against Article 8 of the ECHR, and takes it into account *ex officio* only in the return of non-asylum applicants (UAM and families with minor children) and when deciding on the requests for a residency permit of UAM whose request for asylum failed. In other cases, this is only done upon the request of the applicant. In Germany, the BIC assessment in relation to return is not undertaken systematically. Concerning UAMs, some *Länder* have legislation in place to consider the BIC when implementing a return decision based on Article 10 of the Return Directive and often involving cooperation with the youth welfare services or the German embassy in the country of destination. However, this procedure was rarely applied, because UAMs are not forcibly returned in practice. Regarding accompanied minors, there is no formal BIC assessment in the return process, although the personal situation of the individual or family concerned might be an impediment to issuing a return decision or to enforcing the removal. The German Federal Administrative Court²³³ ruled that Article 10(2) of the Return Directive²³⁴ has the legal effect of a removal ban as long as the immigration authorities have not ensured the concrete fact that a member of the minor's family or another authorised person or institution will receive the minor. This means that in practice, unaccompanied minors are not currently removed. Latvia is in the process of adopting measures to improve the cooperation between the practical and legislative framework with authorities involved in assessing the BIC. In Ireland, the national legislation does not require the BIC to be taken into account before issuing a return decision.²³⁵ The BIC is assessed by the Child and Family Agency (TUSLA) and by IOM in relation to the voluntary return of unaccompanied minors.

In addition, some Member States reported on having developed policy guidance regarding the return of minors. Finland developed thorough guidelines on dealing with minors in the return procedure, and Luxembourg recently mandated the establishment of an inter-institutional commission, composed of the representative of the child as well as the representatives of the ministries and departments concerned; the commission was responsible for conducting an individual assessment of the BIC with the aim of issuing return decisions or issuing them a residence permit.

7.2.2 GUARANTEES AND ELEMENTS TAKEN INTO ACCOUNT TO ASSESS THE BEST INTEREST OF THE CHILD

In terms of guarantees for UAMs during the assessment process of the BIC, some Member States foresee the obligation to nominate a legal guardian who is responsible for initiating the procedure to assess the BIC and for contributing to the assessment of the case (BE, CZ, EE, ES, IT, HU, LT, LV, LU, NL). Finland, Germany and Sweden²³⁶ nominate a legal guardian but s/he is not responsible of initiating the procedure to assess the BIC.

When a decision to return UAMs cannot be carried out, the majority of responding Member States foresee the possibility to grant a right to stay to the individual concerned. The large majority grant a right to stay in the form of:

- Temporary permits (CY, CZ, EE, ES, IT, LT, LV HR, HU, SL, SE, UK) of a determined duration renewable up to the age of 18;
- Tolerated status (AT, DE²³⁷, FR²³⁸, SK);
- Possibility to apply for further leave to remain upon turning 18 (SK²³⁹, UK).

²³³ Case No. 10 C 13.12; 13.06.2013.

²³⁴ Article 10(2) of the Return Directive provides that "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.

²³⁵ Section 3 of the Immigration Act 1999 which sets out the Minister's power to make deportation orders does not require the best interests of the child to be taken into account before issuing a return decision.

²³⁶ The Swedish Migration Agency is responsible for the BIC during the whole procedure from lodging the asylum application to leaving the country.

²³⁷ In Germany, the UAMs concerned do not get residence permits but merely certificates of the suspension of their removal ("*Duldung*").

²³⁸ Unaccompanied minors (UAMs) arrested or identified by the competent authorities when they are in the territory cannot be challenged for the illegality of their stay; it is, therefore, impossible to remove them from the territory. UAMs are considered to be legally staying in the territory. BIC is taken into account by children's social welfare. It is a fundamental principle guiding intervention of this service. To do so, family links and projects of the minors are evoked during the first assessment.

²³⁹ Provided that UAMs turn 18, were previously granted tolerated stay or subsidiary protection and lived in Slovakia for three years during which they studied, they can apply for a permanent residence for an unlimited time period.

In fewer instances, Member States may immediately grant a permanent residence permit in the following situations:

- In Finland, a residence permit on compassionate grounds may be issued on a case-by-case basis, usually when the whereabouts of the UAM's parents/guardians are unknown and therefore adequate reception upon return cannot be ensured;
- In Cyprus and Italy,²⁴⁰ the prohibition of return of an UAM is automatically accompanied by the issuance of a permanent residence permit.

In a few Member States, minors are not granted a right to stay at all (EL) or only in exceptional cases (LU, NL). Namely, in Netherlands, in addition to the normal policy to grant a residence permit to persons that cannot leave for permanent reasons beyond their control, a UAM younger than 15 years old, may qualify for temporary residence permit on grounds of the specific 'no-fault policy' for UAMs. In Luxembourg, an UAM can remain on the territory on provisional basis without holding a right to stay and during this period he/she is entitled to receive humanitarian assistance. When performing the assessment of the BIC, the large majority of Member States take into account a combination of factors, notably the child identity and family life, the child and parents' (or care giver's) view, protection and safety of the child, situation of additional vulnerability, the child's right to health and access to education. The table below describes the elements taken into account by Members States when assessing the BIC.

Table 9: Elements considered by Member States in determining the BIC when determining whether a return decision should be issued²⁴¹

Elements	Yes	No
Child's identity	BE, CZ, DE, EE, EL, ES, FI, FR, HR, HU, IE, LT ²⁴² , LU, MT, NL, SE, SK, UK	AT
Parents' (or current caregiver's) views	AT, BE, CZ, DE, EE, EL, ES, FI, FR, HR, HU, IE, LT, LU, MT, SE, SK, UK	NL
Child's views	AT, BE ²⁴³ , CZ, EE, EL, ES, FI, FR, HR, HU, IE, LT, LU, MT, SE, SK, UK	NL
Preservation of the family environment, and maintaining or restoring relationships	AT, BE, DE, EE, EL, ES, FI, FR, HR, HU, IE, LT, LU, LV, MT, NL, SE, SK, UK	CZ
Care, protection and safety of the child	AT, BE, CZ, DE, EE, EL, ES, FI, FR, HR, HU, IE, LT, LU, LV, MT, NL, SE, SK, UK	-
Situation of vulnerability	AT, BE, CZ, DE, EE, EL, ES, FI, HR, HU, IE, LT, LU, LV, MT, NL, SE, SK, UK	-
Child's right to health	AT, BE, DE, EE, EL, ES, FI, FR, HR, IE, LU, LV, MT, NL, SE, SK, UK	CZ, HU
Access to education	AT, BE, DE, EE, EL, ES, FI, FR, HR, IE, LU, LV, LT, MT, NL, SE, SK, UK	CZ, HU
Other	AT: Appropriate provision of the child's needs; respect of the child by its parents; avoidance of any impairment; the rights, claims and interest of the child; the living conditions of the child; FI, FR: Child's age.	-

²⁴⁰ In Italy unaccompanied foreign-national minors are treated in all respects in the same way as abandoned Italian minors. Their custody is entrusted to a caregiver who acts in the minor's interests.

²⁴¹ In Ireland, the national legislation does not require the BIC to be taken into account before issuing a return decision.

²⁴² When determining the BIC, all individual circumstances are being assessed.

²⁴³ In Belgium, only unaccompanied minors' views will be considered; this is not applicable to accompanied minors.

Recommendation 13(c) calls for Member States to put in place targeted reintegration policies for UAMs. Generally, UAMs are not specifically targeted by Assisted Voluntary Return and Reintegration (AVR(R)) programmes or other form of support to return, however, they are eligible to apply and hence to benefit of such assistance.

Member States providing support for reintegration:

12



In this context, ten Member States reported that they provided support for reintegration to UAMs through government funded programmes and in-kind or cash support (AT, BE, FI, HR), or Asylum, Migration and Integration Fund (AMIF) project based AVR(R) programmes (AT, DE, EE, HU, LU, NL, SE, SK, UK).

Other Member States reported that they were underway to develop a reintegration programme targeting UAMs (FR). Others, instead of designing tailored assistance under returns programmes, condition the return to the assurance that the country of return will take over the full care of UAMs (LT).

7.3 STATE OF HEALTH OF THIRD-COUNTRY NATIONALS IN THE RETURN PROCEDURE

Articles 9 and 16 of the Return Directive define a number of guarantees for people suffering from physical or psychological health problems. In particular, a removal may be postponed based on the assessment of a third-country national's physical state or mental capacity.

7.3.1 SUSPENSION OF THE RETURN PROCEDURE ON HEALTH GROUNDS

All Member States foresee the possibility to postpone the removal of a third-country national based on health reasons. Generally, deferral is granted in cases where the travel may worsen the health condition and be life-threatening. Such a suspension of the execution of the return decision is generally only permitted for a temporary period of time until the health situation allowed to travel (CZ, DE, EE, FI, EL, HU, IE, LV, LU, NL, SK, UK).

7.3.2 HEALTH ASSESSMENT

In terms of the support documentation needed to assess the health situation of third-country nationals subject to a return decision, Member States adopted various procedures:

- Twelve Member States accept both own health certificate, or certificates issued by a doctor appointed by the competent authority (AT, BE, CY, DE²⁴⁴, EE, EL, FI, HR, LV, LU, SI, UK²⁴⁵);
- Five Member States only accept certificates issued by appointed doctors (CZ, EL, HU, IT, SK);
- Four Member States exclusively accept own health certificates provided they are issued by accredited doctors (FR, IR, NL, SE);
- Some Member States foresee alternative or additional systems for instance or offer the opportunity to conduct a health assessment at national healthcare centres (SE) or foresee an examination of the health assessment by a specialised section of the national migration authorities based on the applicants' own health certificates (NL).

Pregnancy is generally not considered as such as a ground for postponing return, however the vast majority of Member States (AT, BE, CY, DE, EE, EL, ES, FI, FR,HR, HU, IE, IT, LV, LT, LU, NL, SE, SK, SL, UK)

²⁴⁴ In Germany, persons must bring certificates by a licensed physician on their own initiative. The authority may then order a further medical examination by an appointed physician.

²⁴⁵ If the person is in detention, then the healthcare provider at the detention centre is responsible for making the assessment on fitness to return.

assess the consequences of the pregnancy on the health of the individual or the capacity of the person to travel as a ground for a potential temporary suspension of the removal of the person for medical reasons, or in line with provisions set by most airlines forbidding the travel of women in advanced pregnancy (i.e. after the 28th week of pregnancy). In Spain, in practice pregnancy is always a reason for postponement of the return. In Ireland, albeit the law is silent on this matter, practice shows that a suspension of the removal of pregnant women is possible when the pregnancy is so advanced that the travel is not possible. Conversely, in Hungary each case is assessed individually, however there are limited examples of deferral decisions based on the pregnancy of the woman concerned by the return decision.

7.3.3 ASSESSMENT OF THE MEDICAL SITUATION IN THE COUNTRY OF RETURN

A majority of Member States assess the accessibility of medical treatment in the country of return (AT, BE, CY, DE, FI, FR, HR, HU, IR, IT, LU, MT, NL, SK, SE, UK) which for instance is taken into consideration in some cases as a ground to postpone the removal of a third-country national (DE, FI, FR, IE²⁴⁶, LU, NL) or can be used to tailor the return and reintegration assistance (BE, FI, LV, NL, SE, UK). For example, in Germany the removal can be suspended in the case of life-threatening or serious illness which would significantly worsen upon the removal being carried out. In its assessment, the Federal Office for Migration and Refugees takes into account the accessibility of medical treatment in the country of return. However, it is not necessary that medical care in the country of destination be equivalent to the standard in Germany. Sufficient medical care is assumed to exist if it is guaranteed only in parts of the state of destination.

Ten Member States (BE, DE, EE, FI, HR, MT, NL²⁴⁷, SE, SK, UK) provide returnees with the necessary medication supply in their country of returns. In some cases, this supply is limited to the medication necessary during the travel or immediately upon arrival (FI, HR, NL, SE, SK) while the others provide larger amounts of medical supplies: for example, Estonia provides supply sufficient for up to one month upon return, while Belgium provides medical support and supply for a period of six months, or exceptionally 12 months through the “Adapted Medical Assistance After Arrival” (AMAAR) project . In Austria, medical supply is not provided in case of removal but could be provided in case of voluntary return as part of a reintegration project.²⁴⁸ Germany reported that in some cases the foreigners’ authorities register persons for care at their arrival in the country of destination. The German diplomatic offices will then take care of this in consultation with the destination country’s competent authorities.

7.4 CHALLENGES AND GOOD PRACTICES

Members States pointed out several challenges faced when dealing with vulnerable third-country nationals during the return process. The most common were those related to the provision of assistance to specific groups of people, in particular:

- The return and the pre-removal detention of families with minor children, and people with health and mental illnesses in particular people with disabilities, require the use of special facilities responding to their specific needs, tailored counselling support to prepare their return, and a medical escort during their return trip, requirements that often stretch the available human and financial resources of Member States (BE, CY, EL, LU, NL).
- Ensuring the voluntary return of UAM and people with disabilities and mental illnesses pose additional challenges related to the difficulty of tracing back UAM’s parents, or determining a person responsible for the minor that can provide consent to the voluntary return. When this person can be identified, there can be a resistance of parents and relatives in accepting back

²⁴⁶ Only where the non-availability of medical treatment would violate the prohibition on torture or inhuman and degrading treatment under Article 3 ECHR that the Minister will refrain from making a deportation order.

²⁴⁷ Medication is supplied if this is part of the medical conditions to effectuate return set by the Bureau of Medical Advice of the Dutch Immigration and Naturalisation Service. Medication is provided for a period of up to 3 months.

²⁴⁸ The AMAAR project focuses on voluntary return. For forced returnees with medical / mental problems, the special needs project was developed.

minors or members of their family with disabilities and mental problems who may be seen as a burden (AT, BE, FR, NL, LV).

- The ordinary challenges associated with returning individuals also apply to vulnerable groups such as withhold of travel documentation; lack of cooperation of the third-country national on the verification of ID, nationality, and age (especially for self-declaring minors); resistance to the return; or the lack of cooperation of the third country authorities (EE, FI, SI, UK).

Other challenges reported by some Member States included:

- In those Member States where the legislation does not provide for a definition of vulnerable third-country nationals, there are difficulties in granting additional support to individuals in need.
- Diagnosing psychological illnesses such as post-traumatic stress disorder is a complex process, and there are instances when doctors may reach diverging assessments on the state of health of the person (DE, NL). This also may lead to potential abuses of medical claims. From the NGO perspective, difficulties in diagnosing psychological illnesses are increased by the introduction of accelerated asylum procedures since 2016 (DE).
- Balancing the individual interests and the identified rights of certain groups protected in the context of return represents a challenge for some Member States (AT, NL). Similarly, the Netherlands emphasised that the limitations of a group classification of vulnerability were also highlighted as opposed to an individual vulnerability assessment that would allow for a more accurate individualised policy response.
- To ensure that, in the context of voluntary return, the persons concerned are also willing to return (LU).

Member States also reported a number of good practices addressing some of the abovementioned challenges, including:

- Some Member States presented good practices to address the challenges of ensuring the return of families and providing the necessary guarantees while preventing the risk of absconding. Notably, in the United Kingdom, in March 2011, the government adopted the Family Return Process aimed at ensuring the return of families by promoting a culture of compliance to encourage voluntary returns. Families were assisted by Family Engagement Managers (FEMs) who accompanied them through the entire return process while ensuring the welfare and safeguards of children. In the Netherlands, a Closed Family Centre was established. This is a facility for families with minor children and unaccompanied minors (UAMs) who are placed in migration detention. The facility provides the opportunity for UAMs and families with minor children to be, for a limited period, detained humanely and decrease the risk of absconding immediately prior to return.
- To deal with especially vulnerable categories, Belgium put in place some reinforced assistance measures. For instance, an extra-care list was created for persons in detention in need of attention due to their vulnerability or because they “misbehave”; the list was followed-up on a daily basis by a multidisciplinary team in the detention facility. Another example is the project “My Future”, providing personalised counselling support to preparing UAMs without a realistic chance to get a legal residence permit in Belgium, to the day when they will turn 18 and will no longer be entitled to accommodation in a reception facility.
- Several Member States provided tailored medical assistance including escort during the removal of person with health and mental illnesses (AT, DE, BE, FR, LT, NL, and UK). A good example of tailored projects is the Belgian programme to facilitate the voluntary return of third country nationals with health problems. Developed by the Federal Agency for the Reception of Asylum Seekers in cooperation with IOM and Caritas International Belgium, the programme consists of three components: analysis of medical treatment available in the country of origin, maximal

referral to already existing healthcare, and financing of medical costs for a period of six months. In Luxembourg, persons with difficulties are accompanied and assisted for the whole duration of the travel until arrival to destination.

- To improve the overall effectiveness of its reintegration programmes, Belgium put in place a combination of measures including: an online monitoring tool in ten countries of return to collect data useful to the assessment of returnees' reintegration; training for return counsellors including also field visits in the countries of return to enable the counsellor to provide more accurate information to the returnees; allocated funds for an extra reintegration support for vulnerable migrants in case of return.
- In Sweden, the Red Cross published two reports regarding return projects from 2008 to 2015 co-funded by the EU Return Fund. The reports highlighted the need to support, in particular to vulnerable persons, before and during the procedure and in the country of return; it also stressed the need of boosting good cooperation between NGOs and relevant authorities.

08

VOLUNTARY
DEPARTURE



8. Voluntary departure

The section analyses Member States' practices in relation to voluntary departure. In particular, Section 8.1 examines the length of the period of voluntary departure granted by Member States while Section 8.2 provides an overview of the measures adopted by Member States to guarantee the effectiveness of voluntary departure.

8.1 PERIOD FOR VOLUNTARY DEPARTURE

8.1.1 START OF THE PERIOD FOR VOLUNTARY DEPARTURE

Voluntary departure is defined as the “preferred option” over forced return in Recital (10) of the Return Directive and for this reason a period for voluntary departure should be granted. This principle is reiterated in EU Action Plan on Return²⁵⁰ and the renewed Action Plan²⁵¹ alike.

In complement, Recommendation 17 encourages Member States to grant a period of voluntary departure only following a request by the third-country national, while ensuring that he or she is well informed of the possibility of submitting such application.

Member States granting a period for voluntary return following a request:

6



The period for voluntary departure is automatically granted with the return decision in the vast majority of Member States (AT, BE, DE, CY, EE, EL, FI, FR²⁵², HR, LT, LU, LV, NL, SE, SI, SK), while six Member States (CZ, IT, HU, LV, MT, UK) reported that the voluntary departure procedure started following a request submitted by the third-country national concerned, in line with the Commission's recommendation.

In Ireland, the period for availing of voluntary departure expires once the deportation order is issued, thus the concept of a voluntary departure period post return decision does not exist in national legislation.²⁵³

In Member States where the third-country national needs to apply for voluntary departure, the information about the possibility to apply for a period for voluntary departure is communicated in the form of a letter or a brochure handed over to the person concerned together with the return decision (CZ, IT, HU, UK). The letter informs about the possibility to ask to depart voluntarily within a given time frame, and about the possibility of benefitting from the support or the institutions and/or existing AVR(R) programmes. The information is provided in English (UK), in multiple languages i.e. English, French, Spanish (IT) as well as Arabic, Albanian and Farsi (HU), translated in the mother tongue of the concerned person (CZ, MT) or provide an interpreter (MT).

Generally, in the Member States requiring the third-country nationals to submit a request for voluntary departure, the institution providing the information is the authority in charge of taking the return decision.

The United Kingdom highlighted a close cooperation between the Home Office, NGOs and reception centres to design the content of the information, to devise various communication tools (leaflets, hotline,

²⁵⁰ European Commission, Communication on an EU Action Plan on Return, *op. cit.*, p. 3.

²⁵¹ European Commission, Communication on a more effective return policy, *op. cit.*, p. 7.

²⁵² On a case-by-case assessment, if conditions are fulfilled.

²⁵³ In Ireland, before a deportation order is issued, asylum applicants are given five days from notice of rejection of their protection application to confirm that they will return voluntarily. 'Non-protection' applicants receive a notice of intention to deport which allows 15 days before a deportation order is issued. If the individual has started to make arrangements to leave the State the period may be extended.

and website), and to disseminate the information about the possibility to submit a request and the steps in the voluntary return process, including the available options for assistance before and after the departure.

8.1.2 LENGTH OF THE PERIOD FOR VOLUNTARY DEPARTURE

Article 7(1) of the Return Directive defines an obligation for Member States to provide for an appropriate period for voluntary departure of between seven and thirty days.

Recommendation 18 calls for Member States to provide in the return decision for the shortest possible period for voluntary departure needed to organise and proceed with the return, taking into account the individual circumstances of the third-country national concerned.



In all Member States, the period granted to third-country nationals to voluntarily depart is between seven and thirty days, in accordance with the Return Directive. Some Member States allow up to fourteen (AT, SE) or to thirty days (BE, CY, FI, FR, HR, LU, NL, and SE). Spain only exceptionally limits the period for voluntary departure to less than 15 days. In the United Kingdom, individuals returning voluntarily without any support are granted up to 21 days to depart, while this term is extended if the third-country national benefits from assistance under a return programme. In Germany, the period is 30 days as a rule in both asylum and non-asylum cases;²⁵⁴ if an asylum application has been rejected as manifestly unfounded, then the period is reduced to seven days.

Recommendation 19 emphasises that in determining the duration of the period for voluntary departure, Member States should assess the individual circumstances of the case, especially the prospects of return and the willingness of the individual to cooperate with competent authorities in view of his/her return.

Member States assessing both prospect of return and willingness to cooperate:

14



The majority of Member States assess the individual circumstances when establishing the duration of the granted period of voluntary departure. This assessment looks at both the prospect of return and the willingness to cooperate with the competent authorities in view of return (CZ, EE, ES, FI, FR, HR, HU, IT, LV, LT, MT, SI, SK, UK). However, Belgium only takes into account the medical situation of the person as a ground to determine the initial duration of the period for voluntary departure, while Sweden only considers the length of the stay on its territory. In the Netherlands, the *Boudjlida* and *Mukarubega* CJEU rulings²⁵⁵ have led to the expansion of the standard list of questions in hearings preceding the return decision.

Article 7(4) of the Return Directive provides that Member States have the possibility to grant a period for voluntary departure shorter than seven days in cases where there is a risk of absconding, where his/her application for a legal stay was dismissed as fraudulent or manifestly unfounded, or when the individual poses a risk for public policy, public or national security.

In its Recommendation 21, the Commission advised that no period for voluntary departure should be granted in such cases, with an emphasis on cases where the third-country national concerned risks absconding. In addition, Recommendation 20 specified that Member States should only grant more than seven days for voluntary departure in cases where the third-country national cooperates



²⁵⁴ In Germany, in non-asylum cases however this is at the discretion of authorities and individual circumstances are to be taken into account.

²⁵⁵ CJEU, C 249/13, *Boudjlida*, 11 December 2014 and C 166/13, *Mukarubega*, 5 November 2014.

with the authorities in view of his/her return.

Member States not granting a period of voluntary return under certain circumstances:

10

Member States extending period of voluntary return under certain circumstances:

19



Most Member States, with the exception of Slovenia, reported that they either limited or waived the time available for voluntary departure to less than seven days in certain circumstances. Some Member States foresee the possibility to both waive and shorten the period for departure (BE, DE, EL, HU, LV, LT, LU, MT, SK) while others only provide for a waiver of the period of voluntary departure (AT, CY, EE, ES, FI, FR, IT, NL, SE, UK), and Croatia and Czech Republic only foresee the possibility of shortening the period.

The grounds for taking such a decision include:

- Reasons of public safety and national security (AT, BE, CY, CZ, DE, EE, EL, ES, FI, FR, HR, HU, LV, LT, LU, MT, NL, SK, SE, UK);
- Risk of absconding (AT, BE, CY, DE, EE, EL, ES, FI, FR, HE, HU, LV, LT, LU, MT, NL, SE, SK);
- The dismissal as manifestly unfounded or fraudulent of an application for legal stay (AT, BE, EE, EL, ES, FI, HR, HU, LV, LU, MT, NL, SE);
- The violation by the third country national of a removal order (BE);
- The impossibility to identify the person (SK);
- Cases where the third-country national is already in detention (DE, EE, UK).

All respondent Member States (AT, BE, CY, CZ, DE, EE, EL, ES, FR, HR, HU, IT, LV, LT, LU, MT, NL, SE, SK), with the exception of the United Kingdom²⁵⁶ and Finland²⁵⁷, allowed, under certain circumstances, an extension of the initial duration of the period for voluntary departure. Member States base their decision on the overall consideration of the personal circumstances of the individual, case in line with Article 7(2) of the Return Directive. In particular, Member States reported looking at:

- The presence of children attending school (AT, BE, CY, CZ, DE, EE, EL, ES, FR, HR, HU, LV, LT, LU, MT, NL, SE, SI, SK);
- The existence of other family and social links (AT, BE, CY, DE, EE, EL, ES, FR, HR, HU, LV, LT, LU, MT, NL, SE, SI, SK);
- The length of stay (AT, DE, EE, EL, ES, FR, HR, HU, LV, LT, LU, MT, SE, SK);
- The health situation (BE, LT, SK);
- The willingness to cooperate with authorities in the view of return (BE, DE²⁵⁸);

²⁵⁶ In the UK, those making a voluntary return without assistance are expected to leave as soon as practically possible, and within 21 days. For assisted voluntary return cases, that period may be extended up to three months, or occasionally further, if the individual is already in the process of making arrangements with the Home Office to return.

²⁵⁷ Whereas in Finland 30 days is the longest period of voluntary departure which can be granted, the approach is pragmatic: it is understood that often it is not possible to arrange a travel within that timeframe. Therefore, instead of focusing on the date of departure, the focus is on the fact whether the third-country national has committed to the voluntary return process in the given timeframe.

²⁵⁸ In Germany, the period can be up to three months if a person withdraws an asylum application or a court action brought against a decision by the Federal Office for Migration and Refugees and if the person is willing to leave Germany.

- The time needed to accomplish all the pre-departure duties (e.g. receiving the travel documents, family issues etc.) (SI); and
- The willingness to ensure timely availability of the documents required for return (NL).

8.1.3 MONITORING EFFECTIVE RETURN WITHIN THE PERIOD FOR VOLUNTARY DEPARTURE

Recommendation 24(b) encourages Member States to set up means to verify if third-country nationals illegally staying in the EU had returned within the period for voluntary departure and, if not, to follow-up on their situation.

Member States with a system in place to verify returns and follow-up:

14



Approximately half of the responding Member States reported having such system in place (AT, BE, DE, EE, ES, FI, FR, HE, LT, LU, MT, SE, SI, SK²⁵⁹). In Ireland, as outlined above, the concept of a voluntary departure period following the issuance of the return decision does not exist, hence the adoption of verification mechanisms is not applicable.

Some Member States impose an obligation to declare the departure at the border crossing point through identification on site (FR, ES, HR, LT), to submit a crossing border certification previously handed over to the third-country national (DE, MT, SE, SI), or record the departure on the aliens register (FI, LT). The information is then shared with the competent authorities who can also proactively prompt border institutions to verify if a third-country national has departed or not. When there is no confirmation of the departure of the third-country national, the Police can be authorised to conduct a verification and research of the person (DE, FR, HR, LT, LU, NL).

Other Member States also put in place an entry-exit registration system (EE), relied on the national Schengen border control information tracking (SK), or established bilateral agreements with neighbouring countries to intensify the collection of information on the border crossing of third country nationals (LV).

Some Member States use indirect mechanisms, including pre-departure checks to ensure that the third-country national is preparing to depart and control at the registered home address (BE), or demanding him/her to appear in front of the representation authority in the country of return (AT, DE, ES).

8.2 CHALLENGES RELATED TO VOLUNTARY DEPARTURE

Member States pointed out various outstanding issues with the effective implementation of voluntary departure, in particular the following elements.

Insufficient length of the period for voluntary departure

Close to half of the Member States (AT, CY, DE, EE, HU, LU, SE, SI, SK) pointed out that the period for voluntary departure is often too short in practice, despite the due consideration of all the circumstances of the individual case.

A number of constraints were identified, which prevented the timely fulfilment of pre-departure preparations, both for the individual concerned (e.g. closing up a business, withdrawing children from school, finding flights, etc.) as well as for the administration (e.g. issuing documents, providing medical

²⁵⁹ Only if the third-country national crosses through the external border, i.e. travels through Ukraine, through an airport and the record is made in the national database MIGRA.

support during travel, etc.). Thus, generally the periods of time are significantly longer than the minimum seven days, and in several instances additional extensions are granted. The need to resort to an extension can cause additional complications. For instance, the Slovak Republic highlighted that the delayed voluntary departure of third-country nationals creates an overlap with the entry ban authorisation system, as an alert is automatically created in the SIS (Schengen Information System) immediately after the return decision is issued. If the return is carried out subsequently in the form of a forced return, the ban has to start running anew after the execution of the return, thus creating an additional complication to the process.

Risk of absconding during the period for voluntary departure

Member States (AT, BE, CY, DE, EL, ES, FR, IT, LT, LU, LV, NL, SE, SI, SK, UK) highlighted that the risk of absconding remained prevalent among the challenges linked to voluntary departure. For instance, Hungary reported that it is difficult for Member State to prevent absconding and act in cases where the individual provides a false residency or changes it without informing the authorities. A few Member States pointed out that, in the absence of a common European border registration system, of a shared entry-exit information system, and of internal border controls, it was not possible to establish with certainty if the third-country national had left the EU, had gone into hiding in the Member State, or had moved to another Member States (CZ, DE, EE, HU, FI, LT, and LV). Hence the risk of absconding is closely linked to the challenges of verifying that a departure had effectively taken place.²⁶⁰

Verification of the departure within the period of voluntary departure

As described above, 12 Member States have a verification system in place (BE, DE, EE, ES, FI, FR, HE, LT, LU, SE, SI, SK²⁶¹). Those who have such system still do not manage to ensure a full control over the third-country national's movements. In particular, while in AVR's there is a systematic sharing of the departure information from the border crossing post to the migration authorities, it is more challenging to track the movement of returnees not benefitting from any return support. Most notably, the absence of a common entry-exit system makes it difficult for Member States to verify whether a third-country national has crossed the external border of any Schengen State. Lithuania highlighted that this increased the time costs and financial burden for the authorities to control the enforcement of the return decision. In addition, the incapacity to verify the actual departures creates complications with the implementation of the entry ban procedure in relation to the alert period in the SIS (NL and SK).

Other challenges identified

The lack of documentation (LU) especially for some third-country nationals, also often prevents the voluntary return from taking place. Furthermore, some third-country nationals may start a new procedure (BE), e.g. asylum or family reunification, during the period for voluntary departure, with a suspensive effect on the departure decision. Lithuania also pointed out that Member States do not share information on return decisions taken by other Member States.

In the absence of clear legislative provisions on the validity of an expulsion decision adopted by another Member States, the decisions are only valid within the territory of the issuing State, while other Member States can, based on national laws, decide whether to recognise the decision or allow the alien to pass in transit without additional formalities. This can result in extra time and financial costs for the public authorities and also prolong the irregular stay of the alien allowing for abuses of the possibility of the voluntary departure.

²⁶⁰ See also European Commission, Proposal for a Regulation on the establishment, operation and use of the Schengen Information System (SIS) in the field of border checks, amending Regulation (EU) No 515/2014 and repealing Regulation (EC) No 1987/2006, COM(2016)882, 21 December 2016.

²⁶¹ Only if the TCN crosses through the external border, i.e. travels through Ukraine, through an airport and the record is made in the national database MIGRA.

Table 10: Challenges associated with the period for voluntary departure.

Identified Challenge	MS affected
Insufficient length of the period for voluntary departure	AT, CY, DE, EE, HU, LU, SE, SI, SK
Absconding during the period for voluntary departure	AT, BE, CY, DE, EE, EL, ES, FR, IT, LT, LU, LV, NL, SE, SI, SK, UK
Verification of the departure within the period of voluntary departure	AT, BE, CZ, DE, EE, EL, ES, FR, HR, FI, LT, LU, LV, NL, SE, SI, SK
Start new procedures with suspensive effect to prevent enforcement of return	BE
Lack of documents	LU
Exclusion of certain categories from return support (e.g. from safe countries)	NL
Decision on voluntary departure are not shared with or recognised by other Member States	LT

8.3 GOOD PRACTICES RELATED TO VOLUNTARY DEPARTURE

Responding Member States also identified some good practices in relation to addressing the above-mentioned challenges, which can be clustered in the following groups:

Flexible approach

The practice demonstrates that the preparations for departure and return to the country of origin can vary greatly and take up to a few weeks. Five Member States (AT, BE, DE, SL, UK) favour the adoption of a pragmatic approach to the duration of the period for voluntary departure, by granting longer periods of time when the individual is genuinely engaging in the departure process. Finland has a similarly pragmatic approach albeit the maximum period of voluntary departure was 30 days: instead of focusing on the date when the individual effectively left the country, Finland focuses on the commitment of the third-country national to the voluntary return process. As stressed by the United Kingdom, this also helps to prevent individuals from using their application as a means of frustrating enforced removal.

Deterrent measures

The Netherlands considered as a good practice by government agencies the removal of the period for voluntary departure for asylum seekers from safe countries of origin whose application had been rejected. It enables the Member State to immediately detain third-country nationals concerned. This contributes to preventing the risk of absconding, and allows to immediately start the procedure of return. In addition, this measure has a deterrent effect against abuses of the asylum and reception system. Germany emphasised the importance of raising awareness about the legal consequences of a forced removal and of absconding (e.g. longer re-entry bans and obligation to bear the repatriation costs), aiming at encouraging voluntary departures. In this regard, different information tools were created, for instance hotlines or a return portal, encouraging discussion about return opportunities and handing out a return information package already at the time of the filing of the asylum application.

09

ENTRY BANS



9. Entry bans

This section reviews Member States' practices on the interpretation and implementation of EU rules relating to the conditions to impose an entry ban as per Article 11 of the Return Directive. According to Article 3(6) of the Return Directive, an entry ban is "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". An entry ban has an EU-wide effect as it applies not only to the territory of the Member State issuing the return decision but to all (Member) States bound by the Return Directive.²⁶² A fuller analysis of the legal and institutional framework for the imposition of entry bans and their practical application in the (Member) States can be found in the EMN Synthesis Report presenting the main findings of the 2014 EMN Focussed Study on "Good practices in the return and reintegration of irregular migrants: (Member) States' entry bans policy and use of readmission agreements between (Member) States and third countries".²⁶³ The aim of this section is to provide for an update of the information analysed in 2014 in the light of the Commission's Recommendation published in March 2017.

Furthermore, Recommendation 24 encourages Member States to make full use of entry bans by (a) ensuring that they are valid from the day the third-country national leaves the territory of the EU; (b) putting in place means to verify if a third-country national had left during the period of voluntary departure and, if not, ensuring the appropriate follow-up; (c) systematically entering an alert in SIS II; and (d) putting in place a system for issuing a return decision when the irregularity of the stay is discovered during an exit check.



This section examines Member States' practices in imposing an entry ban, such as the grounds for issuing an entry ban (Section 9.1) and the length of an entry ban (Section 9.2). In addition, Section 9.3 provides an overview of Member States' practices in registering an entry ban in SIS II. Consequences of breaching an entry ban are analysed in Section 9.5. Finally, Section 9.6 examines the effectiveness of entry bans via challenges faced by Member States in implementing entry bans and evaluations of their effectiveness. Practices relating to the exit checks are discussed under Section 9.4.

9.1 GROUNDS FOR ISSUING AN ENTRY BAN

Article 11(1) of the Return Directive provides that an entry ban shall be issued:

- If no period for voluntary departure has been granted (as per Article 7(4) of the Return Directive) or
- If the obligation to return has not been complied with (i.e. if return has not taken place within the period for voluntary departure set in accordance with Article 7(1) of the Return Directive).

In other cases, return decisions may be accompanied by an entry ban. The Return Directive therefore leaves (Member) States a margin of discretion to issue an entry ban in other cases, which may depend on the specific circumstances of a third-country national.

A majority of Member States reported imposing automatically an entry ban in the cases foreseen by Article 11(1) of the Return Directive (BE, EL, ES, FI, FR, HR, LT, NL, SE, SI, SK), while four Member States (CZ, EE, ES²⁶⁴, HR and IT) automatically imposed an entry ban with all return decisions issued.

²⁶² All EU Member States with the exception of the UK and Ireland, plus Switzerland, Norway, Iceland and Liechtenstein.

²⁶³ EMN, 2014, Focussed Study on Good practices in the return and reintegration of irregular migrants: Member States' entry bans policy and use of readmission agreements between Member States and third countries, https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/networks/european_migration_network/reports/docs/emn-studies/emn_study_reentry_bans_and_readmission_agreements_final_december_2014.pdf.

²⁶⁴ However, when voluntary departure is complied with, the entry ban is revoked.

Ireland, which is not bound by the Return Directive, also imposes an entry ban systematically with a deportation order.²⁶⁵

Likewise, the United Kingdom systematically imposes an entry ban, with the exception of cases where the returnee both leaves the UK within 30 days of the expiry of their right to stay and leaves at their own expense. Where an individual is removed with a deportation order, the entry ban will remain in place until the deportation order is lifted.

Other Member States (BE, CY, FI²⁶⁶, FR, HR, HU, LU, MT, SK, SE) issue an entry ban on a case-by-case basis on return decisions in other cases than the ones provided for in the Return Directive. No entry ban is issued systematically in a few Member States (AT, LV).

Lastly, in Germany, an entry ban is automatically imposed against persons who have been expelled²⁶⁷ or removed, regardless of whether a period for voluntary departure has been granted or not.

In Austria, following a ruling of the Administrative High Court interpreting national legislation in light of the provisions of Return Directive, national provisions on the systematic imposition of entry bans accompanying a return decision were amended²⁶⁸ to provide that national authorities can impose an entry ban at the same time as a return decision is issued, rather than automatically imposing an entry ban of 18 months with each return decision.

Most Member States' legislation imposes an entry ban in cases the person concerned presented a risk of absconding (BE, CZ, EE, EL, FI, FR²⁶⁹, HR, LU, MT, NL²⁷⁰, SI, SE, SK) (see also Section 4 on this topic). In other Member States, the risk of absconding, whilst not being explicitly mentioned in national legislation as grounds for imposing an entry ban, can be taken into account indirectly when assessing the individual circumstances of the case (AT, LT) or when adopting a return decision which is accompanied by an entry ban (LV).

Where it was considered that a third-country national could pose a risk to public policy, public security or national security, most Member States could impose an entry ban (AT, BE, CY, CZ, DE, EE, EL, FI, FR, HR, HU, IT, LV, LT, LU, MT, NL²⁷¹, SE, SI, SK, UK). For example, in Estonia, such a risk is considered to exist where there is information or a good reason to believe that the person concerned belongs to a criminal organisation, is connected to drug trafficking, is a member of a terrorist organisation, or has committed an act of terrorism. Generally, where an entry ban is imposed on public policy or security grounds in Member States, the validity of the entry ban is the longest (see Sub-section 9.2).

Similarly, in most Member States, an application for legal stay dismissed as manifestly unfounded or fraudulent can be a ground for imposing an entry ban (AT²⁷², BE, CZ, DE, EE, EL, FI, FR, HR, LV, LT, LU, NL, SK, SE, UK). This is the case where it is considered that a third-country national has submitted an application for international protection for manifestly unfounded reasons or to hinder the return procedure.

²⁶⁵ A deportation order requires the person specified in the order to leave the State within the period specified in the notice given under national law and thereafter to remain out of the State.

²⁶⁶ In Finland, national legislation does not list all the grounds on which an entry ban can be imposed; it simply states that an entry ban may be imposed on an alien in conjunction with a return decision.

²⁶⁷ In German law, the term "expulsion" refers to the administrative act terminating the lawfulness of stay if a person poses a threat to public safety and law and order, e.g. in cases of a conviction for a serious criminal offence. Further clarification on terminology is to be found in Germany's National Report for this Study, p. 20.

²⁶⁸ Before January 2014, an entry ban of at least 18 months was automatically imposed with any return decision issued in Austria. However, the Administrative High Court ruled that national provisions establishing such practice conflicted with the Return Directive as it did not allow for the length of an entry ban to be determined with regard to the individual circumstances of a third-country national.

²⁶⁹ This ground is indirectly taken into account as the risk of absconding may be a ground for refusing a voluntary departure period, which in turn requires imposing an entry ban.

²⁷⁰ The fact that the third-country national poses a risk to public order, public security, or national security was not included in Dutch legislation as a ground for imposing an entry ban. If the third country national posed a risk to public order, public security, or national security the Dutch authorities may, however, decide not to award a period for voluntary departure. This means that the third-country national must leave the Netherlands immediately and that an entry ban will be imposed.

²⁷¹ See footnote 107.

²⁷² This ground was not explicitly included in national legislation but it can be considered when assessing the case.

An entry ban can be imposed by national authorities in Belgium and Germany if a third-country national's repeated applications for international protection had been rejected as unfounded or inadmissible.²⁷³ This is also the case in Germany where an asylum application lodged by a third-country national from a safe country of origin was rejected as manifestly unfounded.

In such cases, an entry ban is imposed in addition to the entry ban imposed on third-country nationals who were forcibly removed or who did not return within the period for voluntary departure.

A third-country national who has been refused a residence permit or a visa can also be subject to an entry ban in Lithuania for example in cases where he or she had submitted counterfeit documents to substantiate his or her application.

Other grounds for imposing an entry ban provided in (Member) States' national legislation include:

- A third-country national was convicted and, as a consequence, an expulsion order was issued (DE);
- A third-country national had obstructed administrative or judicial decisions (CZ);
- A third-country national had contracted a marriage of convenience (SK).

9.2 DURATION OF AN ENTRY BAN

Article 11(2) of the Return Directive provides that the length of entry bans should be determined based on all relevant circumstances of the individual case of the third-country national concerned and should not, in principle, exceed five years. Exceptionally, this period of validity may be extended where a third-country national represents a serious threat to public policy, public or national security.

This section describes the period of validity of entry bans in Member States and the moment from which the period of validity starts running.

9.2.1 PERIOD OF VALIDITY OF AN ENTRY BAN

National legislation in all Member States – with the exception of Ireland and Malta – provides for different durations of the entry bans depending on the grounds on which it was imposed (AT, BE, CY, CZ, DE, EE, ES, FI²⁷⁴, FR, HU, HR, IT, LT, LU, NL, SK, SE, UK) (see Annex 2).

Generally, entry bans do not exceed five years in cases where a third-country national breached immigration laws in a majority of Member States (AT, BE, CY, CZ, DE, EE, EL, FI, FR, HR, HU, IT, LV, LT, LU, MT, NL, SE, SI), with the exception of Slovakia²⁷⁵ and the UK – where the maximum period of validity of an entry ban on all grounds is 10 years. Germany amended its legislation on entry bans following the *Filev and Osmani* judgement (CJEU, C-297/12), in which the court concluded that entry bans had to be limited in time *ex officio* and not only following an application by the person concerned. In the Netherlands, The *Zh. and O* CJEU ruling has had consequences on the periods for voluntary departure and issuance of entry bans. When imposing an entry ban of more than two years, the additional criterion must also be taken into consideration of a "genuine, present and sufficiently serious threat affecting one of the fundamental interests of society". The threshold for imposing entry bans of over two years has thus become higher.

Entry bans exceeding the duration of five years defined in the Return Directive are usually imposed in cases not related to the Directive and where it is determined that a third-country national poses a particularly serious threat to public policy or national security (AT, BE, CY, CZ, DE, EL, FI, HR, HU, LV, LT, LU, MT, NL, SK). In these circumstances, some Member States set a maximum duration for entry bans. For example, it may not exceed 10 years (CY, CZ, DE, EL, HU) or 15 years (SK). In other Member States, the

²⁷³ In Belgium, unfounded (i.e. more than two applications for international protection) or fraudulent applications can lead to an entry ban of up to 5 years. In Germany, an entry ban could also be imposed if a subsequent (i.e. at least for the second time) application was repeatedly rejected as inadmissible.

²⁷⁴ In Finland, the legislation only provided for the maximum duration of an entry ban. The legislation did not list all the different lengths according to various grounds. These were listed in instructions on a policy guideline level.

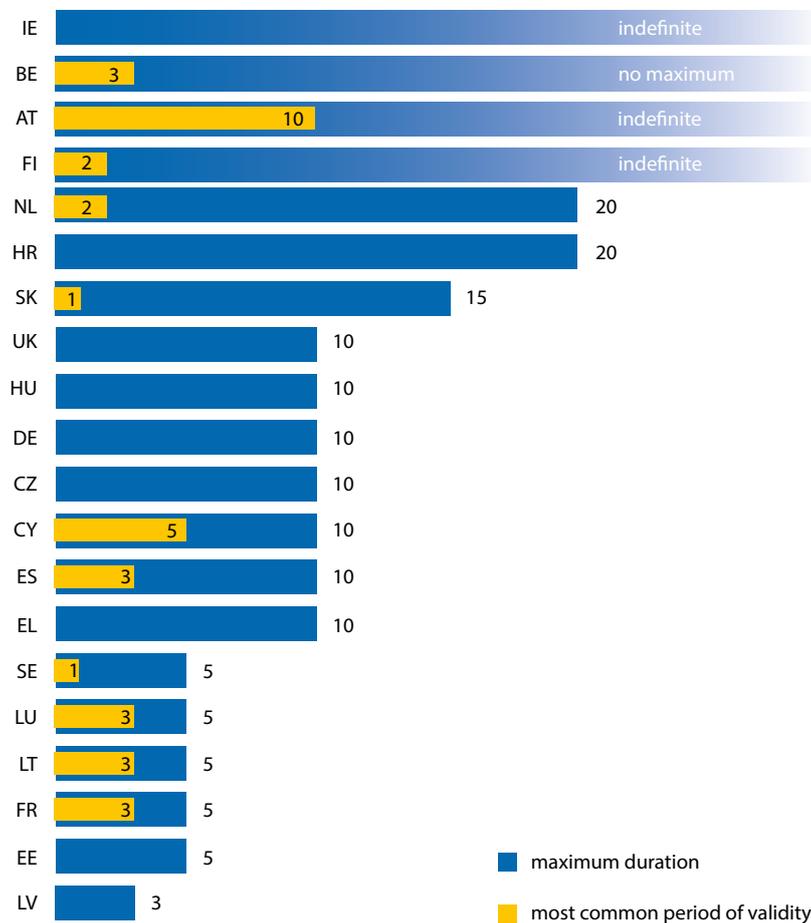
²⁷⁵ With one exception: where security of persons or private property or other public interest is at stake, the maximum validity of an entry ban is 15 years.

national legislation does not set a maximum cap and uses a broader wording ('more than five years') in such cases (BE, LT, LU). In three Member States, entry bans can be imposed for an indefinite duration where a third-country national has committed a particularly serious crime (AT, DE, FI).

In Ireland, entry bans are imposed for an indefinite duration and, following a recent amendment to the national law in 2017, there is no maximum duration for an entry ban in Belgium.²⁷⁶ The indefinite duration of an entry ban has been challenged before national courts in Ireland in cases related to family life. The courts have found that the risk of an entry ban of indefinite duration being disproportionate depends on the facts of each individual case.

In practice, the most common periods of duration of entry bans range from one year (SK, SE) to three years (BE, FR²⁷⁷, IT, LT, LU, MT), to up to ten years (AT) in some Member States. Figure 4 provides an overview of the maximum duration and the most common duration of entry bans in Member States.

Figure 4: Maximum duration and most common period of validity of entry bans in Member States (in years)



Source: EMN NCPs National contributions

²⁷⁶ Although in practice, Belgian authorities have not issued an entry ban of more than 20 years to date.

²⁷⁷ In France, the maximum period of validity for an entry ban is two or three years depending on the situation. The administrative authorities may combine the order to leave the French territory with an entry ban, of a maximum duration of three years from its notification, when no period of voluntary departure has been granted to the foreign national or when he/she has not met this obligation within the required time period. The administrative authorities may issue an entry ban for a maximum duration of two years from its notification in the other cases (article L5111-1-III of the CESEDA).

9.2.2 STARTING POINT OF THE VALIDITY OF AN ENTRY BAN

Recommendation 24(a) encourages Member States to seek to ‘ensure that entry bans start being valid on the day in which the third-country nationals leave the EU so that their effective duration is not unduly shortened; this should be ensured in cases where the date of departure is known to the national authorities, notably in cases of removal and of departure in conjunction with an assisted voluntary return programme.’²⁷⁸

Member States starting entry bans on the day of departure from EU:

11



Part of this recommendation was confirmed by a judgment of the CJEU of July 2017 that, interpreting Article 11(2) of the Return Directive, ruled that the starting point of the duration of an entry ban must be calculated from the date on which the person concerned actually left the territory of the Member States.²⁷⁹ This ruling may lead to a legislative change in a number of Member States. It also prompts questions about which party will have to bear the burden of proof: either third-country nationals or the national authorities will have to prove that the person concerned has left the territory on a specific date to calculate whether the entry ban is still valid (see Section 9.3).

A number of Member States reported that the duration of the entry ban started applying on the day when the third-country national left the EU (AT, CY, EE, ES, HR, HU, IT, LV, MT, SI, SK). In Germany, in the specific case of applicants for international protection from safe countries of origin whose claim has been rejected or whose subsequent or secondary application failed repeatedly, an entry ban can be imposed which becomes applicable as soon as the decision on the asylum claim enters into force.

In other Member States, the duration of the entry ban starts running on the day when the third-country national left its territory (AT²⁸⁰, DE, HU, NL²⁸¹, LT²⁸², UK). In a few Member States, the starting point is calculated on the day the return decision is issued (FI, EL, IE), whilst in others, the starting date is the date of notification of the entry ban to the person concerned (BE, FR, LU). In a few other Member States, the entry ban can also start applying after the period of voluntary departure has expired (CZ, HR, SK). In Sweden, entry bans start applying when the decision to impose an entry ban came into force, i.e. three weeks after the decision was adopted. Finland and Sweden added that they are currently working on adapting its practices to the *Mossa Ouhrami* judgment²⁸³ whereby the Court considered that the starting point of the duration of an entry ban must be calculated from the date on which the person concerned actually left the territory of the Member States.

In Estonia, an electronic platform allows national authorities to track the procedure of an individual from apprehension until departure which would automatically notify authorities when a deadline for voluntary departure was closing, set the time period of the entry ban and record an alert in SIS.

²⁷⁸ Commission Recommendation on making returns more effective when implementing Directive 2008/115/EC of 7 March 2017.

²⁷⁹ CJEU, judgment of 26 July 2017, *Mossa Ouhrami*, Case C-225/16, ECLI:EU:C:2017:590.

²⁸⁰ The validity period of an entry ban starts on the day after departure.

²⁸¹ In the Netherlands, the duration of the entry ban starts after the third-country national has left the territory, but the entry ban remains valid, meaning that if the third-country national is found to be staying irregularly, the entry ban is already enforceable.

²⁸² However, in case of a voluntary return, and an entry ban may be imposed later and thus it may start applying later than the date of the departure of a third-country national.

²⁸³ CJEU, C-225/16, *Mossa Ouhrami*, 26 July 2017.

9.3 REGISTRATION OF ENTRY BANS IN SIS II

Current EU legislation states that (Member) States may register alerts related to entry bans issued in accordance with the Return Directive in the SIS II database.²⁸⁴

For the purpose of making full use of the entry bans, Recommendation 24(c) calls for Member States to ‘systematically [enter] an alert on entry ban in the second-generation Schengen Information System.’ The legislative proposal put forward by the European Commission aims to amend the SIS Regulation to make compulsory for all Member States to register in SIS II all entry bans issued in application of the provisions of the Return Directive.²⁸⁵

Member States systematically entering alerts into SIS II:

12

All Member States with access to the SIS II database register alerts related to entry bans imposed on third-country nationals in the SIS (thus excluding CY, IE, HR, UK) albeit not systematically. A number of Member States systematically enter alerts into the database (CZ, DE, EE, EL, ES, FI, IT, LV, LU, NL, SI, SK). A few Member State enter alerts on a regular basis (BE, FR).

As an example, in Belgium, the systematic registration of entry bans in SIS is not possible due to staff and operational constraints. Consequently, entry bans are registered following a priority list according to which third-country nationals who have already returned or who pose a threat to public order or national security are issued with an alert into SIS II. Priority is given to third-country nationals with the longest period of validity of the entry ban.

Other Member States enter alerts into the SIS on a case-by-case basis depending on the individual circumstances of the case (AT²⁸⁶, HU²⁸⁷, LT²⁸⁸).

In Sweden, alerts are entered into the SIS as soon as entry bans has entered into force (see section 9.2 on this point).

9.4 ISSUANCE OF ENTRY BANS WHEN ILLEGAL STAY IS DETECTED ON EXIT

The issuance of entry bans when illegal stay is detected on exit is not explicitly foreseen in the Return Directive and nothing prevents Member States from imposing entry bans to “over-stayers” if they present themselves at an external border check before leaving the territories of the Member States.

In cases where an irregularly staying third-country national is apprehended at the EU external border when leaving the EU territory, a return decision may be imposed in order to allow Member States to also issue an entry ban and thus prevent further entry (see also Section 3 on this topic).

Recommendation 24(d) encourages Member States to “put in place a system for issuing a return decision in cases where illegal stay is discovered during an exit check. Where justified, following an individual assessment and in application of the principle of proportionality, an entry ban should be issued in order to prevent future risks of illegal stay.”

²⁸⁴ Article 24 (3) of Regulation No 1987/2006.

²⁸⁵ European Commission, proposal for a Regulation on the establishment, operation and use of the Schengen Information System (SIS) in the field of border checks, amending Regulation (EU) No 515/2014 and repealing Regulation (EC) No 1987/2006, COM(2016)882, 21 December 2016.

²⁸⁶ For example where valid entry bans imposed on the person concerned still exist.

²⁸⁷ Decision on creating an alert or not in SIS II is taken by national administrative authorities. Hungary calculates the ban from the date on which the person actually left the territory and that's the date when the SIS alert is issued.

²⁸⁸ National authorities must justify in each case of the reasons substantiating the entry of an alert into SIS and why it is not sufficient to ban entry only into Lithuania.



Member States issuing an entry ban following a return decision:

11



A number of Member States reported issuing an entry ban if a return decision was issued when irregular stay was detected on exit (CZ, EE, FI, HR, HU, LT²⁸⁹, LV, MT, NL, SK, SE). In Finland, Border Guards can issue a person with an entry ban of a maximum of two years depending on the circumstances of the person concerned.²⁹⁰ In the Netherlands,²⁹¹ an entry ban will be systematically imposed by national authorities if it is determined that a third-country national, leaving voluntarily the national territory after his/her illegal stay, has not received a return decision with an entry ban before.

The Czech authorities issue an entry ban during the exit if it is determined that the third-country national resided irregularly for a period longer than six months. However, a number of circumstances existed in certain Member States' national legislation following which an entry ban would not be imposed. In the Netherlands²⁹² and Sweden, an entry ban was not imposed if it hampers the third-country national's departure. In Latvia, an entry ban is not issued if the illegal stay is of a short duration and there are objective reasons or circumstances which justify a third-country national's overstay on national territory.

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Other Member States do not issue entry bans in such situations (AT, BE, CY, DE, FR, LU,). In Belgium and France, an entry ban must always refer to a return decision yet no return decisions are issued when illegal stay is detected on exit. If a third-country national leaves the country after his visa has expired, she or he will not be sanctioned and his overstaying will not be registered. In the United Kingdom, a return decision is not issued when illegal stay is detected on exit, but the third-country national concerned will then be subject to the same entry ban as other immigration offenders.

9.5 PENALISING BREACH OF ENTRY BANS

A third-country national ignoring an entry ban is sanctioned or considered a criminal offence in most Member States (AT, BE, CY, CZ, DE, EL, ES, FI, FR, HR, IE, LV, LU, MT, NL, SK, SE).

Some of them classified it as a misdemeanour (AT, BE²⁹³, CZ, FR, HR, LV, SI). In Austria, a maximum fine of EUR 15,000 can be imposed in such cases; in France such behaviour can be punished by a prison term up to three years; while in Spain the starting point of an entry ban is reset from the beginning. In other Member States, ignoring an entry ban is a criminal offence (CY, DE, EL, FI, IE, LU, SK, SE), which can lead to up to one (SE²⁹⁴), two (SK) or three years of imprisonment (DE, LU) and a fine of up to EUR 3,000 (LU). In

²⁸⁹ If the return decision is issued, an entry ban may be imposed by a separate decision, and if the decision on expulsion is issued, this decision also sets the length of the entry ban.

²⁹⁰ If a longer entry ban should be imposed, the Finnish Border Guards will forward the case to the Finnish Immigration Service, which may impose an entry ban of a maximum of five years or until further notice.

²⁹¹ Issuing a return decision and an entry ban is time-consuming and if this would cause a third-country national to miss his/her flight the return decision is not issued. The Dutch immigration authorities will initiate an experimental *in absentia* procedure in case of a longer overstay (14 days) on visa or visa free period if detected at Schiphol airport on exit.

²⁹² Following the CJEU *Boudjlida* and *Mukarubega* rulings, a returnee has the right to be heard before issuing an entry ban and according to the Council of State every entry ban needs to be substantiated individually. The Netherlands is exploring possible solutions.

²⁹³ National legislation provides for criminal sanctions for illegal entrance and illegal stay but does not specifically mention the violation of an entry ban, which is not in accordance with case-law of the Court of Justice. That is why a project of law has been adopted by the Council of Ministers on 30th June 2017, in order to amend national legislation.

²⁹⁴ In Sweden, ignoring an entry ban is a criminal offence only if the third-country national is convicted for a crime. It could lead to imprisonment up to a year OR a fine.

the Netherlands, it is a misdemeanour when a 'light' entry ban is breached and a criminal offence where a 'heavy' entry ban (i.e. that is issued for public order reasons) is breached. In Greece, albeit national legislation classifies irregular entry as a criminal offence, in practice, criminal prosecution of such cases is suspended by the prosecuting authorities which refers such cases to the competent administrative authorities in charge of return, thus shifting to an administrative procedure.

In contrast, the breach of entry bans is not punished in a few (Member) States (EE, HU, LT, UK). Instead, national legislations penalise the illegal entry (EE, UK), which can concern a third-country national subject to an entry ban (EE).

9.6 EFFECTIVENESS OF ENTRY BANS

9.6.1 EVALUATIONS OF THE EFFECTIVENESS OF ENTRY BANS

A few Member States reported having conducted a formal evaluation of the effectiveness of entry bans since the 2014 EMN Study on "Good practices in the return and reintegration of irregular migrants".²⁹⁵ In the Czech Republic and in Hungary, national evaluations found that the existence of entry bans contributed to preventing re-entry up to a certain extent and was one of the factors contributing to ensuring compliance with voluntary return.

In Luxembourg, entry bans were found to be less effective regarding the prevention of re-entry. These may be effective to the extent they may prevent third-country nationals who are required to travel with a visa from re-entering – but in even in such cases, they may circumvent the visa requirement by travelling to other third countries before entering the Schengen area. Similarly, entry bans can contribute to ensuring compliance with voluntary return by third-country nationals from the Western Balkans (LU).²⁹⁶

9.6.2 CHALLENGES AND GOOD PRACTICES IN THE IMPLEMENTATION OF ENTRY BANS

Member States reported a number of challenges in the implementation of entry bans.

Compliance with entry bans on the part of the third-country national concerned represents a practical challenge in a number of Member States (BE, DE, EL, ES, FR, HU, LT, LU, SE, SI, SK). This can be due, in part, to Member States' national legislation where entry bans enter into force only at the time of notification of a return decision (BE, FR). This is an issue in particular as regards third-country nationals who were issued a return decision and an entry ban but remained on the territory of the EU, hence stripping the entry ban of any legal effect. In Austria and Lithuania, an entry ban can be imposed after the person concerned has already complied with a return decision and is thus not aware of the existence of the entry ban against him/her until he/she applies for a visa. Sweden underlined that entry bans appeared to have little impact on third-country nationals' behaviour as they tried to re-enter despite an active entry ban.

Against this background, monitoring the compliance with entry bans is a topical issue in about half of the responding Member States (AT²⁹⁷, BE, CZ, DE, EL, LT, LU, NL, SE). As mentioned above, monitoring is challenging for third-country nationals other than those returned via forced return or via an AVR programme (BE), those leaving the territory independently or spontaneously without any notification (DE) or where a third-country national leaves voluntarily, but after the period expired, or when it is not possible to make time for hearings and decisions – hence there is no proof of departure.

²⁹⁵ In the Netherlands, the Research and Documentation Centre (WODC) published in 2014 a study on "The fate of the entry ban". The findings of this evaluation were included in the 2014 EMN Focussed Study on "Good practices in the return and reintegration of irregular migrants".

²⁹⁶ Third-country nationals from the Western Balkans tend to avoid being subject to an entry ban in order to be able to re-enter without having to pay a smuggler.

²⁹⁷ In case of irregular re-entry.

Additionally, the use of false or counterfeit documents (DE, SK) and/or different transcription of the names in databases (EE, LT) represents a challenge to identify persons subject to an entry ban. To avoid situations where a third-country national subject to an entry ban attempts re-entry using a different transcription of his/her name, Estonia tried to enter into its national databases and SIS all possible aliases of the person's name. Furthermore, monitoring entries in the Schengen area is a challenge, for example where a third-country national enters a Member State from another Schengen State (DE, LT, SE).

Some Member States highlighted a number of good practices which supported a more effective monitoring of entry bans' compliance by third-country nationals. For example, Estonia reported that monitoring the compliance with entry bans worked efficiently thanks to the concentration of the police, border guard and migration service duties in one organisation (the Police and Border Guard Board) and that they all had access to entry ban information and the entry ban system. Additionally, relevant national databases have automatic SIS alert checks. In the Slovak Republic, the national Migration and international protection information system (or MIGRA IS) is interconnected with the INBO system (which contains records on unwanted or blocked persons, vehicles and objects at border crossing points) into which the information on entry bans and their duration are recorded. The system allows the identification of persons with entry bans thus preventing them from entering the territory of the Slovak Republic or other Schengen countries as all entries are copied also into the SIS.

Member States also reported a lack of statistics on the number of third-country nationals re-entering the territory of a Member State despite an entry ban (AT, LU).

Eight Member States mentioned cooperation with other Member States in the implementation of entry bans as challenging (DE, EL, ES, FI, LT, NL, SI, SK). This may be due to the non-entry of alerts relating to an entry ban in SIS by other Schengen States (DE, NL, SI). This may lead to instances where a third-country national was issued an alert relating to an entry ban in SIS but also held a valid residence permit to enter another Schengen State (FI). Delayed response from other (Member) States to confirm or inform this right to stay can be an issue (LT). Other (Member) States reported, on the contrary, situations where an alert relating to an entry ban was entered into SIS against third-country nationals where their return decision was not final, thus creating legal uncertainty when persons concerned were apprehended on the territory of another Member State (SK).

Cooperation with countries of origin in the implementation of entry bans is a challenge (EL, SK) as an entry ban is often associated with forced return, thus resulting in a lack of cooperation with the country of origin (SK).

Finally, IOM Netherlands pointed out that an entry ban could have an opposite effect and obstruct voluntary return of third-country nationals. Indeed, prospects of voluntary return decrease in cases where a third-country national receives an entry ban or where s/he is aware that an entry ban can be imposed the moment s/he returned as s/he will not be able to re-enter the EU afterwards. Thus, an entry ban also increases the possibility for third-country nationals to leave through a different EU Member State.

10

CONCLUSIONS



10. Conclusions

The return of irregularly-staying third-country nationals is one of the main pillars of the EU's policy on migration and asylum. However, recent Eurostat data show that the number of returns has not increased in proportion to the number of those who were ordered to leave, despite the important increase in the number of rejected asylum applications and the number of return decisions issued since 2014. In its 2015 EU Action Plan on Return and subsequently in its 2017 Communication on a more effective return policy and attached Recommendation, the Commission emphasised the need for a stronger enforcement of EU rules on return in order to increase the overall effectiveness of the EU's return policy.

More than half of the Member States have introduced changes related to return in their national legal and/or policy framework on asylum and migration since 2015. National debates also increasingly focus on return, which is widely considered as a national priority across Member States. National practices implementing the Return Directive and related CJEU case law – or equivalent standards – vary between Member States, as a result of different administrative practices or different interpretations of EU rules, as well as national and EU case law.

As shown by the EU's persistently low return rates in recent years, several important challenges remain to the effective implementation of returns. Aside from external challenges, such as the difficulties in cooperating with third-countries' national authorities and obtaining travel documents, a number of these challenges relate to the implementation of EU rules and equivalent standards.

The EU attempted to mitigate cooperation issues with third countries readmitting third-country nationals by developing EU travel documents for return in its Regulation 2016/1953. While several Member States make use of these documents, in practice only a few third countries accept these documents as valid. Issues with the timely delivery of valid travel documents has consequences on the application of other EU standards and rules as well, as for example a third country's refusal to readmit a third-country national may lead to the maximum length of detention being exceeded and/or cancel the reasonable prospect of return, and therefore the grounds for detention.

Another important challenge to the effectiveness of the return procedures is the risk that third-country nationals abscond, and the assessment of the risk that this may happen. According to Member States, absconding remains prevalent when third-country nationals are granted a period for voluntary departure. Most Member States included objective criteria to determine the existence of such a risk in their national legislation, yet it remains difficult to apply these criteria to individual cases in practice to effectively determine whether the third-country national represents a high risk of absconding or not. High standards are also applied by national courts regarding the motivation of the assessment of a risk of absconding by national authorities. This issue has important consequences on the return procedure as the concept of risk of absconding may be used to both withdraw or shorten the period for voluntary departure, or to decide on the placement of the third-country national in detention or on the use of alternatives to detention.

All Member States foresee the possibility to make use of detention in the context of a return procedure, under certain conditions. However, the costs and resources attached to the detention of third-country nationals are also often raised as a challenge by Member States, both with regard to maintaining the standards defined in EU rules and standards, and guaranteeing that sufficient places are available in detention centres in the Member States. This is particularly valid when it comes to detaining third-country nationals who are vulnerable or have special needs. In this context, several Member States reported increasing their capacity for detention of third-country nationals in the return process in specialised facilities, while also taking into account families, children and other vulnerable persons' needs.

The length of the procedure before the third-country national can effectively be returned, coupled with the increase in irregular migration flows and in the number of rejected asylum applications, has in some cases contributed to a backlog of cases in Member States. For this reason, the Commission's Recommendation suggested streamlining a number of procedures, for instance the assessment of the principle of *non-refoulement* or the organisation of hearings. A number of Member States already make use of these possibilities by merging to some extent administrative hearings connected to return or making use of alternative methods available during the hearings on the return decision while respecting the framework provided by international and EU law, which requires an individual assessment of cases and the respect of the *non-refoulement* principle and of Article 3 of the ECHR.

Nearly half of the Member States introduce entry bans in application of the provisions of the Return Directive in SIS as per Commission's Recommendations. Better cooperation and communication within Member States, between Member States and with third-countries may help solving some the challenges related to monitoring whether third-country nationals comply with the entry bans imposed by Member States.

While it is difficult in the absence of evaluative evidence to draw conclusions on the effectiveness of different national measures used by Member States to enhance the effectiveness of return, some good practices were identified in the study. For example, the involvement of civil society players, NGOs and international organisations in the handling of return cases and in detention centres helps fostering trust with third-country nationals and providing them with adequate, tailored support. In the same vein, some Member States invest in the management of their detention facilities and training of staff, adopting a multidisciplinary approach to accommodate the needs of the detainee (in particular when s/he has special needs) and facilitate the return process.

Overall, a number of good practices, encouraged by Commission's Recommendation, were identified to increase effectiveness of return. For example, several Member States make use of the possibility provided in the Return Directive to issue return decisions together with decisions on ending of a legal stay. The return decisions of over half of the Member States have an unlimited validity, which helps to facilitate their enforcement at any given time. Most Member States' national legislation offers the possibility to recognise a return decision issued by other Member States. Although in practice, the enforcement of return decisions is subject to a number of conditions, the registration of return decisions into the future SIS may have a positive effect in the future.

Adopting a flexible approach to rules applicable to return and tailoring them to the individual merits of a case is reported as a good practice by several Member States to speed up some return procedures. This can be done by fastening the return process (e.g. shortening appeal deadlines or the period for voluntary departure) in cases where this is deemed necessary, either because the third-country national represents a threat to public order and security or because of his/her claim for international protection was rejected and it is established that s/he comes from a safe country of origin. Another possibility is to grant third-country nationals in detention or in prison for having committed a criminal offence with the possibility to be released if s/he leaves the territory. Finally, a flexible approach to the period of voluntary departure in cases where it exceeds the time limits set in EU or equivalent standards may contribute to increasing the success of the voluntary departures.

Annex 1. Recent changes in national legal and/or policy framework on return

Member State	Theme	Changes in national legal/ policy framework	Year of implementation
Austria	Removal	Austria started to remove Afghan nationals.	2017
	Voluntary return	An information campaign was launched and additional return assistance and return bonuses were provided to asylum seekers returning voluntarily.	2017
Belgium	Removal	New laws regarding the removal of third-country nationals with residence permits who posed a threat to society were enacted to facilitate the procedure when ending a third-country national's residence right (of more than 3 months) and organising removals for reasons of public order or national security.	2016
	Capacity for return	More resources were invested in order to substantially increase the capacity of detention centres.	2016
	Travel documents	Memorandums of understanding were signed with Cameroon on migration and return (01.02.2017), with Morocco (2016) and with Somalia (also 2016). On 24 and 25.04.2017 declarations of intent on migration and return were signed with Iraq (Baghdad government and Kurdish government).	2016 -
Estonia	Risk of absconding	A new provision was enacted to the OLPEA according to which the risk of absconding of a third-country national occurred if he or she has left without permission his/her residence, or another Schengen State.	2016
	Detention	At the request of the Police and Border Guard Board, an administrative court could extend the term of detention of a returnee in a detention centre by four months at a time but for no longer than for 18 months as of the day the detention started, depending on the grounds for detention.	2016
Finland	Capacity for return	Establishment of a transit reception centre for those who returned voluntarily on the Police's charter flights, in order for returnees to handle departure formalities in a smoother way, to wait for their departure and to leave for their flight directly from the reception centre.	2016
Germany	Risk of absconding	A prohibition to inform the person concerned of her or his removal date was introduced. A legal amendment in 2017 introduced the possibility of electronic monitoring and tightened the residence requirement for those who are required to leave Germany.	2015 and 2017
	Detention	Germany introduced custody to secure departure (Ausreisegewahrsam), which aims at securing the removal of third country nationals. The preconditions are less strict than those for using detention in the removal process. Custody facilities are typically located near an airport, and the maximum length of custody to secure departure is 10 days (since 2017; previously it was limited to four days).	2015

Member State	Theme	Changes in national legal/ policy framework	Year of implementation
Germany	Removal	A new legal basis for special reception centres was created and the obligation was introduced for persons from safe countries of origin to stay in reception centres during the whole procedure (until return in case of rejection). The special reception centres shall also be used as accommodation for persons who file a subsequent application or have given false information about their identity or nationality. The conditions for suspending a removal due to health concerns were made more restrictive with a legal amendment in 2017.	2016
	Capacity for return	Several <i>Länder</i> have opened new detention facilities or expanded existing ones. Bilateral agreements with Western Balkan states and the joint declaration with Afghanistan have facilitated returns as those countries now accept EU travel documents issued by the German authorities.	2015 - 2017
Greece	Employment of irregularly staying TCNs	Introduction of the possibility of employment of irregularly staying third-country nationals is now provided in order to meet the urgent needs of the rural economy when the execution of the return decision has been postponed.	2016
	<i>Non-refoulement</i>	A new provision clarified the application of the principle and created a non-removal order for humanitarian reasons to simplify the procedure and speed up the processing of cases in case of mass arrivals.	2015
Hungary	Expulsion	After an amendment of the Hungarian Criminal Code, perpetrators of unlawful crossing of the border barrier, vandalism of border fence or the obstruction of construction works on border fence may be imposed an executable term of imprisonment and expulsion may not be omitted. If expulsion is ordered for a specific term, it shall be the double of the term of imprisonment, but at least two years.	2015
Ireland	Detention	Section 78 of the International Protection Act 2015 amended the Immigration Act 1999 to provide that the maximum length of detention (8 weeks) may be exceeded in certain circumstances. This applies where a person has already been detained for the maximum period but, having been released from detention, there are fresh grounds for detention.	2015
Italy	Bilateral agreements with third country nationals and return simplified procedure	In the Minniti-Orlando Law on immigration adopted in 2017, the Italian government underlines its full commitment to supporting activities aimed at returning foreign nationals deemed to be irregular through collaboration with countries of origin increased by means of bilateral agreements, and by simplifying procedures for returning foreign nationals for reasons of public order, safety and prevention of terrorism.	2017

Member State	Theme	Changes in national legal/ policy framework	Year of implementation
Italy	Conditions for issuing alerts on refusal of entry or stay	In the Minniti-Orlando Law on immigration adopted in 2017 provides that, for cases referred to in Article 24(2) (b) of Regulation 1987/2006, the decision to include the reporting in the SIS for the purpose of refusal of entry in accordance with Article 24(1) of the aforementioned Regulation, is adopted by the Director Central of Prevention Police of the Ministry of the Interior, on assessment of the strategic counter-terrorism analysis committee. Ministry of the Interior, on assessment of the strategic counter-terrorism analysis committee.	2017
	Detention	New legislation provides for the replacement of CIEs (Centres for Identification and Expulsion) with “Centri di Permanenza per il Rimpatrio” (CPR) detention centres for repatriation. The CPR will be set in every Region. Currently four existing structures have been strengthened; a structure in Apulia has been added, and by the end of the year 2017, another structure will be active in Basilicata. Procedures are ongoing to open five more centres in 5 different regions.	2017
Luxembourg	Detention	The amendment to the Law of the Detention Centre extends the period of detention of adults/families with children (from 72 hours to 7 days) in regard to the execution of a return decision.	2015
Malta	Reception, Detention, Return	The ‘Strategy for the reception of asylum seekers and irregular migrants’ marks the most recent changes in Malta’s legislative and policy framework on this subject. This also takes into account ECHR rulings on detention. The strategy established the Initial Reception Centre and removal of automatic detention.	N/A
The Netherlands	Voluntary return	Reduction (or abolishment) of assistance to voluntary return for third-country nationals from certain countries	2015-2017
Sweden	Voluntary return	In order to increase the incentives for voluntary return, adult persons without minor children were no longer entitled to accommodation and financial support when their return decision had become final.	2016
	Detention	The number of places in detention was substantially increased.	N/A
	Capacity for return	A number of return liaison officers were deployed in countries of origin, a bilateral memorandum of understanding on readmission was reached with Afghanistan and reintegration support was offered via the ERIN programme to returnees to certain third countries, including Afghanistan and Iraq.	N/A
United Kingdom	General returns	A major piece of immigration legislation – the Immigration Act – entered into force in 2016. This built on a previous similar Act (the Immigration Act 2014) and introduced new sanctions on illegal working, preventing irregular migrants accessing services and introduced new measures to enforce immigration laws.	2016

Annex 2. Overview of grounds and duration for imposing entry ban

	Less than 3 years	Max. 3 years	Max. 5 years	More than 5 years	Max. 10 years	More than 10 years	Indefinite period/no maximum
AT	-	-	Threat to public safety or policy, or contradicting of public interest.		Serious threat to public safety or policy	-	Final conviction to minimum 5 years imprisonment, relationship to a criminal organization or terrorist activity, endangering national security.
BE	-	No period for voluntary departure; a former return decision has been ignored.	Fraud or unlawful means to get legal stay or to maintain legal stay, or marriage, registered partnership or adoption solely to get legal stay or to maintain legal stay.	Serious threat to public order or national security	-	-	No maximum duration for entry bans issued to foreigners who pose a threat to society
CY	-	Voluntary departure in case a TCN has resided irregularly for longer than 6 months.	TCNs who have been forced to return (expelled)	-	Conviction for a criminal offense or considered to pose a danger to public security, safety or health (possibility to extend).	-	-

²⁹⁸ In Ireland each deportation order issued contains an inherent entry ban of indefinite duration. Therefore, entry bans are not issued independently of deportation orders.

	Less than 3 years	Max. 3 years	Max. 5 years	More than 5 years	Max. 10 years	More than 10 years	Indefinite period/no maximum
CZ	-	Residence without a travel document, a visa or a valid residence permit; use of false information in the procedures to obtain a right to stay.	Irregular stay, use of forged documents, illegal employment, illegal border crossing, disregarding the enforcement of judicial or administrative decisions.	-	Threaten the state's security by using force in the pursuit of political objectives; a reasonable risk that the foreigner may seriously undermine public order while residing in the territory.	-	-
DE	No departure within the period of voluntary departure (1 year).	Manifestly unfounded asylum application; Subsequent or secondary application repeatedly rejected as inadmissible.	Expulsion, removal	-	Expulsion after sentence for a criminal offence; serious threat to public security and order.	-	Crime against peace, a war crime or a crime against humanity
EE	-	Voluntary departure	No period for voluntary departure (e.g. for reasons of public order or national security).	-	-	-	-
EL	-	-	Duration of an entry ban does not exceed 5 years	-	Duration of an entry ban is scaled from 7 to 10 years in cases of criminal offences (reasons of public policy and security)	-	-
ES			Entry bans should not exceed five years.		Serious threat to public security, public policy or national security		

	Less than 3 years	Max. 3 years	Max. 5 years	More than 5 years	Max. 10 years	More than 10 years	Indefinite period/no maximum
FI	E.g. irregular stay; manifestly unfounded asylum application or the dismissal of an application; State border offence, irregular crossing of the border; unlawful use of narcotics; well-founded suspicion of solicitation of sexual services; small-scale smuggling of cigarettes and alcohol.	-	E.g. forgery of passports, stamps, visas and residence permits; arrangement of illegal immigration; theft; robbery; trafficking in human beings.	-	-	-	Imposing an entry ban that is valid until further notice always requires that the foreign national is convicted of a crime. Generally, an indefinite entry ban follows from most aggravated cases of certain crimes, such as import of narcotic substances, theft, robbery, serious offences against life or health and trafficking in human beings.
FR	Regular length of an entry ban: two years.	No period of voluntary departure or when the period of voluntary departure was not complied with.	Possibility to extend the period of voluntary departure in case of non-compliance with the return decision or when the Foreign national has returned in the EU whilst the entry ban is still valid.	-	-	-	-

	Less than 3 years	Max. 3 years	Max. 5 years	More than 5 years	Max. 10 years	More than 10 years	Indefinite period/no maximum
HR	Three months to 1 year, if the TCN stayed longer than the statutory deadline but not longer than 30 days.	Three months to three years if the foreigner did not leave within the period of voluntary departure, or illegal border crossings.	-	-	-	Increased societal danger (maximum 20 years)	-
HU	-	-	An entry ban may not exceed five years.	-	Serious threat to public security, public policy or national security.	-	-
IT	-	In general, an entry ban may not exceed three years	Five years if a third country national committed a serious violation/ crime or has been removed because s/he poses a threat to public order.	-	National security reasons	Up to 15 years for terrorism	-
LV	-	An entry ban may be determined for a third-country national for a time period from 30 days up to 3 years.	Entry bans should not exceed five years.	TCNs may represent a threat to national security or public policy	-	-	-
LT	-	-	Entry bans should not exceed five years.	TCNs represent a threat to national security or public policy.	-	-	-
LU	-	-	Entry bans should not exceed five years;	A serious threat to public policy, public security or national security.	-	-	-

	Less than 3 years	Max. 3 years	Max. 5 years	More than 5 years	Max. 10 years	More than 10 years	Indefinite period/no maximum
NL	One year if a third-country national has exceeded the free period for residence by more than three days, but no more than 90 days.	Three years if a third-country national has been sentenced to a custodial sentence of up to six months.	Custodial sentence of six months or more, use of false or forged travel or identity documents or intentionally submitted travel or identity documents that did not pertain to him/her, or has received more than one entry ban, entered Dutch territory while under an entry ban.		Serious threat to public order or public security (e.g. a sentence for a violent or drug offence, a custodial sentence for a crime that carries a sentence of over 6 years, the circumstance that Article 1F of the Refugee Convention is invoked against them, or placement in a psychiatric hospital as a result of a criminal offence.)	Serious threat to national security or compelling interests: more than ten years.	-
SE	No return within the period of voluntary departure (one year). No period of voluntary departure is granted (two years).	-	The maximum period is five years but if risk to public policy, public security or national security a longer validity of an entry ban can be given.	-	-	-	-

	Less than 3 years	Max. 3 years	Max. 5 years	More than 5 years	Max. 10 years	More than 10 years	Indefinite period/no maximum
SK	One year if the obligation to return has not been complied with; if a TCN refuses to provide a credible identity document; failure to notify the police department that the purpose of the TCN's temporary residence has expired.	Performing an activity other than the one for which the TCN was granted temporary residence or visa; other severe or repeated breaches of generally binding legal regulations.	Risk to public policy, public security or national security; the application for legal stay was dismissed as manifestly unfounded or fraudulent; irregular stay of a TCN in the territory; irregular crossing of the external border, intentional evasion or refusal to undergo border control; final conviction of the TCN of an intentional criminal offence without the penalty of expulsion; breaching the law on narcotic and psychotropic substances; submitting false or forged documents or documents owned by a different person during an inspection; entering a fraudulent marriage; cancellation or withdrawal of a visa by the police department.	-	Serious threat to the state security and public order; Existence of a risk of absconding.	Security of persons or private property or other public interest: maximum 15 years.	-

	Less than 3 years	Max. 3 years	Max. 5 years	More than 5 years	Max. 10 years	More than 10 years	Indefinite period/no maximum
UK	TCN voluntarily left at their own expense (there is no ban if the individual leaves at their own expense within 30 days of the expiration of their right to be in the UK); TCN voluntarily left the UK at public expense within six months of their removal decision or exhaustion of their appeal rights against that decision.	-	TCN voluntarily left the UK at public expense after six months of their removal decision or exhaustion of their appeal rights against that decision.	-	TCN was forcibly removed or deported from the UK.	-	-

