ANNEX

Return Handbook

FOREWORD

The objective of this Return Handbook is to provide guidance relating to the performance of duties of national authorities competent for carrying out return related tasks, including police, border guards, migration authorities, staff of detention facilities and monitoring bodies.

The content of this handbook deals essentially with standards and procedures in Member States for returning illegally staying third-country nationals and is based on EU legal instruments regulating this issue (in particular the Return Directive 2008/115/EC). When reference is made in this handbook to other types of procedures (asylum procedures, border control procedures, procedures leading to a right to enter, stay or reside) the relevant Union and national legislation will apply to such types of procedures. In any case, Member States should always ensure a close cooperation between the different authorities involved in these procedures.

This handbook does not create any legally binding obligations upon Member States and it does not establish new rights and duties. It bases itself to a large extent on the work conducted by Member States and the Commission within the "Contact Committee Return Directive" in the years 2009-2014[1] and regroups in a systematic and summarised form the discussions that have taken place within this forum, which do not necessarily reflect a consensus among Member States on the interpretation of the legal acts. It is complemented by supplementary guidance on newly arising issues (e.g. new ECJ judgements). Only the legal acts on which this handbook is based on, or refers to, produce legally binding effects and can be invoked before a national jurisdiction. Legally binding interpretations of Union law can only be given by the European Court of Justice.

[1] The findings of the Contact Committee Return Directive are compiled in document MIGRAPOL CC Return 51.

1. Definitions

1.1. Third-country national

Legal Basis: Return Directive - Article 3(1); Schengen Borders Code - Article 2(5)

Any person who is not a citizen of the Union within the meaning of Article 17(1) of the Treaty and who is not a person enjoying the Community right of free movement, as defined in Article 2(5) of the Schengen Borders Code.

The following categories of person are not considered "third-country nationals":

- ⇒ Persons who are Union citizens within the meaning of Article 20(1) TFEU (previously Article 17(1) of the Treaty) = persons holding the nationality of an EU Member State[2];
- ⇒ Persons holding the nationality of EEA/CH;
- ⇒ *Family members* of Union citizens exercising their right to free movement under Directive 2004/38/EC;
- ⇒ *Family members* of nationals of EEA/CH enjoying rights of free movement equivalent to Union citizens.

Any other person (including a stateless person) is to be considered "third-country national".

Further clarification:

- Members of the family of EU/EEA/CH nationals are, irrespective of their nationality:

  – the spouse and, if this is contracted on the basis of the legislation of a Member State and recognised by the legislation of the host Member State as equivalent to marriage, the partner with whom the EU/EEA/CH citizen has contracted a registered partnership;

  – the direct descendants under the age of 21 or dependants, including those of the spouse or registered partner;

  – the dependent direct relatives in the ascending line, including those of the spouse or registered partner.

[2] By virtue of a special provision in the UK Accession Treaty, only those British nationals who are "United Kingdom nationals for European Union purposes" are also citizens of the European Union.

- Third-country nationals whose claim to be family member of a Union citizen enjoying an EU right to free movement under Article 21 TFEU or Directive 2004/38/EC was rejected by a Member State may be considered as third-country national. Such persons may therefore fall in the scope of application of the Return Directive and the minimum standards, procedures and rights foreseen therein will have to be applied. However, as regards a possible appeal against the decision rejecting being a beneficiary of Directive 2004/38/EC, the Commission considers that the person will continue – as a more favourable provision under Article 4 of the Return Directive – to be able to rely on the procedural safeguards provided for in Chapter VI of Directive 2004/38/EC (for example as regards notification and justification of decision, the time allowed to voluntarily leave the territory, redress procedures etc.).

1.2. Illegal stay

Legal Basis: Return Directive - Article 3(2); Schengen Borders Code - Article 5

The presence on the territory of a Member State, of a third-country national who does not fulfil, or no longer fulfils the conditions of entry as set out in Article 5 of the Schengen Borders Code or other conditions for entry, stay or residence in that Member State.

This very broad definition covers any third-country national who does not enjoy a legal right to stay in a Member State. Any third-country national physically present on the territory of an EU Member State is either staying legally or illegally. There is no third option.

Legal fictions under national law which consider persons physically staying in specially designated parts of Member State territory (e.g. transit areas or certain border areas) as not "staying in the territory" are irrelevant in this context, since this would undermine the harmonious application of the EU Return acquis. Member States may, however, decide not to apply certain provisions of the Return acquis to this category of persons (see section 2 below).

The following categories of third-country nationals are, for instance, considered as illegally staying in the Member State concerned:

⇒ Holders of an expired residence permit or visa;

⇒ Holders of a withdrawn permit or visa;

⇒ Rejected asylum seekers;

⇒ Asylum applicants who have received a decision ending their right of stay as asylum seeker;

⇒ Persons subject to a refusal of entry at the border;

⇒ Persons intercepted in connection with irregular border crossing;

⇒ Irregular migrants apprehended in Member State territory;

⇒ Persons enjoying no right to stay in the Member State of apprehension (even though they are holding a right to stay in another Member State);

⇒ Persons present on Member State territory during a period of voluntary departure;

⇒ Persons subject to postponed removal.

The following categories of persons are not considered as illegally staying since they enjoy a legal right to stay (which may only be of temporary nature) in the Member State concerned:

⇒ asylum applicants staying in the Member State in which they enjoy a right to stay pending their asylum procedure;

⇒ persons staying in a Member State where they enjoy a formal toleration status (provided such status is considered under national law as "legal stay");

⇒ holders of a fraudulently acquired permit for as long as the permit has not been revoked or withdrawn and continues to be considered as valid permit.

Further clarification:

- Persons subject to a pending application for a residence permit may be either legally or illegally staying, depending on whether they hold a valid visa or another right to stay or not.

- Applicants for renewal of an already expired permit are illegally staying, unless national law of a Member State provides otherwise. (see also section 5.7).

- Third-country nationals to whom the return procedure established by the Return Directive had been applied and who are illegally staying in the territory of a Member State without there being any justified ground for non-return (scenario referred to in para 48 of ECJ judgement in case C 329/11 *Achoughbabian*) are illegally staying. The special reference made by ECJ in *Achoughbabian* relates only to the compatibility of national criminal law measures with the Return Directive. Nothing is said in this judgement on the scope/applicability of the Return Directive and the general rule fixed in Article 2(1) remains applicable: "Either A or B", meaning that a person is either staying illegally and the Return Directive applies or the persons enjoys a right to stay and the Return Directive doesn´t apply.

1.3. Return

Legal Basis: Return Directive - Article 3(3)

Means the process of a third-country national going back - whether in voluntary compliance with an obligation to return, or enforced - to:

1) his or her country of origin, or

2) a country of transit in accordance with Community or bilateral readmission agreements or other arrangements, or

3) another third country, to which the third-country national concerned voluntarily decides to return and in which he or she will be accepted.

This definition contains limitations on what can be accepted as "return" and what cannot be accepted as "return" for the purposes of implementing the Return Directive. Passing back an illegally staying third-country national to another Member State cannot be considered under Union law as return. Such action may, however, be exceptionally possible under bilateral readmission agreements or Dublin rules. It is recommended not to call it "return" but rather "transfer" or "passing back".

This definition also implies that Member States must only carry out return to a third-country in the circumstances exhaustively listed in one of its three indents. It is therefore, for instance, not possible to remove a returnee to a third country which is neither the country of origin nor the country of transit without consent of the returnee.

Further clarification:

- "Country of transit" in the second indent covers only third countries, not EU Member States.

- "Community or bilateral readmission agreements or other arrangements" in the second indent relates to agreements with third countries only. Bilateral readmission agreements between Member States are irrelevant in this context. Such agreements between Member States may, however, in certain cases allow for passing back of irregular migrants to other Member States under Article 6(3) of the Return Directive (see section 5.5. below).

- The term "voluntarily decides to return" in the third indent is not tantamount to voluntary departure. "Voluntary" in this context refers to the *choice of the destination* by the returnee. Such voluntary choice of the destination may also happen in the preparation of a removal operation: there may be cases in which the returnee prefers to be removed to another third country rather than to the country of transit or origin.

- Specification of the country of return in the case of removal: If a period of voluntary departure is granted, then it is the returnee's responsibility to make sure that he/she complies with the obligation to return within the set period and there is in principle no need to specify the country of return. Only if coercive measures have to be used by Member States (removal), then it is necessary to specify to which third country the person will be removed.

1.4. Return Decision

Legal Basis: Return Directive - Article 3(4); 6(6)

An administrative or judicial decision or act, stating or declaring the stay of a third-country national to be illegal and imposing or stating an obligation to return.

The definition of a 'return decision' focuses on two essential elements. A return decision has to contain: 1. a statement concerning the illegality of the stay and 2. the imposition of an obligation to return.

A return decision may contain further elements, such as an entry ban, a voluntary departure period, designation of the country of return.

Member States enjoy wide discretion concerning the form (decision or act, judicial or administrative) in which a return decision may be adopted.

Return decisions can be issued in the form of a self-standing act or decision or together with other decisions, such as a removal order or a decision ending legal stay (see section 12.1 below).

A return decision states the illegality of stay in *the* Member State which issues the decision. It needs to be highlighted, however, that in accordance with Article 11, return decisions may be accompanied by entry bans having an EU-wide effect (binding on all States bound by the Return Directive).

Further clarification:

- The flexible definition of 'return decision' does not preclude the decision imposing the obligation to return from being taken in the form of a criminal judgment and in the context of criminal proceedings (*Sagor*, C-430/11, para 39).

1.5. Removal Order

Legal Basis: Return Directive - Article 3(5); 8(3)

Administrative or judicial decision or act ordering the enforcement of the obligation to return, namely the physical transportation out of the Member State.

The removal order can either be issued together with the return decision (one-step procedure) or separately (two-step procedure). In those cases in which return decision and removal order are issued together in a one-step procedure, it must be made clear - in those cases in which a period for voluntary departure is granted - that removal will only take place if the obligation to return within the period of voluntary departure has not been complied with.

In view of the obligation of Member States to always respect the principle of non-refoulement the Commission takes the position that removal (physical transportation out of the Member State) cannot go to an unspecified destination but only to a specified country of return. The returnee must be made aware of the destination of the removal operation in advance so that he or she can express any reasons for believing that removal to the proposed destination would be in breach of the principle of non-refoulement and is able to make use of the right to an appeal. The Commission recommends that this should be done either by mentioning the country of return in the separate removal decision (two-step procedure) or by mentioning the country to which the person will be removed in the case of non-compliance with the obligation to return, in the combined return and removal decision (one-step procedure).

1.6. Risk of absconding

Legal Basis: Return Directive - Article 3(7); Recital 6

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.

The existence (or absence) of a "risk of absconding" is a decisive element for determining whether a period of voluntary departure shall be granted or not and for deciding on the need of detention. Member States must base their assessment whether there is a risk of absconding or not on objective criteria fixed in national legislation. Frequently used criteria in national law are, for instance:

- ⇒ lack of documentation;
- ⇒ absence of cooperation to determinate identity;
- ⇒ lack of residence;
- ⇒ use of false documentation or destroying existing documents,

⇒ failing repeatedly to report to relevant authorities;

⇒ explicit expression of intent of non-compliance;

⇒ existence of conviction for criminal offence;

⇒ non-compliance with existing entry ban;

⇒ violation of a return decision;

⇒ prior conduct (i.e. escaping);

⇒ lack of financial resources;

⇒ being subject of return decision made in another Member State;

⇒ non-compliance with voluntary departure obligation.

According to general principles of EU law, all decisions taken under the Return Directive must be adopted on a case-by-case basis. The above list of criteria should be taken into account as an element in the overall assessment of the individual situation, but it cannot be the sole basis for assuming automatically a "risk of absconding". Any automaticity (such as "illegal entry = risk of absconding") must be avoided and an individual assessment of each case must be carried out. Such an assessment must take into account all relevant factors and may in certain cases lead to a conclusion that there is no risk of absconding even though one or more of the criteria fixed in national law are fulfilled.

1.7. Voluntary departure

Legal Basis: Return Directive - Article 3(8)

Compliance with the obligation to return within the time-limit fixed for that purpose in the return decision.

Voluntary departure in the context of the EU return acquis refers to the voluntary compliance with an obligation to return to a third country. The term "voluntary departure" does not cover cases in which *legally* staying third-country nationals decide to go back to their home country based on their own decision. Such "truly" voluntary return (scenario 1 in the below picture) falls outside the scope of the Return Directive, since it concerns legally and not illegally staying third-country nationals. The departure of illegally staying third country nationals who have not been detected/apprehended yet (e.g. overstayers), can be considered as covered by the definition of "voluntary departure". These persons are already under an "abstract" obligation to return under the Return Directive and may receive a return decision as well as an entry ban once the authorities obtain knowledge of their illegal stay (at the latest upon exit check – see below section 13.3.).

The Return Directive covers only scenarios 2 and 3:

1. VOLUNTARY RETURN: voluntary return of *legally staying third country nationals*	2. VOLUNTARY DEPARTURE: voluntary compliance with an obligation to return of *illegally staying third country nationals*	3. REMOVAL: enforced compliance with an obligation to return of *illegally staying third country nationals*

2 + 3 = "Return" (within the meaning of Art 2(3) Return Directive)

Going from the *national* territory of one Member State to the territory of another Member State in accordance with Article 6(2) (see below section 5.4.) cannot be considered as voluntary departure. The definition of voluntary departure always requires departure to a third country. Specific rules on transit by land through territories of other Member States in the context of voluntary departure are set out in section 6.4. below.

1.8. Vulnerable persons

Legal Basis: Return Directive - Article 3(9)

Minors, unaccompanied minors, disabled people, elderly people, pregnant women, single parents with minor children and persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence.

Contrary to the definition of vulnerable persons used in the asylum acquis (see for instance: Article 21 of the Reception Conditions Directive 2013/33/EU or Article 20(3) of the Qualification Directive 2011/95/EU), the definition in the Return Directive is drafted as an exhaustive list. The need to pay specific attention to the situation of vulnerable persons and their specific needs in the return context is, however, not limited to the expressly enumerated categories of vulnerable persons. The Commission therefore recommends that Member States should also pay attention to other situations of special vulnerability, such as those mentioned in the asylum acquis: being a victim of human trafficking or of female genital mutilation, being a person with serious illness or with mental disorders.

Likewise, the need to pay specific attention to the situation of vulnerable persons should not be limited to the situations expressly referred to by the Return Directive (during the period of voluntary departure, during postponed return and during detention). The Commission therefore

recommends that Member States should pay attention to the needs of vulnerable persons in all stages of the return procedure.

2. Scope

Legal Basis: Return Directive - Article 2 and Article 4(4)

The scope of the Return Directive is broad and covers any third-country national staying illegally on the territory of a Member State. The following Member States are currently (2015) bound by the Return Directive:

– all EU Member States, except UK and Ireland;
– Switzerland, Norway, Iceland and Liechtenstein.

Member States may decide not to apply the Directive to certain categories of third-country nationals:

– "border cases" in accordance with Article 2(2)(a) (details see section 2.1. below) and
– "criminal law cases" in accordance with Article 2(2)(b) (details see section 2.2. below).

The decision of a Member State to make use of the derogation and not to apply the Directive to "border cases" or "criminal law cases" must be made clear, in advance, in the national implementing legislation[3], otherwise it can develop no legal effects. There are no specific formal requirements for making known an "opt-out" decision. It is, however, important that it clearly derives – explicitly or implicitly - from the national legislation if and to which extent a Member State makes use of the derogation.

If a Member State hasn´t made public, in advance, its decision to use the derogations under Article 2(2)(a) or (b), these provisions cannot be used as a justification for not applying the Return Directive subsequently in individual cases.

Nothing prevents Member States from limiting the use of the derogation of Article 2(2)(a) or 2(2)(b) to certain categories of persons (e.g.: only refusals of entry at air borders or sea borders), provided this is made clear in the implementing national legislation.

[3] Unlike EU Member States, Switzerland, Norway, Iceland and Liechtenstein are not bound by EU directives on the basis of Art. 288 TFEU, but only once they have accepted them and according to general public international law principles. Thus, contrary to EU Member States, Switzerland, Norway, Iceland and Liechtenstein are not bound by the ECJs case-law related to the transposition of directives into national law and are free to choose the modalities of the transposition of the obligation set out in the Return Directive (e.g by a direct reference to the text of the Directive) in compliance with its international obligations.

Member States can decide to make use of the derogation at a later stage. This must, however, not have disadvantageous consequences with regard to those persons who were already able to avail themselves of the effects of the Return Directive. (See ECJ in *Filev and Osmani, C-297/12*: *"…in so far as a Member State has not yet made use of that discretion … it may not avail itself of the right to restrict the scope of the persons covered by that directive pursuant to Article 2(2)(b) thereof with regard to those persons who were already able to avail themselves of the effects of that directive").*

2.1. Border cases - Article 2(2)(a)

Persons who have been refused entry and who are present in a transit zone or in a border area of a Member State are frequently subject to special rules in Member States: by virtue of a "legal fiction" these persons are sometimes not considered to be "staying in the territory of the Member State" concerned and different rules are applied. The Return Directive doesn´t follow this approach and it considers any third-country national physically staying on Member State territory as covered by its scope.

Member States are, however, free (but not obliged) to decide not to apply the Directive to "border cases", defined as third-country nationals who:

– *are subject to a refusal of entry in accordance with Article 13 of the Schengen Borders Code, or*
– *who are apprehended or intercepted by the competent authorities in connection with the irregular crossing by land, sea or air of the external border of a Member State*

and who have not subsequently obtained an authorisation or a right to stay in that Member State.

Further clarification:

- The following categories of persons are for instance covered by the term *apprehended or intercepted by the competent authorities in connection with the irregular crossing* of external borders, because there is still a DIRECT connection to the act of irregular border crossing:

⇒ persons arriving irregularly by boat who are apprehended upon or shortly after arrival;
⇒ persons arrested by the police after having climbed a border fence;
⇒ irregular entrants who are leaving the train/bus which brought them directly into the territory of a Member State (without previous stopover in Member State territory).

- The following categories of persons are not covered by the term *apprehended or intercepted by the competent authorities in connection with the irregular crossing* of external borders, because there is no more DIRECT connection to the act of irregular border crossing:

  ⇒ irregular entrants who are apprehended within Member State territory, within a certain period after irregular entry;

  ⇒ irregular migrants apprehended in a border region (unless there is still a direct connection to the act of irregular border crossing);

  ⇒ an irregular migrant leaving a bus coming from a third country, if the bus had already made several stops in EU territory;

  ⇒ irregular migrants who, having been expulsed at a previous occasion, infringe a still valid entry ban (unless they are apprehended in direct connection with irregular border crossing);

  ⇒ irregular migrants crossing an internal border (NB: Both the wording of Article 2(2)a and Article 13 SBC clearly refer to "external borders").

- Practical example of cases covered by the clause *"and who have not subsequently obtained an authorisation or a right to stay in that Member States"*:

  ⇒ irregular entrants who had been apprehended at the external border and subsequently obtained a right to stay as asylum seeker. Even if – after final rejection of the asylum application - they become again "illegally staying", they must not be excluded from the scope of the Directive as "border case";

  ⇒ a third-country national who was subject of a refusal of entry and who is staying in the airport transit zone (and thus may be excluded from the scope of the Directive) is transferred to a hospital for medical reasons and given a short-term national *permit* (and not just a postponement of removal under Article 8(2)(a)) to cover the period of hospitalisation.

- The form, content and legal remedies of decisions issued to third-country nationals excluded from the scope of application of the Return Directive by Article 2(2)(a) are covered by national law.

- Refusals of entry according to Article 13 SBC cover everybody who does not fulfil the entry conditions in accordance with Article 5(1) SBC.

- Persons who are refused entry in an airport transit zone or at a border crossing point situated on Member State territory fall under the scope of the Return Directive (since they are already

physically present on the territory). However, Member States can make use of the derogation of Article 2(2)(a) stating that Member States may decide not to apply the directive to these cases.

- The temporary reintroduction of internal border controls does not re-convert internal borders to external borders. It is therefore irrelevant for the scope of application of the Return Directive. The Commission takes the view that the exceptions for border cases under Article 2(2)(a) only apply to cases of apprehension at the external borders, not at the internal borders.

- Border and border-like cases which may be excluded from the scope of the Directive in accordance with Article 2(2)(a) of the Directive are not the same as the cases mentioned in Article 12(3) (simplified procedure in case of illegal entry): Illegal entry (the term used in Article 12(3)) is not synonymous with the "border and border-like" cases described in Article 2(2)(a). Example: An illegally staying third-country national who is apprehended in the territory of a Member State three months after his/her illegal entry is not covered by Article 2(2)(a) but may be covered by Article 12(3).

2.2. Special safeguards for border cases

If Member States opt not to apply the Directive to border cases, they must nevertheless ensure – in accordance with Article 4(4) of the Return Directive - that the level of protection for affected persons is not less favourable than that set out in the Articles of the Directive dealing with

⇒ *Limitations on use of coercive measures;*

⇒ *Postponement of removal;*

⇒ *Emergency health care and taking into account needs of vulnerable persons;*

⇒ *Detention conditions and*

⇒ *Respect the principle of non-refoulement.*

In addition, it should be highlighted that the safeguards under the EU asylum acquis (such as in particular on access to asylum procedure) are by no means waived by Member States choice not to apply the Return Directive to border cases. The obligations under the EU asylum acquis include in particular an obligation of Member States to:

⇒ inform third country nationals who may wish to make an application for international protection on the possibility to do so;

⇒ ensure that border guards and other relevant authorities have the relevant information and that their personnel receives the necessary level of training on how to recognize

applicants and instructions to inform applicants as to where and how applications for international protection may be lodged;

⇒ make arrangements for interpretation to the extent necessary to facilitate access to the procedure;

⇒ ensure effective access by organisations and persons providing advice and counselling to applicants present at border crossing points, including transit zones, at external borders.

Further clarification:

- Practical application of this provision in case of refusal of entry at the border: There are two possibilities: Either the person is physically present in the territory of a Member State after refusal of entry at the border (e.g. in an airport transit zone) or the person is not physically present in the territory of a Member State (e.g. a person who was refused entry at a land border and who is still physically staying on third-country territory). In the first case, the safeguards of Article 4(4) can and should be applied. In the second case, Article 4(4) cannot be applied.

- The right to non-refoulement recognised by Article 4(4)(b) (and enshrined in Article 3 ECHR as well as Article 19(2) CFR) is absolute and must not be restricted under any circumstances, even if foreigners are a threat to public order or have committed a particularly serious crime. Such persons may be excluded from refugee or subsidiary protection status, but they still cannot be returned to a place at which they may be tortured or killed.

2.3. Criminal law and extradition cases

Member States are free (but not obliged) to decide not to apply the Directive to third-country nationals

– *who are subject to return as a criminal law sanction or as a consequence of a criminal law sanction, according to national law, or*

– *who are the subjects of extradition procedures.*

Further clarification:

- The criminal law cases envisaged by this provision are those typically considered as crime in the national legal orders of Member States. Minor migration related infringements, such as mere irregular entry or stay cannot justify the use of this derogation:

⇒ in *Filev and Osmani*, C-297/12 the ECJ expressly clarified that offences against the provisions of the national law on narcotics and convictions for drug trafficking may be cases to which the derogation is applicable.

⇒ in *Achoughbabian*, the ECJ confirmed that this derogation cannot be used without depriving the Return Directive of its purpose and binding effect, to third-country nationals who have committed only the offence of illegal staying.

- Extradition procedures are not necessarily related to return procedures (The basic 1957 Council of Europe Convention circumscribes extradition as *surrendering persons against whom the competent authorities of the requesting Party are proceeding for an offence or who are wanted by the said authorities for the carrying out of a sentence or detention order*). There may, however, be overlaps and this derogation aims at making clear that Member States have the option not to apply the procedural safeguards contained in the Return Directive when carrying out return in the context of extradition procedures.

3. More favourable provisions

Legal Basis: Return Directive - Article 4

Even though the Return Directive aims at harmonising return procedures in Member States, it expressly leaves unaffected more favourable provisions contained in *bilateral or multilateral international agreements* (Article 4 para 1). The Return Directive also leaves unaffected *any provision which may be more favourable for the third-country national, laid down in the Community acquis relating to immigration and asylum* (Article 4 para 2) as well as *the right of the Member States to adopt or maintain provisions that are more favourable to persons to whom it applies provided that such provisions are compatible with this Directive.* (Article 4 para 3)

Further clarification:

- Given that the Return Directive aims at providing for common minimum standards regarding the respect of fundamental rights of the individuals in return procedures, "more favourable" must always be interpreted as "more favourable for the returnee" and not more favourable for the expelling/removing State.

- Member States are not free to apply stricter standards in areas governed by the Return Directive: See ECJ in *El Dridi*, C-61/11, para 33: *"… Directive 2008/115 …. does not however allow those States to apply stricter standards in the area that it governs*."

- Removal to another Member State – instead of return to a third country - of a person who does not agree to go back voluntarily in accordance with Article 6(2) to the Member State of which it holds a permit: It is normally not possible to use Article 4(3), since more favourable provisions must be compatible with the Directive – which is not the case in this context, since the general rule under the Return Directive is return to a third country and not the passing back of returnees to another Member State. If, however, direct return to a third country is considered impossible by Member State authorities (for factual or legal reasons) a Member State practice of enforced passing back to the Member State of which the person holds a permit would not undermine the Directive and could – to the extent that going back to the Member State of which the person holds a right to stay is more favourable for the person concerned– qualify as a more favourable measure under Article 4(3).

- Refraining from issuing return decisions to UAMs as more favourable provision? The Return Directive expressly allows Member States which do not wish to return/remove third-country minors staying illegally on their territory or are restrained from removing the unaccompanied minor due to the best interests of the child to grant at any moment a permit or authorisation in accordance with national law (e.g. a temporary permit for a minor to stay until the age of 18). The Return Directive obliges, however, Member State to say either "A" (grant a permit or a legal right to stay) or "B" (carry out return procedures). This is a straightforward approach, aimed at reducing “grey areas” and improving legal certainty for all involved. In order to be compatible with the Return Directive, the situation of unaccompanied minors should be framed – in legal terms – either as granting of a temporary permit or a right to stay until they reach 18, or as postponed removal.

- Imposing a fine instead of issuing a return decision: The Return Directive does not permit a mechanism being put in place which provides, in the event of third-country nationals illegally staying in the territory of a Member State, depending on the circumstances, for either a fine or removal, since the two measures are mutually exclusive (*Zaizoune,* C-38/14).

- Applying parts of the Return Directive to persons excluded from its scope under Article 2(2)(a) and (b) is possible. Such practice is in the interest of the concerned person; it is compatible with the Directive and can be considered as covered by Article 4(3).

4. Criminal law measures for infringements of migration rules

Legal Basis: Return Directive – as interpreted by ECJ in cases El Dridi, C-61/11, Sagor, C-430/11 Achughbabian, C-329/11, Filev and Osmani, C-297/12.

Member States are free to lay down penal sanctions in relation to infringements of migration rules, provided such measures do not compromise the application of the Return Directive. It is up to national law to determine which types of infringements of migration rules are penalised. Nothing prevents Member States from also addressing and taking into account in their national penal law infringements of migration rules committed in other Member States:

- The imposition of a – proportionate – financial penalty for illegal stay under national criminal law is not as such incompatible with the objectives of the Return Directive since it doesn´t prevent a return decision from being made and implemented in full compliance with the conditions set out in the Return Directive (*Sagor*, C-430/11). National legislation which foresees – in the event of illegal stay – for either a fine or removal is incompatible with the Return Directive since it undermines its effectiveness (*Zaizoune*, C-38/14).

- Immediate expulsion under national criminal law (in cases which aren´t excluded from the scope of the Return Directive under Article 2(2)(b) – see section 2.3. above) is only allowed in so far as the judgement stating this penalty complies with all safeguards of the Return Directive (including on the form of return decisions, legal safeguards and advance consideration of the possibility of voluntary departure). (*Sagor*, C-430/11)

- House arrest under national criminal law is only allowed if guarantees are in place that house arrest does not impede return and that it comes to an end as soon as the physical transportation of the individual concerned out of that Member State is possible. (*Sagor*, C-430/11)

- Member States are not free to impose imprisonment under national criminal law on the sole ground of illegal stay before or during carrying out return procedures since this would delay return. (*El Dridi*, C-61/11)

- Member States are free to impose penal sanctions under national criminal law aimed at dissuading "non-removable returnees" from remaining illegally on Member State territory, i.e. in situations in which the coercive measures allowed under the Return Directive have not enabled removal. Such measures may, however, only be applied if there are no justified reasons for non-return. Moreover full compliance with fundamental rights, particularly those guaranteed by the ECHR and CFR, must be respected. (*Achughbabian*, C-329/11)

Further clarification:

- "Justified reasons for non-return" may

⇒ either be reasons *outside the scope* of influence of the returnee (such as delays in obtaining necessary documentation from third countries caused by bad cooperation of third country authorities; crisis situation in country of return making safe return impossible; granting of formal postponement of return/toleration status to certain categories of returnees, …) or

⇒ reasons *within the sphere of the returnee* which are recognised as legitimate or justified by Union or national law (e.g. health problems or family reasons leading to postponement of removal; pending appeal procedure with suspensive effect; decision to cooperate with authorities as witness,. ..) The mere subjective wish to stay in the EU can never be as such considered as "justified reason".

- "Non-justified reasons for non-return" may be reasons *within the scope of influence* of the returnee which are not recognised as legitimate or justified by Union or national law, such as: lack of cooperation in obtaining travel documents; lack of cooperation in disclosing ones identity; destroying documents; absconding; hampering removal efforts; ….. . It should be underlined that the mere subjective wish of an illegally staying third-country national to stay in the EU can never be considered as "justified reason".

- Penal sanctions aimed at dissuading non-removable returnees who have no justified reasons for non-return from remaining illegally must comply with fundamental rights, particularly those guaranteed by the ECHR as well the proportionality principle. The maximum limit for depriving the liberty of non-cooperating returnees has been limited by the Return Directive, in line with – and even going beyond - Article 5 ECHR, to 18 months. The Commission considers[4] that Member States should not impose imprisonment under penal law after the expiry of 18 months (or the maximum allowed under relevant national law) on returnees who committed no other offence than irregular stay or non-cooperation.

5. Apprehension and obligation to issue a return decision

Legal Basis: Return Directive - Article 6

Member States shall issue a return decision to any third-country national staying illegally on their territory.

[4] This issue is subject of pending case C-390/14 *Mehrabipari*.

Member States are obliged to issue a return decision to any third-country national staying illegally in their territory, unless an express derogation is foreseen by Union law (see list of exceptions described below). Member States are not allowed to tolerate in practice the presence of illegally staying third-country nationals on their territory without either launching a return procedure or granting a right to stay. This obligation on Member States to either initiate return procedures or to grant a right to stay aims at reducing "grey areas", to prevent exploitation of illegally staying persons and to improve legal certainty for all involved.

As a general rule, the relevant criterion for determining the Member State in charge of carrying out return procedures is the place of apprehension. Example: If an irregular migrant has entered the EU via Member State A (undetected), subsequently travelled through Member State B and C (undetected) and was finally apprehended in Member State D, Member State D is in charge of carrying out a return procedure. Temporary reintroduction of internal border control between Schengen States doesn´t affect this principle. Exceptions to this general rule are set out in sections 5.2, 5.3, 5.4, 5.5. and 5.8. below.

Further clarification:

- An administrative fine under national law for irregular stay may be imposed in parallel with the adoption of a return decision. Such administrative fine cannot, however, substitute the obligation of Member States to issue a return decision and to carry out the removal (*Zaizoune*, C-38/14).

- Return decisions in accordance with the Return Directive must also be taken when a return procedure is carried out using a readmission agreement: the use of readmission agreements with a third country (covering the relations between EU Member States and third countries) doesn't affect the full and inclusive application of the Return Directive (covering the relation between removing State and returnee) in each individual case of return. In fact the use of the readmission agreement presumes the issuance of the return decision first.

- National legislation may foresee that a third-country national is obliged to leave the territory of the EU, if his stay is illegal. Such abstract legal obligation doesn´t constitute a return decision. It must be substantiated in each case by an individualised return decision.

Apprehension practices – fundamental rights considerations

The obligation on Member States to issue a return decision to any third-country national staying illegally on their territory is subject to the principle of proportionality expressly recognised by the

Return Directive in its recital 20: the legitimate aim of fighting illegal migration may be balanced against other legitimate State interests, such as general public health considerations, the interest of the State to fight crime, the interest to have comprehensive birth registration, respect for the best interests of the child (expressly highlighted in recital 22) as well as other relevant fundamental rights recognised by the CFR. Without prejudice to the competence of Member States to determine in accordance with national law the rules on apprehension of illegally staying third-country nationals by law-enforcement authorities, the Commission encourages Member States to respect the considerations set out in the 2012 Fundamental Rights Agency document "*Apprehension of migrants in an irregular situation – fundamental rights considerations*" (⇒ Council doc 13847/12). Practices in Member States which respect these principles will not be considered by the Commission as an infringement of the obligation to issue return decisions to any third-country national staying illegally under Article 6(1) of the Return Directive:

Access to health:

Migrants in an irregular situation seeking medical assistance should not be apprehended at or next to medical facilities.

Medical establishments should not be required to share migrants' personal data with immigration law enforcement authorities for eventual return purposes.

Access to education:

Migrants in an irregular situation should not be apprehended at or next to the school which their children are attending.

Schools should not be required to share migrants' personal data with immigration law enforcement authorities for eventual return purposes.

Freedom of religion:

Migrants in an irregular situation should not be apprehended at or next to recognised religious establishments when practicing their religion.

Birth registration:

Migrants in an irregular situation should be able to register the birth and should be able to obtain a birth certificate for their children without risk of apprehension.

Civil registries issuing birth certificates should not be required to share migrants' personal data with immigration law enforcement authorities for eventual return purposes.

Access to justice:

In the interest of fighting crime, Member States may consider introducing possibilities for victims and witnesses to report crime without fear of being apprehended. To this end, the following good practices may be considered:

– introducing possibilities for anonymous, or semi-anonymous, or other effective reporting facilities;
– offering victims and witnesses of serious crimes the possibility to turn to the police via third parties (such as a migrants ombudsman, specially designated officials; or entities providing humanitarian and legal assistance);
– defining conditions under which victims or witnesses of crime, including domestic violence, could be granted residence permits building upon standards included in Directive 2004/81/EC and Directive 2009/52/EC ;
– considering the need for delinking the immigration status of victims of violence from the main permit holder, who is at the same time the perpetrator;
– developing leaflets in cooperation with labour inspectorates or other relevant entities to systematically and objectively inform migrants apprehended at their work places of existing possibilities to lodge complaints against their employers, building upon Directive 2009/52/EC, and in this context taking steps to safeguard relevant evidence.

Migrants in an irregular situation who seek legal aid should not be apprehended at or next to trade unions, or other entities offering such support.

In addition, the Commission recommends that third country nationals in an irregular situation who wish to access public services premises which register international protection applications should not be apprehended at or next to such facilities,

Special cases:

5.1. Apprehension in the course of an exit check

Legal Basis: Return Directive - Article 4(3); Article 6

A return decision should in principle also be adopted if an illegally staying third-country national is apprehended at the EU external border when leaving the EU territory. This situation frequently arises in cases in which an overstay is detected upon exit control. Nothing prevents Member States to launch a return procedure when acquiring knowledge about the overstay and continue the procedure leading to the issuing of a return decision accompanied by an entry-ban in an "*in absentia*" procedure (see also section 11.3. below).

Even though in such a specific situation, the person is anyhow about to leave the EU, the issuing of a return decision makes sense, since it allows Member States to also issue an entry ban, has financial implications (distribution of AMIF allocations based on the number of return decisions issued by Member States) and impacts reliability of statistical data.

Thus Member States are encouraged to provide for procedures allowing the issuing of return decisions and – if applicable – an entry ban) directly at the airport (or other border crossing points).

If a third country national has overstayed his/her visa or permit in a first Member State and leaves the EU via a second/transit Member State, the return decision and entry ban will have to be issued by the second Member State (the "overstayer" will normally also be "illegally staying" within the meaning of the Return Directive in the second/transit Member State).

However, in those cases in which the bureaucracy involved (time needed) for issuing a return decision might have contrary effects (the person might miss a flight and illegal stay would be prolonged), Member States may refrain from issuing a return decision. (Such practice is covered by the right of Member States to provide for more favourable provisions for returnees which are compatible with the Return Directive.)

5.2. Holders of a return decision issued by another Member State

Legal Basis: Directive 2001/40/EC

Reminder/explanation: The effect of a return decision issued by one Member State in another Member State had been subject of a separate chapter V of the 2005 Commission proposal for the Return Directive ("Apprehension in other Member States"). This chapter, as well as Article 20 of the Commission proposal which foresaw to delete *Directive 2001/40 on the mutual recognition of decisions on the expulsion of third-country nationals* was, however, removed during negotiations and Directive 2001/40 remained in force. *Directive 2001/40/EC* expressly enables the recognition of a return decision issued by a competent authority in one Member State against a third-country national present within the territory of another Member State. Article 6 of the Return Directive does not expressly mention the case that a second Member State recognises a return decision issued by a first Member State in accordance with Directive 2001/40. A literal interpretation of Article 6 which would require in such a case the recognising Member State to also issue a full

second return decision in accordance with Directive 2008/115, would deprive Directive 2001/40 of any added value. In order to give an "effet utile" to the continued existence of 2001/40, it was necessary to look for an interpretation which gives a useful meaning to the continued co-existence of Directives 2001/40 and 2008/115.

If Member State A apprehends a person who is already subject of a return decision issued by Member State B, Member State A has the choice of either:

1) issuing a new return decision under Article 6(1) of the Return Directive or
2) passing back the person to Member State B under an existing bilateral agreement in compliance with Article 6(3) of the Return Directive, or
3) recognising the return decision issued by Member State B in accordance with Directive 2001/40/EC.

If Member State A recognises the return decision issued by Member State B in accordance with Directive 2001/40, it is still obliged to apply the safeguards related to enforcement of return (removal) foreseen in the Return Directive when enforcing the recognised return decision.

The mutual recognition of return decisions may provide for significant added value in certain constellations – notably in the context of transit of returnees by land (see section 6.4. below). The Commission encourages Member States to make use of the option of mutual recognition, whenever it helps to speed up return procedures and to reduce administrative burden.

5.3. Illegally staying third-country national who can be transferred to another Member State under Dublin rules

Legal Basis: Dublin Regulation (EU) No 604/2013 – Articles 19 and 24

Article 6 of the Return Directive does not expressly mention the case that a second Member State makes use of the possibility offered under the Dublin Regulation to ask a first Member State to take back an illegally staying third-country national. A literal interpretation of Article 6 which would require in such a case that the requesting (second) Member State also issues a full return decision in accordance with Directive 2008/115, would deprive the relevant Dublin rules of their added value. The wording of the new Dublin Regulation No 604/2013/EU expressly addresses this issue and provides for clear rules regulating the co-existence of the Return Directive and the Dublin Regulation.

Cases, in which the third-country national has applied for asylum and obtained a right to stay as asylum seeker in the second Member State fall outside the scope of the Return Directive since the

third-country national has a right to stay as asylum seekers and cannot therefore be considered as "illegally staying" in the second Member State.

Cases in which the third-country national has not applied for asylum and has not obtained a right to stay as asylum seeker in the second Member State fall in principle within the scope of the Return Directive. The following situations[5] could be envisaged:

i. The third-country national has a status as asylum seeker in the first Member State (on-going procedure, not yet a final decision). In this case the Dublin Regulation takes precedence, on the basis of the underlying principle that every third-country national lodging an application for asylum in one of the Member States should have his/her needs for international protection fully assessed by one Member State. A Member State cannot return that third-country national to a third country; instead it may only send him/her to the Member State responsible under Dublin Regulation in order to have his/her claim examined.

ii. The third-country national has withdrawn his/her asylum application in the first Member State: If the withdrawal of the application *has led to a rejection* of the application (on the basis of Article 27 or 28 of the recast Asylum Procedures Directive), the rules described below under point iii (choice between applying Dublin rules or the Return Directive) can be applied. If the withdrawal of the application *hasn´t led to a rejection* of the application, the Dublin Regulation takes precedence (as *lex specialis*), on the basis of the underlying principle that every third-country national lodging an application for asylum in one of the Member States should have his/her needs for international protection fully assessed by one Member State.

iii. The third-country national has a final decision in the first Member State, rejecting his/her asylum application. In this case, a choice can be made between applying the Dublin Regulation or the Return Directive. In the new Dublin Regulation this choice is clearly stipulated in Article 24(4) and the clarification is added that from the moment in which authorities decide to make a Dublin request, the application of the Return Directive and return procedures are suspended and only Dublin rules apply (this also affects rules on detention and on legal remedies).

[5] The examples provided are simplified for explanatory purposes. In practice every case must be evaluated based on the individual circumstances.

iv. The third-country national had already been subject of successful return/removal (following rejection or withdrawal of an asylum application) from the first Member State to a third country. In this case, should the third-country national re-enter EU territory, the new Dublin Regulation clearly stipulates in its Article 19(3) that the first Member State can no longer be responsible for the third-country national (and therefore no transfer can be foreseen to this Member State). In this scenario the Return Directive will have to be applied.

Concrete examples:

- An applicant for international protection in Member State A travels without an entitlement to a neighboring Member State B (crossing internal borders) where he/she is apprehended by police. As a subject to the Dublin Regulation, he/she is transferred back from Member State B to Member State A. Should Member State B in this situation issue a return decision to this person for illegal stay in the territory?

⇒ *Dublin rules prevail. No return decision can be issued by Member State B.*

- Is Member State A (in the above described scenario) allowed to issue a return decision itself (together with an entry ban that will be postponed until the completion of the asylum procedure)?

⇒ *No. As long as the person enjoys the right to stay as an asylum seeker in Member State A, his/her stay is not illegal within the meaning of the Return Directive in Member State A and no return decision can be issued by Member State A.*

- A third-country national granted international protection by Member State A is illegally staying in Member State B (e.g. overstaying 90 days). Is the Return Directive applicable in such cases? What will be the procedures if the person refuses to go back voluntary to the first member state which has granted protection?

⇒ *The Dublin Regulation does not contain rules on taking back beneficiaries of international protection. Therefore the "general regime" foreseen in Article 6(2) of the Return Directive will have to be applied. This implies that Member State B will have to ask the person to go back to Member State A and – if the person does not comply voluntarily – Member State B has to consider issuing a Return Decision, taking into account all safeguards provided by the Return Directive, including in particular the principle of non-refoulement. In certain circumstances when return/removal to a third*

country is not possible and removal to another Member State can be qualified as "more favourable measure" (see section 3 above) Member State B may enforce the "passing-back" of the person to Member State A.

- A third-country national who had been fingerprinted following irregular entry to Member State A and who hasn´t requested asylum in Member State A is subsequently apprehended in Member State B. Can Member State B transfer the person back to Member State A in accordance with Dublin rules?

  ⇒ *No. Since there isn´t any link to an asylum procedure, the Dublin Regulation is not applicable.*

5.4. Illegally staying third-country national holding a right to stay in another Member State

Legal Basis: Return Directive – Article 6(2)

Third-country nationals staying illegally on the territory of a Member State and holding a valid residence permit or other authorisation offering a right to stay issued by another Member State shall be required to go to the territory of that other Member State immediately. In the event of non-compliance by the third-country national concerned with this requirement, or where the third-country national's immediate departure is required for reasons of public policy or national security, paragraph 1 shall apply.

This provision – which replaces a similar rule contained in Article 23(2) and (3) of the Schengen Implementing Convention (SIC) – foresees that no return decision should be issued to an illegally staying third-country national who is holding a valid permit to stay in another Member State. In such cases the third-country national should in the first place be required to go immediately back to the Member State where he/she enjoys a right to stay. Only if the person does not comply with this request or in cases of risk for public policy or national security, a return decision shall be adopted.

Further clarification:

- The form in which the request "to go to the territory of that other Member State immediately" is issued should be determined in accordance with national law. It is recommended to issue decisions in writing and with reasons. In order to avoid confusion, the decision should not be labelled "return decision".

- Period for going back to other Member State: No general indication can be given regarding the time which should elapse between the request to go to the territory of another Member State until the moment at which a return decision in accordance with Article 6(1) is issued. An appropriate time frame should be chosen in accordance with national law, taking into account the individual circumstances, the principle of proportionality and the fact that the term "*immediately*" is used in the legal provision. The time between the request to go to the other Member State and the issuing of a return decision under Article 6(1) must not be counted as part of an eventual period for voluntary departure, since the period of voluntary departure is an element of the return decision and will start running only with the issuing of return decision.

- Control of departure to other Member State: Union law doesn´t specify how compliance with the obligation to go back to the other Member State has to be controlled. Member States should make sure, in accordance with national law that an appropriate follow-up is given to their decisions.

- Verification of validity of permits/authorisations issued by another Member State: There is currently no central system for exchanging information between Member States on this issue. Member States are encouraged to cooperate bilaterally and provide without delay relevant information to each other, in accordance with national law and bilateral cooperation arrangement. Existing national contact points (e.g. those listed in annex 2 of the Schengen Handbook) might also be used for this purpose.

- The term "*residence permit or other authorisation offering a right to stay*"[6] is very broad and covers any status granted or permits issued by a Member State which offers a right to legal stay (and not just an acceptance of temporary postponement of return/removal).

The following cases are covered by this term:

⇒ long-term visa (it clearly offers a right to stay);

⇒ temporary humanitarian permit (in so far as such permit offers a right to stay and not just a mere postponement of return);

⇒ an expired residence permit based on a still valid international protection status (the status of international protection is not dependent on validity of the paper demonstrating it);

[6] This term is a broad "catch-all" provision, which covers also those cases which are expressly excluded from the definition of "residence permit" under Article 2(15) (b) (i) and (ii) of the SBC.

⇒ a valid visa in an invalid (expired) travel document (NB: According to relevant Union legislation, it is not allowed to issue a visa with a validity going beyond the validity of the passport. The case of a valid visa in an expired passport should therefore never appear in practice. If this case nevertheless arises, the third-country national concerned should not be unduly penalised. For detailed guidance on the relevant Visa rules see the updated Visa Handbook – part II, Point 4.1.1. and 4.1.2.).

The following cases are <u>not covered</u> by this term:

⇒ an expired residence permit based on an expired residence status,

⇒ counterfeit, false and forged passports or residence permits;

⇒ paper certifying temporary postponement of removal;

⇒ toleration (in so far as toleration does not imply a legal right to stay).

- <u>As a general rule no removal to other Member States</u>: If a third-country national does not agree to go back voluntarily in accordance with Article 6(2) to the Member State of which he/she holds a permit, Article 6(1) becomes applicable and a return decision, providing for direct return to a third country should be adopted. It is not possible to pass back the person to the other Member State with force, unless an existing bilateral agreement between Member States which was already in force on 13.1.2009 (See Article 6(3) below) provides expressly for this possibility or in certain circumstances when return/removal to a third country is not possible and removal to another Member State can be qualified as "more favourable measure" (see section 3 above).

- <u>No issuing of EU entry bans when using Article 6(2):</u> When passing back an illegally staying third-country national to another Member State under Article 6(2), no EU entry ban can be issued under Article 11, since Article 11 applies only in connection with the issuing of a return decision and doesn´t apply in cases in case of mere "passing back" to another Member State. Moreover it is pointless from a practical point of view to issue an EU entry ban in a situation where the person will continue to legally stay in another Member State.

- <u>Immediate departure required for reasons of public policy or national security:</u> In the exceptional circumstances addressed by Article 6(2)(2nd phrase) (2nd case), the person *shall* be immediately made subject of a return decision and removed to a third country. The Member State where the person enjoys the right to stay should be informed about this fact.

<u>Concrete example</u>:

- What provisions of the Return Directive should be applied with regard to third-country nationals detected in Member State A, who possess a valid residence permit issued by Member State B and at the same time are subject of an SIS alert (entry ban) initiated by Member State C ?

  ⇒ *Member State A should apply Article 6(2) (ask person to go back to Member State B). As regards the co-existence of an entry ban issued by Member State C and a residence permit issued by Member State B, this must be clarified bilaterally between the Member State issuing the alert (C) and the Member State which had issued the permit (B) in accordance with Article 25(2) Schengen Implementing Convention.*

5.5. Illegally staying third-country national covered by existing bilateral agreements between Member States

Legal Basis: Return Directive – Article 6(3)

⇒ An indicative list of existing bilateral readmission agreements between Member States can be found at the "*inventory of the agreements linked to readmission*" hosted by the Return migration and Development Platform of the European University Institute, available at: http://rsc.eui.eu/RDP/research/analyses/ra/

Member States may refrain from issuing a return decision to a third-country national staying illegally on their territory if the third-country national concerned is taken back by another Member State under bilateral agreements or arrangements existing on the date of entry into force of this Directive (=13.1.2009). In such a case the Member State which has taken back the third-country national concerned shall apply paragraph 1.

This provision foresees – as an exception and in the form of a "stand still clause"– the possibility for Member States to pass back irregular migrants to other Member States under bilateral agreements or arrangements existing on 13.1.2009.

Historic reminder/explanation: The principle upon which the Return Directive is based is *direct* return of illegally staying persons from the EU to third countries. The possibility to request another Member State to take back an illegally staying person under bilateral agreements which then in turn would carry out the return to a third country ("domino-return") runs contrary to this principle and was only included into the text of the Directive at a late stage of negotiations following a strong request from certain Member States which insisted that the Return Directive should not oblige them to change well established practices of taking/passing back illegally staying third-country nationals to other Member States under bilateral agreements.

Further clarification:

- Subsequent use of bilateral agreements between Member States A-B and B-C: The Return Directive – and in particular its Article 6(3) - does not expressly interdict "domino taking back" under existing bilateral arrangements. It is, however, important that in the end a full return procedure in accordance with the Directive will be carried out by one Member State. Since this kind of subsequent procedures is both cost intensive for administrations and involves additional discomfort for the returnee, Member States are encouraged to refrain from applying this practice.

- No issuing of EU entry bans when using Article 6(3): When passing back an illegally staying third-country national to another Member State under Article 6(3) no EU entry ban can be issued under Article 11, since Article 11 applies only in connection with the issuing of a return decision and doesn´t apply in case of mere "passing back" to another Member State. Moreover it is pointless from a practical point of view to issue an EU entry ban in a situation in which the person does not yet leave the EU. (As regards the possibility to issue purely national entry bans in exceptional circumstances under Article 25(2) SIC, see section 11.8. below.)

- How should a decision on readmission to another Member State be called? – Since the notion of "return" under the Return Directive always implies return to a third-country, it is recommended to call this kind of national decisions "transfer decision" or "passing back decision" and not to call it "return decision".

- Standstill clause: Article 6(3) is an express "stand-still" clause. Member States may only use the option offered by Article 6(3) in relation to bilateral readmission arrangements that entered into force before 13.1.2009. Existing agreements which were renegotiated/renewed after 13.1.2009 may continue to be covered by Article 6(3) if the renegotiated/renewed agreement is an amendment of the already existing agreement and clearly labeled as such. If the renegotiated/renewed agreement is an "aliud" (an entirely new agreement with different substance) then 6(3) would not cover it anymore.

- Readmission agreements between Schengen Member States and the UK: For the purposes of interpreting Article 6(3) (interpretation of an exception to the general rules of the Return Directive) the UK is to be considered as a Member State.

5.6. Illegally staying third-country national benefitting from humanitarian (or other) permit/authorisation

Legal Basis: Return Directive – Article 6(4)

Member States may at any moment decide to grant an autonomous residence permit or other authorisation offering a right to stay for compassionate, humanitarian or other reasons to a third-country national staying illegally on their territory. In that event no return decision shall be issued. Where a return decision has already been issued, it shall be withdrawn or suspended for the duration of validity of the residence permit or other authorisation offering a right to stay.

Member States are free – at any moment – to grant a permit or right to stay to an illegally staying third-country national. In this event any pending return procedures shall be closed and an already issued return decision or removal order must be withdrawn or suspended. The same applies in cases in which Member States have to grant a right to stay, e.g. following the submission of an asylum application. It is up to Member States to decide which approach (withdrawal or suspension of the return decision) they choose, taking into account the nature and likely duration of the permit or right to stay which was granted.

5.7. Illegally staying third-country national subject of a pending procedure renewing a permit/authorisation

Legal Basis: Return Directive – Article 6(5)

If a third-country national staying illegally on the territory of a Member State is the subject of a pending procedure for renewing his or her residence permit or other authorisation offering a right to stay, that Member State shall consider refraining from issuing a return decision, until the pending procedure is finished, without prejudice to paragraph 6.

Member States are free to refrain from issuing a return decision to illegally staying third-country nationals who are waiting for a decision on the renewal of their permit. This provision is intended to protect third-country nationals who were legally staying in a Member State for a certain time and who – because of delays in the procedure leading to a renewal of their permit – temporarily become illegally staying. This provision refers to a pending procedure for renewal of a residence permit in the Member State of apprehension (arg: "*that* Member State"). Member States are encouraged to make use of this provision in all cases in which it is likely that the application for renewal will be successful and to provide the persons concerned at least with the same treatment as the one offered to returnees during a period of voluntary departure or during postponed return.

This provision does not cover pending procedures for renewal of a residence permit in another Member State. The fact that a person is subject to a pending procedure for renewal of a residence permit in another Member State may, however, in specific circumstances justify postponement of

return in accordance with Article 9(2) or application of more favourable measures in accordance with Article 4(3).

5.8. Special rules in legal migration directives on readmission between Member States in cases of intra-EU mobility

Legal Basis: ICT Directive 2014/66/EU – Article 23; LTR Directive 2003/109/EC (amended by Directive 2011/51/EU) – Articles 12 and 22; Blue Card Directive 2009/50/EC – Article 18;

The above-quoted Directives contain special rules on readmission between Member States in cases of intra-EU mobility of certain categories of third-country nationals (ICTs; holders of EU Blue Cards; long-term residents). These provisions are to be considered as "*leges speciales*" (more specific rules) which have to be followed in the first place in those cases/constellations expressly covered by the said Directives.

6. Voluntary departure

Legal Basis: Return Directive – Article 7(1)

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

The promotion of voluntary departure is one of the key objectives of the Return Directive. Voluntary compliance with an obligation to return is preferable to removal for the threefold reason that it is a more dignified, safer, and frequently a more cost-effective return option. Member States are encouraged to offer the possibility of voluntary departure to the largest possible number of returnees and to only refrain from doing so in those cases in which there is a risk that this might hamper the purpose of the return procedure.

The *Return Expert Group (REG)* of the European Migration Network (EMN) aims at facilitating improved practical cooperation among States and stakeholders in the field of return,assisted voluntary return and reintegration programs. It should be a key tool for the gathering and sharing of information and Member States are encouraged to make active use of it.

Further clarification:

- The time frame of 7 - 30 days constitutes a general principle. It is binding for Member States to fix a period which respects this frame, unless specific circumstances of the individual case justify an extension in accordance with Article 7(2) (see below).

- Granting 60 days as a general rule would be incompatible with the harmonisation and "common discipline" provided for by the Return Directive to have a frame of 7-30 days and cannot therefore be justified as more favourable provision under Article 4(3). If, however, periods between 30-60 days (exceeding the range harmonised by para 1) are only granted in case of specific circumstances (referred to in para 2), this is covered by Article 7(2).

- In line with the right to be heard enshrined in Article 41(2) CFR, Member States should provide the returnee with a possibility to specify individual circumstances and needs to be taken into account when determining the period to be granted, both in cases where the period of voluntary departure is determined ex-officio and in cases in which the period is fixed following an application of the returnee.

- Information about the possibility to apply for a period of voluntary departure in accordance with the third sentence of Article 7(1) should be given individually to the person concerned. General information sheets for the public (e.g. an announce of the possibility of submitting such application on the website of the Immigration Office or printing adds and posting them on information panels in the premises of the local immigration authorities) may be helpful but should always be complemented with individualised information to the concerned person.

- Application requirement for certain categories of irregular migrants: Member States are free to foresee an application requirement in accordance with Article 7(1)(2nd sentence) for certain categories of irregular migrants only, and to apply the general rule of Article 7(1)(1st sentence) in all other cases.

6.1. Extended period of voluntary departure

Legal Basis: Return Directive – Article 7(2)

Member States shall, where necessary, extend the period for voluntary departure by an appropriate period, taking into account the specific circumstances of the individual case, such as the length of stay, the existence of children attending school and the existence of other family and social links.

Further clarification:

- There is no pre-fixed maximum time limit for the extension of the period for voluntary departure and each individual case should be treated on its own merits in accordance with national implementing legislation and administrative practice. Taking into account the reference in the text to children attending school (logically linked to the idea of letting children finish their school year) extensions of up to 1 year are certainly covered by the Directive.

- An extension of the period beyond 30 days can already be granted from the outset (the point of time when the return decision is issued). It is not necessary to first issue a 30 days period and to subsequently extend it.

- The term "where necessary" refers to circumstances both in the sphere of the returnee and in the sphere of the returning State. Member States enjoy discretion relating to the substance and the regulatory depth of their national implementing legislation on this issue.

- The three subcases mentioned in Article 7(2) (length of stay, children attending school, family links) should be expressly respected in national implementing legislation and administrative practice. Member State administrative rules can be more detailed and also provide for other reasons for extension, but should not be less precise, otherwise harmonisation would be undermined.

6.2. Obligations pending voluntary departure

Legal Basis: Return Directive – Article 7(3)

Certain obligations aimed at avoiding the risk of absconding, such as regular reporting to the authorities, deposit of an adequate financial guarantee, submission of documents or the obligation to stay at a certain place may be imposed for the duration of the period for voluntary departure.

Further clarification:

- The obligations enumerated in Article 7(3) can only be imposed in particular circumstances, such as where there is a risk of absconding to avoid. If there are no particular circumstances, they are not justified. ⇒ See also ECJ in *El Dridi*, C-61/11, para 3: *It follows from Article 7(3) and (4) of that directive that it is only in particular circumstances, such as where there is a risk of absconding, that Member States may, first, require the addressee of a return decision to report regularly to the authorities, deposit an adequate financial guarantee, submit documents or stay at a certain place or, second, grant a period shorter than seven days for voluntary departure or even refrain from granting such a period.*

- Attention should be paid to the fact that the possibility for Member States to impose certain obligations may be an advantage for the returnee since it may allow the grant of a period of voluntary departure in cases which would not normally otherwise qualify for such treatment.

- It is not possible to give a generally applicable figure of what amount constitutes an "adequate financial guarantee". In any case the proportionality principle should be respected, i.e. the amount should take into account the individual situation of the returnee. Current Member State practice foresees amounts varying from around 200 Euro to 5.000 Euro.

- If this is required in an individual case, the obligations mentioned in Article 7(3) can also be imposed in a cumulative manner.

- When imposing obligations under Article 7(3), Member States should take into account the individual situation of the returnee and avoid imposing obligations which can de facto not be complied with (if a person e.g. doesn't possess a passport, he/she won´t be able to submit it).

6.3. Counter-indications

Legal Basis: Return Directive – Article 7(4)

If there is a risk of absconding, or if an application for a legal stay has been dismissed as manifestly unfounded or fraudulent, or if the person concerned poses a risk to public policy, public security or national security, Member States may refrain from granting a period for voluntary departure, or may grant a period shorter than seven days.

Member States are free to refrain from granting a period of voluntary departure in those cases – exhaustively listed in Article 7(4) – in which there is a "counter indication", such as a risk of absconding or a risk to public order. Member States may, however, change their assessment of the situation at any moment (a previously non-cooperating returnee may change his/her attitude and accept an offer for assisted voluntary return) and grant a period of voluntary departure even though there was initially a risk of absconding.

Further clarification:

- It is not possible to exclude in general all illegal entrants from the possibility of obtaining a period of voluntary departure. Such generalising rule would be contrary to the definition of risk of absconding and the obligation to carry out a case by case assessment and it would undermine the "effet utile" of Article 7 (promotion of voluntary departure).

- It is possible to exclude under Article 7(4) persons who submitted abusive applications. Article 7(4) expressly covers manifestly unfounded or fraudulent applications. Abusive applications normally involve a higher degree of reprehensible behavior than manifestly unfounded applications; therefore Article 7(4) should be interpreted as also covering abusive applications.

6.4. Practical compliance – transit by land

⇒ ***Annex 39 to the Schengen handbook*** *a "STANDARD FORM FOR RECOGNISING A RETURN DECISION FOR THE PURPOSES OF TRANSIT BY LAND".*

⇒ *Map of participating Member States (available as EMN ad-hoc query, return, 2015, at the EMN Europa website)*

Reminder/explanation: A returnee who intends to leave the territory of the EU by land within the period for voluntary departure does not have any valid visa or other permission to transit through other Member States to his/her country of origin and therefore runs the risk of being apprehended/stopped by the police on his/her way home and to be made subject of a second return decision issued by the transit State. This runs contrary to the policy objective of the Return Directive to encourage voluntary departure.

Issuing a transit visa to the returnee would be an inappropriate and inadequate solution, since granting a visa to illegally staying third-country nationals who are obliged to leave would be contrary to EU rules on visa. Moreover transit Member States do not seem to have any incentive to issue such kind of visa (risk that persons may abscond and/or cause removal costs) and would in practice therefore frequently refuse issuing the visa. Providing for a "European laissez-passer" for the returnee does not offer a solution either: In the absence of a clearly defined legal nature and legal effects of such a "laissez-passer" the returnee would - strictly legally speaking - still be considered as "illegally staying" in the transit State and might therefore be subject of a new return decision in accordance with Article 6(1).

One way of avoiding the problem is to promote direct return to third countries by air. This may, however, be expensive and unpractical for the returnee.

Recommended approach: An approach, expressly recommended by the Commission, is for transit Member States to recognise return decisions issued by the first Member State in accordance with Annex 39 to the Schengen Handbook "*STANDARD FORM FOR RECOGNISING A RETURN DECISION FOR THE PURPOSES OF TRANSIT BY LAND"* (issued by Commission in September 2011, following consultations with concerned Member States at technical level and discussion within the Migration-Expulsion WP of the Council).

According to this approach, the transit Member State may recognise the return decision including the period of voluntary departure granted by the first Member State and will let the returnee transit on the basis of the recognised decision and the recognised period of voluntary departure. This approach has the advantage that the transit State is not obliged to issue a new return decision and

that it can ask the first Member State to reimburse all cost related to removal if something goes wrong and the returnee needs to be removed at the cost of the transit State (in application of Decision 2004/191 setting out the criteria for compensation of financial imbalances resulting from the application of Directive 2001/40).

Those Member States which are still reluctant to use this voluntary option (either as sending or receiving Member State) are encouraged to join in and to inform Commission and other Member States about their participation.

Further clarification:

- Form of recognition: The very broad and general wording of Directive 2001/40/EC provides for discretion as regards the practical modalities (procedural details) for mutual recognition in accordance with practical needs and national legislation. The form proposed in Annex 39 of the Schengen Handbook is one possible but not the exclusive way to proceed.

- Legally speaking, all relevant elements of the return decision issued by Member State A are recognised by Member State B, including recognition of the statement that the third-country national is illegally staying and enjoys a period of voluntary departure – with effect for the territory of the recognising Member State B.

- The recognising Member State enjoys three different "safeguards":

    1) use of the standard form of annex 39 is made on a voluntary basis only; this always leaves Member States with the option not to recognise a return decision issued by another Member State in a specific individual case;
    2) the first Member State may only grant a period of voluntary departure in accordance with Article 7 if there is no "counter indication", such as a risk of absconding. The "pre-screening" of the personal situation of returnees in accordance with Article 7 which has to be carried out by the first Member State may be a helpful reassurance for the recognising transit Member State;
    3) if something goes wrong and the returnee needs to be removed at the cost of the transit State, all cost related to removal can be charged to the first Member State in application of Decision 2004/191.

6.5. Practical compliance – transit by air (Directive 2003/110/EC)

Directive 2003/110/EC on assistance in cases of transit for the purpose of removal by air provides for a legal frame on cooperation between the competent authorities at Member State airports of transit with regard to both escorted and unescorted removal by air. The term "*unescorted removal*" in this Directive (which was adopted five years before the Return Directive) can be interpreted as also covering "*voluntary departure*" within the meaning of the Return Directive[7]. The Commission recommends to make systematic use of this legal instrument (Directive 2003/110/EC) when organising transit by air in the context of voluntary departure (See also section 7.2.)

6.6. Recording of voluntary departure

Currently there is no central EU system for keeping track of voluntary departure. In cases of transit by land of returnees in accordance with the recommendation set out in Annex 39 Schengen Handbook, a confirmation is faxed back from the border guard to the Member State which issued the return decision. In other cases, returnees sometimes report back via EU consulates in third countries. Sometimes departure is also registered by border guards conducting exit checks. The absence of a central EU system for keeping track of voluntary departure creates a gap, both in terms of enforcement verification and in terms of statistics.

In the short term Member States are encouraged to make best use of the available information channels and for this purpose:

1) Systematically encourage those returnees who are granted a period of voluntary departure to inform the authorities who had issued the return decision (and entry ban) about their successful departure. The returnee may signal his departure to the border guard (upon departure), at the consular representation of a Member State in his country of origin (following return) or even by writing (with sufficient proof in annex). In order to enhance this practice, an information sheet may be attached to the return decision, specifying the benefits for the returnee of informing the authorities about successful departure and providing contact details of the relevant Member State authorities to whom the returnee may turn.
2) Ask border guards conducting exit checks to enquire – when they become aware of the exit of an irregular migrant – whether the returnee is subject of a return decision accompanied by a period of voluntary departure and to inform – if this is the case –

[7] NB: This interpretation does not imply that unescorted removal is synonymous with voluntary departure. The term unescorted removal may also cover cases of forced return (removal) without police escort.

systematically the authorities who had issued the return decision about the departure of the returnee.

7. Removal

Legal Basis: Return Directive – Article 8(1)-(4)

1. Member States shall take all necessary measures to enforce the return decision if no period for voluntary departure has been granted in accordance with Article 7(4) or if the obligation to return has not been complied with within the period for voluntary departure granted in accordance with Article 7.

2. If a Member State has granted a period for voluntary departure in accordance with Article 7, the return decision may be enforced only after the period has expired, unless a risk as referred to in Article 7(4) arises during that period.

3. Member States may adopt a separate administrative or judicial decision or act ordering the removal.

4. Where Member States use — as a last resort — coercive measures to carry out the removal of a third-country national who resists removal, such measures shall be proportionate and shall not exceed reasonable force. They shall be implemented as provided for in national legislation in accordance with fundamental rights and with due respect for the dignity and physical integrity of the third-country national concerned.

The Return Directive fixes an objective ("enforce the return decision") which should be achieved in an effective and proportionate manner with "all necessary measures", whilst leaving the concrete modalities (the "how") up to Member State legislation and administrative practice. (See ECJ in *Achughbabian*, C-329/11, para 36: *"… the expressions 'measures' and 'coercive measures' contained therein refer to any intervention which leads, in an effective and proportionate manner, to the return of the person concerned.*"

Borderline between voluntary departure and removal: Return is a very broad concept and covers the process of going back to a third country in compliance (voluntary or enforced) with an obligation to return. Removal is much narrower. It means enforcement of the obligation to return, namely the physical transportation out of the Member State. The ECJ has already highlighted in *El Dridi*, C-61/11, (para 41) and *Achoughbabian* that the Return Directive foresees a "gradation of measures" ranging from voluntary to enforced. In practice there are frequently cases which contain both

elements of forced return (detention) and of voluntariness (subsequent voluntary travelling without need of physical force). Member States are encouraged to use – at all stages of the procedure – the least intrusive measures. If returnees who are subject of removal/detention change their attitude and show willingness to cooperate and to depart voluntarily, Member States are encouraged and entitled to show flexibility.

Imprisonment (as a criminal law measure for migration related offences) can never be "a necessary measure" within the meaning of the Return Directive. The only permitted way of deprivation of liberty in the return context is the imposition of detention for the purpose of removal under Article 15 of the Return Directive. (See ECJ in *Achughbabian*, C-329/11, para 37: *"… the imposition and implementation of a sentence of imprisonment during the course of the return procedure provided for by Directive 2008/115 does not contribute to the realisation of the removal which that procedure pursues, namely the physical transportation of the person concerned outside the Member State concerned. Such a sentence does not therefore constitute a 'measure' or a 'coercive measure' within the meaning of Article 8 of Directive 2008/115.*"

7.1. Removal by air

Legal Basis: Return Directive – Article 8(5); Common Guidelines on security provisions for joint removals by air annexed to Decision 2004/573/EC.

In carrying out removals by air, Member States shall take into account the Common Guidelines on security provisions for joint removals by air annexed to Decision 2004/573/EC.

According to the Return Directive, Member States shall take into account the Common Guidelines on security provisions for joint removals by air annexed to Decision 2004/573/EC in the context of all removals by air, and not just – as originally foreseen by Decision 2004/573/EC – in the context of joint removals.

Some parts of these Guidelines are by their nature designed to be taken into account for joint flights only, such as the rules related to the role and distribution of tasks of organising and participating Member States. These cannot be taken account in the purely national context. All other parts of the Guidelines (see the most relevant extracts in the box below) should, however, be taken into account also in purely national removal operations.

COMMON GUIDELINES ON SECURITY PROVISIONS FOR JOINT REMOVALS BY AIR

(extracts)

1. PRE-RETURN PHASE

1.1.2. Medical condition and medical records

The organising Member State and each participating Member State shall ensure that the returnees for whom they are responsible are in an appropriate state of health, which allows legally and factually for a safe removal by air. Medical records shall be provided for returnees with a known medical disposition or where medical treatment is required. These medical records shall include the results of medical examinations, a diagnosis and the specification of possibly needed medication to allow for necessary medical measures. …

1.1.3. Documentation

The organising Member State and each participating Member State shall ensure that for each returnee valid travel documents and other necessary additional documents, certificates or records are available. An authorised person shall keep the documentation until arrival in the country of destination….

1.2.3. Use of private-sector escorts

When a participating Member State makes use of private-sector escorts, the authorities of that Member State shall provide for at least one official representative on board the flight.

1.2.4. Skills and training of escorts

Escorts assigned on board the joint flights shall have received prior special training in order to carry out these missions; they must be provided with the necessary medical support depending on the mission.

…

1.2.5. Code of conduct for escorts

The escorts shall not be armed. They may wear civilian dress, which shall have a distinctive emblem for identification purposes. Other duly accredited accompanying staff shall also wear a distinctive emblem.

The members of the escort shall be strategically positioned in the aircraft in order to provide optimum safety. Moreover, they shall be seated with the returnees for whom they have responsibility.

1.2.6. Arrangements regarding the number of escorts

The number of escorts shall be determined on a case-by-case basis following an analysis of the potential risks and following mutual consultation. It is recommended in most cases that they are at least equivalent to the number of returnees on board. A back-up unit shall be available for support, where necessary (e.g. in cases of long-distance destinations).

2. PRE-DEPARTURE PHASE IN DEPARTURE OR STOPOVER AIRPORTS

2.1. Transportation to the airport and stay in the airport

As regards transportation to and stay in the airport the following shall apply:

(a) in principle, the escorts and the returnees should be at the airport at least three hours before departure;

(b) returnees should be briefed regarding the enforcement of their removal and advised that it is in their interest to cooperate fully with the escorts. It should be made clear that any disruptive behaviour will not be tolerated and will not lead to the aborting of the removal operation;

…

2.2. Check-in, boarding and security check before take-off

The arrangements as regards check-in, boarding and security checking before take-off shall be as follows:

(a) the escorts of the Member State of the present location are responsible for checking in and for assisting in passing control areas;

(b) all returnees shall undergo a meticulous security search before they board a joint flight. All objects that could be a threat to the safety of individuals and to the security of the joint flight shall be seized and placed in the luggage hold;

(c) the returnee's luggage shall not be placed in the passengers cabin. All luggage placed in the hold shall undergo a security check and be labelled with the owner's name. Anything that is considered as dangerous according to the rules of the International Civil Aviation Organisation (ICAO) shall be removed from luggage;

(d) money and valuable objects shall be placed in a transparent covering labelled with the owner's name. The returnees shall be informed about the procedure regarding objects and money that have been put aside;

…

3. IN-FLIGHT PROCEDURE

…

3.2. Use of coercive measures

Coercive measures shall be used as follows:

(a) coercive measures shall be implemented with due respect to the individual rights of the returnees;

(b) coercion may be used on individuals who refuse or resist removal. All coercive measures shall be proportional and shall not exceed reasonable force. The dignity and physical integrity of the returnee shall be maintained. As a consequence, in case of doubt, the removal operation including the implementation of legal coercion based on the resistance and dangerousness of the returnee, shall be stopped following the principle «no removal at all cost»;

(c) any coercive measures should not compromise or threaten the ability of the returnee to breathe normally. In the event that coercive force is used, it shall be ensured that the chest of the returnee remains in upright position and that nothing affects his or her chest in order to maintain normal respiratory function;

(d) the immobilisation of resisting returnees may be achieved by means of restraints that will not endanger their dignity and physical integrity;

(e) the organising Member State and each participating Member State shall agree on a list of authorised restraints in advance of the removal operation. The use of sedatives to facilitate the removal is forbidden without prejudice to emergency measures to ensure flight security;

(f) all escorts shall be informed and made aware of the authorised and forbidden restraints;

(g) restrained returnees shall remain under constant surveillance throughout the flight;

(h) the decision temporarily to remove a means of restraint shall be made by the head or deputy-head of the removal operation.

3.3. Medical personnel and interpreters

The arrangements with regard to medical personnel and interpreters shall be as follows:

(a) at least one medical doctor should be present on a joint flight;

(b) the doctor shall have access to any relevant medical records of the returnees and shall be informed before departure about returnees with particular medical dispositions. Previously unknown medical dispositions, which are discovered immediately before departure and which may affect the enforcement of the removal, should be assessed with the responsible authorities;

(c) only a doctor may, after a precise medical diagnosis has been made, administer medication to the returnees. Medicine required by a returnee during the course of the flight shall be held on board;

(d) each returnee shall be able to address the doctor or the escorts directly, or via an interpreter in a language in which he or she can express him- or herself;

(e) the organising Member States shall ensure that appropriate medical and language staff are available for the removal operation.

3.4. Documentation and monitoring of removal operation

3.4.1. Recording and observers from third parties

Any video- and/or audio-recording or monitoring by third-party observers on joint flights shall be subject to prior agreement between the organising Member State and the participating Member States.

…

5. ARRIVAL PHASE

On arrival:

…

(c) the organising Member State and each participating Member State shall hand over the returnees, for whom they are responsible, to the authorities of the country of destination, with their luggage and any items that were seized prior to boarding. The lead representatives of the organising and participating Member States will be responsible for handing over the returnees to the local authorities upon arrival. The escorts will not normally leave the aircraft;

(d) where appropriate and feasible, the organising and participating Member States should invite consular staff, immigration liaison officers or advance parties of the Member States concerned to facilitate the handover of the returnees to the local authorities insofar as this is consistent with national practices and procedure;

(e) the returnees shall be free of handcuffs or any other restraint when handed over to the local authorities;

(f) the handover of returnees shall take place outside the aircraft (either at the bottom of the gangway or in adequate premises of the airport, as considered appropriate). As far as possible the local authorities shall be prevented from coming on board the aircraft;

(g) the time spent at the airport of destination should be kept to a minimum;

(h) it is the responsibility of the organising Member State and each participating Member State to have in place contingency arrangements for escorts and representatives (and returnees whose readmission has not been permitted) in the event that the departure of the aircraft is delayed following disembarkation of the returnees. These arrangements should include the provision of overnight accommodation, if necessary.

6. FAILURE OF THE REMOVAL OPERATION

In the event that the authorities of the country of destination refuse entry to the territory, or the removal operation has to be aborted for other reasons, the organising Member State and each participating Member

State shall take responsibility, at its own cost, for the return of the returnees, for whom they are responsible, to their respective territories.

Further clarification:

- Escorting of returnees by airline security personnel or hired outside personnel is in principle compatible with Article 8 of the Return Directive. Member States have, however, an overall responsibility for the conduct of the removal operation (issuing of removal order and proportionate use of coercive measures/escorting). Section 1.2.3. of the above Guidelines provide: "When a Member State makes use of private-sector escorts, the authorities of that Member State shall provide for at least one official representative on board the flight". It results that Member States have a general obligation to maintain a supervising role in all cases of "outsourcing" of removal and that the use of airline security personnel for escorting purposes is not excluded, but must be authorised and flanked by at least one Member State official.

- Removal operations carried out by the country of destination (third-country authorities sending a plane to EU for repatriating under their supervision their nationals): Member States have an overall responsibility for the conduct of the removal operation until the hand-over to the authorities of the country of destination has been completed and the aircraft has left EU soil. The respect of fundamental rights as well as a proportionate use of means of constraint in accordance with the common EU standards set out above must, however, be ensured during the whole removal operation. For supervision purposes, a Member State representative shall observe the phase of the removal which is carried out by the country of destination. Furthermore, in the context of Frontex coordinated joint return operations, Frontex's code of conduct (see below section 7.4.) has to be observed by the country of destination until the aircraft has arrived at its final destination.

7.2. Transit by air

Legal Basis: Council Directive 2003/110/EC of 25 November 2003 on assistance in cases of transit for the purposes of removal by air

⇒ *Transit request for the purpose of removal by Air: Annex to Directive 2003/110/EC*

⇒ *List of central authorities under Article 4(5) of Directive 2003/110/EC for receiving transit requests (available as EMN ad-hoc query, return, 2015, at the EMN Europa website)*

Directive 2003/110 defines detailed measures on assistance between the competent authorities at Member State airports of transit with regard to unescorted and escorted removals by air. It provides

for a set of rules aimed at facilitating the transit of persons subject to removal in an airport of a Member State other than the Member State which has adopted and implemented the removal decision. To that end, it defines under which conditions the transit operations may take place and indicates what measures of assistance the requested Member State should provide. Requests for assistance shall be made by means of the standard form, attached to the Directive. These requests shall be sent to the central authorities of Member States, nominated for this purpose.

7.3. Joint removal operations by air

Legal Basis: Council Decision of 29 April 2004 on the organisation of joint flights for removals from the territory of two or more Member States, of third-country nationals who are subjects of individual removal orders (2004/573/EC)

⇒ List of national authorities responsible for organising and/or participating in joint flights under Article 3 of Decision 2004/573/EC (available as EMN ad-hoc query, return, 2015, at the EMN Europa website).

Decision 2004/573/EC on the organisation of joint flights for removals from the territory of two or more Member States, of third-country nationals who are subjects of individual removal orders addresses in particular the identification of common and specific tasks of the authorities responsible for organising or participating in these operations. Common Guidelines on security provisions for joint removals by air are annexed to this Council Decision. According to Article 8(5) of the Return Directive, these Guidelines have to be taken into account for any removal by air (also in purely national operations – see section 7.1. above).

7.4. FRONTEX coordinated joint removal operations

Legal Basis: Council Regulation (EC) No 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (amended by Regulation (EU) No 1168/2011), Article 9

⇒ FRONTEX Code of Conduct for Joint Return Operations coordinated by FRONTEX (Decision of the Executive Director No 2013/67 of 7.10.2013)

One of the tasks of the European Agency for the Management of Operational Cooperation at the External Borders (FRONTEX) is to provide - subject to EU return policy and in particular subject to the Return Directive as key piece of the EU return legislation - assistance for organising joint return operations (JROs) of Member States. The role of Frontex in return issues and its compliance with fundamental rights has been strengthened via an amendment of the Frontex Regulation in 2011 (Regulation No 1168/2011 of 25 October 2011 amending Council Regulation (EC) No 2007/2004).

A FRONTEX Code of Conduct (CoC) for JROs was adopted on 7 October 2013, focusing on effective forced return monitoring procedures and respect of returnees' fundamental rights and dignity during return operations.

There is a clear added value in performing FRONTEX coordinated joint return operations and Member States are encouraged to make ample use of this option.

8. Forced Return Monitoring

Legal Basis: Return Directive, Article 8(6)

⇒ List of national forced-return monitoring bodies (available as EMN ad-hoc query, return, 2015, at the EMN Europa website).

Member States shall provide for an effective forced-return monitoring system

Forced return monitoring is an important tool which may serve the interest of both the returnee and the enforcing authorities as an inbuilt control mechanism for national day-to-day return practices. Effective monitoring may help to de-escalate. It allows quickly identifying and correcting possible shortcomings. It also protects enforcing authorities – who may sometimes be subject of unjustified criticism from media or NGOs – by providing unbiased and neutral reporting.

The Return Directive doesn´t prescribe in detail, how national forced-return monitoring systems should look like. It leaves wide margin of discretion to Member States. Based on the wording of the Directive and its context, some orientation can, however, be given:

1) forced-return monitoring should be understood as covering all activities undertaken by Member States in the respect of removal (from the preparation of departure, until reception in the country of return or in the case of failed removal until return to the point of departure). It does not cover post-return monitoring (the period following reception of the returnee in a third country);
2) monitoring systems should include involvement of organisations/bodies different and independent from the authorities enforcing return ("*nemo monitor in res sua*");
3) public bodies (such as a national Ombudsman or an independent general inspection body) may act as monitor. It seems, however, problematic to assign a monitoring role to a subsection of the same administration which also carries out return/removals;

4) the mere existence of judicial remedies in individual cases or national systems of the supervision of the efficiency of national return policies cannot be considered as a valid application of Article 8(6);
5) there is no automatic obligation of States to finance all costs incurred by the monitor (such as staff costs), but Member States are obliged that – overall - a forced return monitoring is up and running ("effet utile");
6) Article 8(6) does not imply an obligation to monitor each single removal operation. A monitoring system based on spot checks and monitoring of random samples may be considered sufficient as long as the monitoring intensity is sufficiently close to guarantee overall efficiency of monitoring;
7) Article 8(6) does not imply a subjective right of a returnee to be monitored.

Further clarification:

- Monitoring of FRONTEX coordinated joint return operations: The FRONTEX Code of Conduct (CoC) for joint return operations (JROs) referred to in section 7.4. foresees that the monitor (an independent outside observer who frequently represents an NGO or another independent monitoring body entrusted by a Member State with forced return monitoring tasks under Article 8(6) of the Directive) will be given all necessary information in advance of the operation and will be involved in the return process from the pre-return phase (internal briefings) until the post-return phase (debriefing). He/she will have access to all information and physical access to any place he wishes. The observations/reports of the monitor will be included in the reporting on the JRO. Even though this is not expressly required under current legislation, the Commission considers that given the visibility and sensitivity of such operations, an independent monitor should be present in *each* JRO.

9. Postponement of removal

Legal Basis: Return Directive, Article 9

1. Member States shall postpone removal:

(a) when it would violate the principle of non-refoulement, or

(b) for as long as a suspensory effect is granted in accordance with Article 13(2).

2. Member States may postpone removal for an appropriate period taking into account the specific circumstances of the individual case. Member States shall in particular take into account:

(a) the third-country national's physical state or mental capacity;

(b) technical reasons, such as lack of transport capacity, or failure of the removal due to lack of identification.

3. If a removal is postponed as provided for in paragraphs 1 and 2, the obligations set out in Article 7(3) may be imposed on the third-country national concerned.

The Return Directive foresees two absolute interdictions: Member States are not allowed to remove a person, if removal would violate the principle of non-refoulement. Member States are also not allowed to carry out removal for as long as suspensory effect has been granted to a pending appeal.

In other cases Member States may postpone removal for an appropriate period taking into account the specific circumstances of the individual case. The catalogue of possible reasons is open and allows Member States to react flexibly to any newly arising or newly discovered circumstances justifying postponement of removal. The concrete examples listed in the Return Directive (physical or mental state of the person concerned; technical reasons, such as lack of availability of appropriate transport facilities) are indicative examples. Member States may provide also for further cases in their national implementing legislation and/or administrative practice.

Further clarification:

- Difference between period of voluntary departure and postponement of removal: Article 7 (voluntary departure) provides for a "period of grace" in order to allow for an orderly and well prepared departure. It only relates to those returnees who are expected to comply voluntarily with a return decision. Article 9 (removal) relates to those cases in which the obligation to return must be enforced by the State (because voluntary departure is not possible or indicated).

- Legal status pending postponed removal: Pending suspended removal the returnee benefits from the "safeguards pending return" listed in Article 14 (written confirmation of postponed obligation to return and some basic safeguards, such as access to emergency health care and family unity). The returnee is, however, not considered to be legally staying in a Member State, unless a Member State decides - in accordance with Article 6(4) - to grant a permit or a right to legal stay to the returnee.

- Designation to reside at a specific place pending postponed removal: Article 9(3) contains an express reference to the possibilities listed in Article 7(3) including the possibility to impose an obligation to "stay at a certain place".

10. Return of unaccompanied minors (UAMs)

The Return Directive also applies to minors, including unaccompanied minors and provides for a number of safeguards which have to be respected by Member States in this respect. Return of an unaccompanied minor is only one option for a durable solution for unaccompanied minors and any Member State action must take into account as key consideration the "best interests of the child". Before returning an unaccompanied minor, an assessment should be carried out on an individual basis taking into consideration the best interests of the child and his or her particular needs, the current situation in the family and the situation and reception conditions in the country of return. This assessment should ideally be carried out by a multi-disciplinary and experienced team and involve the child´s appointed guardian. Member States are encouraged to consider the suggestions made in this respect by the joint UNHCR-UNICEF Guidelines on the determination of the best interests of the child ("Safe and Sound", October 2014), available at: http://www.refworld.org/docid/5423da264.html and to take account of General Comment No 14 (2013) of the UN Committee on the rights of the child on the child's right to have his or her best interests taken as a primary consideration (Article 3, paragraph 1).[8]

Definition of unaccompanied minor: The Return Directive itself does not define the term unaccompanied minor. It is recommended to use the definition provided in the most recent asylum directives (e.g. in Article 2(e) of the recast Reception Conditions Directive 2013/33/EU): "*a minor who arrives on the territory of the Member States unaccompanied by an adult responsible for him or her whether by law or by the practice of the Member State concerned, and for as long as he or she is not effectively taken into the care of such a person; it includes a minor who is left unaccompanied after he or she has entered the territory of the Member States*".

10.1. Assistance by appropriate bodies

Legal Basis: Return Directive, Article 10(1)

Before deciding to issue a return decision in respect of an unaccompanied minor, assistance by appropriate bodies other than the authorities enforcing return shall be granted with due consideration being given to the best interests of the child.

Historic reminder/explanation: Article 10(1) was not contained in the Commission proposal. It was inserted into the text in the course of the trilogue negotiations following a request from the EP and directly inspired by Guideline 2(5) of the Council of Europe Guidelines on forced return which provides that "Before deciding to issue a removal order in respect of a separated child, assistance - in particular legal assistance - should be granted with due consideration given

[8] http://www2.ohchr.org/English/bodies/crc/docs/GC/CRC_C_GC_14_ENG.pdf

to the best interests of the child." The EP had proposed the wording "assistance by appropriate social services". Council preferred the wording "appropriate assistance" and the compromise found in the end was "assistance by appropriate bodies other than the authorities enforcing return".

Nature of "appropriate bodies": The "appropriate body" should be separate from the enforcing authority and could either be a governmental body (possibly a separate service within the same ministry) or a non-governmental institution or a combination of both systems, providing for multidisciplinary cooperation between government supported and non-governmental guardian- or tutorship systems. Bodies responsible for the care/protection of children shall comply with the standards established in the areas of safety, health, suitability of staff and competent supervision The different roles and responsibilities of the actors must be clear and transparent in particular for the unaccompanied minor/child to allow his/her active involvement and effective participation in all matters concerning him/her.

Nature of "assistance": Assistance should cover legal assistance but must not be limited to it. Other aspects expressly mentioned by the Return Directive, such as provision of necessary medical assistance and health care, contact with family, access to basic education etc., to further the realisation of the rights of the child as set out in the Convention on the rights of the child should also be addressed. Specific emphasis should be given to the need to discuss with the minor in advance and throughout any processes and procedures, all decisions affecting him/her.

Timing of "assistance: Assistance by "appropriate bodies" should start at the earliest point of time. This implies a timely age assessment based on the benefit of the doubt. Assistance should be a continuous and stable process, including the return phase. It may also cover the post-return phase, to ensure adequate follow-up of return. If needed, a transfer of guardianship in the Member State to a guardianship in the country of return in line with Article 10(2) should be achieved.

Age Assessment: The Return Directive contains no provisions on age assessment. Based on a systematic interpretation of the EUs immigration and asylum acquis, the Commission recommends to refer to the provisions fixed in Article 25(5) of the Asylum Procedures Directive 2013/32/EU as well as to take into account related documents developed by the European Asylum support Office (EASO) (EASO - Age assessment practice in Europe´, 2014, European Asylum Support Office).

Continuity of assistance in asylum and return procedures: Although the legal basis between the guardianship provided for to asylum seekers and the "assistance" required for unaccompanied minors/children in the return process differ, close links between the requirements laid down in the

asylum acquis and in the Return Directive exist and continuity of assistance in asylum and return procedures should be sought.

Further clarification:

- Provision of mere guardianship isn´t sufficient to comply with the obligation to provide assistance to minors, since "assistance by appropriate bodies" means more than mere guardianship.

- Everybody below 18 is a minor. In some Member States adolescents between 16 and 18 are authorised to act in their own right in the return procedures and the asylum procedures. Safeguards of the Return Directive are, however, binding for all children/minors up to the age of 18.

10.2. Return to a family member, a nominated guardian or adequate reception facilities

Legal Basis: Return Directive, Article 10(2)

Before removing an unaccompanied minor from the territory of a Member State, the authorities of that Member State shall be satisfied that he or she will be returned to

– a member of his or her family,

– a nominated guardian or

– adequate reception facilities in the State of return.

Among the options provided by Article 10(2), it is recommended that the return to family members should be the preferred one (unless this is manifestly not in the child´s best interests) and that Member States should undertake efforts to trace family members. Return to a guardian or adequate reception facilities may - under certain conditions – also be an acceptable alternative. It is recommended that the return to adequate reception facilities should not be seen as a durable solution and should preferably be accompanied by flanking reintegration and education measures.

Further clarification:

- Voluntary departure of minors: In principle, Article 10(2) only applies to situations where the child is removed and not situations where the child is leaving the host Member State voluntarily. Taking into account Member State obligation deriving from the requirement to respect the best interests of the child, it is recommended to also assess the situation in the family and the situation and reception conditions in the concrete country of return in cases of voluntary departure.

- The adequateness of reception facilities in the country of return needs to be assessed on a case by case basis, taking into account the individual circumstances and age of the returned minor. A

mere reception by the border police in the country of return without any necessary follow-up measures or flanking measures cannot be considered as "adequate reception".

11. Entry bans

Legal Basis: Return Directive, Article 3(6) and Article 11

"Entry ban" means an administrative or judicial decision or act prohibiting entry into and stay on the territory of the Member States for a specified period, accompanying a return decision.

Return decisions shall be accompanied by an entry ban:

(a) if no period for voluntary departure has been granted, or

(b) if the obligation to return has not been complied with.

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

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

The return related entry bans foreseen in the Return Directive are intended to have preventive effects and to foster the credibility of EU return policy by sending a clear message that those who disregard migration rules in EU Member States will not be allowed to re-enter any EU Member State for a specified period. The Directive obliges Member States to issue an entry ban in two "qualified" cases (no period for voluntary departure has been granted, or the obligation to return has not been complied with). In all other cases, return decisions may be accompanied by an entry ban. The length of the re-entry ban shall be determined with due regard to all relevant circumstances of the individual case. In principle it should not exceed five years. Only in cases of serious threat to public policy, public security or national security, may the re-entry ban be issued for a longer period.

The rules on return related entry bans under the Return Directive leave unaffected entry bans issued for purposes not related to migration, such as entry bans related to third-country nationals who have committed serious criminal offences or for whom there is a clear indication that there is an intention to commit such an offence (Article 24(2) SIS II Regulation (EC) No 1987/2006) or entry bans constituting a restrictive measure adopted in accordance with Chapter 2 of Title V of TEU, including measures implementing travel bans issued by the United Nations Security Council.

11.1. EU wide effect

An entry ban prohibits entry to the territory of the Member State**s**: A systematic comparison of all the linguistic versions of the Directive (in particular the EN and FR text) and the wording of recital 14 make clear that an entry ban should apply to the territory of all Member State**s**. The DK version which uses the singular ("…ophold på en medlemsstats") contains an evident translation mistake. The EU-wide effect of an entry ban is one of the key added European values of the Directive. The EU-wide effect of an entry ban must be clearly stated in the entry ban decision issued to a third-country national.

Entry bans are binding on all Member States bound by the Return Directive (i.e.: all EU Member States except UK and Ireland, plus Switzerland, Norway, Iceland and Liechtenstein).

Informing other Member States about issued entry bans: It is essential to inform other Member States about all entry bans which have been issued. Putting entry bans into the SIS is one – but not the exclusive tool – for informing other Member States. As regards those Member States which have no access to SIS, information exchange may be achieved through other channels (e.g. bilateral contacts).

No purely national entry bans: It is not compatible with the Return Directive to issue purely national migration related entry bans unless the exception referred to in Article 11(4) Return Directive is applicable (see section 11.8. below). National legislation must foresee that entry bans issued in connection with a return decision prohibit entry and stay in all Member States, e.g. by foreseeing an obligation to enter all these entry bans systematically into the SIS.

Authorisation to maintain purely national entry bans in exceptional circumstances: Normally, it is not possible to provide purely national entry ban for cases falling under the Return Directive. If, however, a third-country national subject of an entry ban issued by Member State A has a residence permit issued by Member State B and where Member State B does not want to revoke this permission, following an Article 25 SIC consultation referred to in Article 11(4) of the Return Directive, Member State A shall withdraw the EU entry ban, but may put the third-country national on its national list of alerts under Article 25(2) last sentence SIC ("lex specialis").

11.2. Link to SIS

Registration of entry bans in SIS: According to currently applicable legislation Member States may register alerts related to entry bans issued in accordance with the Return Directive in the SIS, but

are not obliged to do so. In order to give full effect to the European dimension of entry bans issued under the Return Directive, Member States are, however, expressly encouraged to do so.

NB: In a declaration made by Commission when adopting the Directive, the Commission stated that the review of the SIS II, envisaged under the review clause of Article 24(5) of Regulation (EC) No 1987/2006), will be an opportunity to propose an obligation to register in the SIS entry bans issued under this Directive. This review is due to take place three years after the date of application (April 2013) of the SIS II Regulation.

Relation between the 3-yearly review of alerts entered into the SIS (under Article 112 SIC and Article 29 SIS II Regulation) and the length of the entry ban fixed under the Return Directive: The review of alerts entered into the SIS (under Article 112 SIC and Article 29 SIS II Regulation) is a procedural requirement aimed at making sure that alerts are only kept for the time required to achieve the purpose for which they were entered. It does not impact the substantive decision of Member States to determine the length of an entry ban in accordance with the provisions of the Return Directive. If at the moment of the 3-yearly review an entry ban imposed under the Return Directive is still in force (e.g.: the ban was imposed for a 5 years period and was not withdrawn in the meantime) Member States may maintain the alert in the SIS for the remaining two year period if the alert is still necessary in view of the applicable assessment criteria (i.e. Article 11 of the Return Directive in conjunction with Article 112(4) of the Schengen Convention or Article 29(4) of Regulation (EC) No 1987/2006).

11.3. Procedural issues

Issuance of entry bans upon departure at the border in an "*in absentia*" procedure (e.g. in cases of visa overstayers presenting themselves to the border control at the airport briefly before departure): Nothing prevents Member States from launching a return procedure when acquiring knowledge about the visa overstay and to continue the procedure leading to the issuing of a return decision accompanied by an entry-ban in an "in absentia" procedure if:

1) national administrative law provides for the possibility of "in absentia" procedures and
2) these national procedures are in compliance with general principles of Union law (such as in particular the requirement to provide for a possibility to make use of the "right to a hearing").

Issuance of an entry ban to returnees who have not complied with the obligation to return within the period for voluntary departure at the moment of departure: An entry ban shall be imposed at a later stage (e.g. upon departure) as an ancillary and subsequent element of an already issued return decision if the returnee has not complied with the obligation to return, within the period for

voluntary departure. Care should, however, be taken that such practice does not have the effect of a disincentive for voluntary departure.

Illegal stay in the past: Member States cannot issue a return decision and an accompanying entry ban to persons not present on their territory who had previously (in the past) stayed illegally and who had returned to a third country before their illegal stay was noticed. If such persons re-enter a Member State again and measures under the Return Directive (return decision, entry ban) are adopted, the previous illegal stay(s) may be taken into account as an aggravating circumstance when determining the length of the entry ban. Previous illegal stays on *other* Member States territory may also be taken into account as an aggravating circumstance when determining the length of the entry ban.

Presence on Member State territory: Illegal stay on its territory is an essential prerequisite for a return decision and an accompanying entry ban. A Member State cannot issue a return decision and an accompanying entry ban to persons who are not staying on its territory. In a situation in which a person has absconded (e.g. after receiving a negative decision on an asylum application) but can still be assumed to be present on the territory of the Member State concerned, a return decision (including an entry ban) may be adopted in an "in absentia" procedure under national law.

11.4. Reasons for issuing entry bans

The Return Directive obliges Member States to issue an entry ban in two "qualified" cases:

1) no period for voluntary departure has been granted, or
2) the obligation to return has not been complied with.

In all other cases (all return decisions adopted under the Return Directive which do not fall under the two "qualified" cases) return decisions may be accompanied by an entry ban. This implies that an entry ban may also be foreseen even if the person departed voluntarily. However Member States enjoy discretion in this respect and are encouraged to exercise this discretion in a way which encourages voluntary departure.

11.5. Length of entry bans

The length of the entry ban shall be determined in accordance with national law transposing the Return Directive with due regard to all relevant circumstances of the individual case. When determining the length of the entry ban, particular account should be taken of aggravating or mitigating circumstances known to the issuing authority, such as whether:

- the third-country national concerned has already been the subject in the past of a return decision or removal order;
- the third-country national concerned has already received in the past voluntary departure and/or reintegration assistance;
- the third-country national has entered the territory of a Member State during an entry ban;
- the third-country national has cooperated or has shown unwillingness to cooperate in the return procedure;
- the third-country national has shown willingness to depart voluntarily.

In normal cases the length of the entry ban must not exceed 5 years. When determining the concrete length of the entry ban, Member States are bound to carry out an individual examination of all relevant circumstances and to respect the principle of proportionality. A Member State might envisage varying timeframes for typical case categories, such as 3 years as a general standard rule, 5 years in aggravating circumstances (repeated infringements of migration law) and 1 year in mitigating circumstances (infringements committed out of negligence only, ...) as general guidance for its administration, but it must be assured that each case will be assessed individually in accordance with the principle of proportionality. Member States may lay down in their national laws or administrative regulations the general criteria which will be taken into account for individually determining the length of the entry ban in accordance with its Article 11(2).

Serious threat to public policy, public security or national security

Historic reminder/explanation: During the negotiations of the Return Directive, disagreement existed between the EP and Council with regard to this clause. Whilst Council proposed to delete the notion of "serious" and to allow unlimited entry bans in all cases of "*threat to public policy or public security or national security*", the EP proposed to require a "*proven serious threat to public order, public security or national security*". The compromise arrived in the end ("*serious threat to public policy, public security or national security*") was a result of the Parliament accepting to delete "*proven*" (the argument which helped the EP to accept this change was the existence of recital 6 which confirms that any decision taken under the Directive must be adopted on a case-by-case basis and based on objective criteria) and Council accepting to reinsert "*serious*" (the argument which helped the Council to accept this change was the point made by one delegation which underlined that any threat to public policy would be ipso facto "serious" and that it would therefore make no real difference to have this word expressly in the text).

In cases of serious threat to public policy, public security or national security, entry bans may be issued for a longer period. Factors which may be taken into account by Member States for determining such threat may be criminal offences as well as serious administrative offences (repeated use of false identity documents; repeated and deliberate violations of migration law).

None of these factors can, however, be considered as constituting automatically and "per se" a public order threat: Member States are always bound to carry out an individual examination of all relevant circumstances and respect the principle of proportionality. The Return Directive gives no definition as to the exact meaning of this term and the ECJ case law on the use of this term in other migration directives and in the free movement context does *not* directly apply in the Return Directive context since the issues at stake and the context are different Nevertheless some considerations contained in ECJ case law (in particular on horizontal concepts such as proportionality and effet utile of Directives) may provide some steer: In Section 3 of its *2 July 2009 Communication "on guidance for better transposition and application of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States" (COM(2009)313)* the Commission provided for detailed guidance relating to the interpretation of the notion of public policy and public security in the free movement context. Moreover comparative information on the interpretations given to this term by Member States in the migration context may be taken from the results of the *EMN Ad-Hoc Query (140) on the understanding of the notions of "public policy" and "public security*".

The length of public order entry bans

Historic reminder/explanation: One issue which was left open – already in the Commission proposal for the Return Directive and later on in the negotiations – was the maximum period for public order entry bans. This was certainly no omission, but rather an anticipative recognition of the fact that it would be very hard to reconcile the views of Member States (some of which provided for the possibility of life-long or unlimited entry bans under existing national legislation) and the EP on this issue. The vague term "more than 5 years" therefore remained untouched throughout the negotiations.

The length of public order entry bans needs to be individually determined, taking into account the seriousness of the offences committed by the third-country nationals, the linked risks to public policy, public security or national security and the individual situation of the person concerned. The principle of proportionality must be respected in any case. A systematic issuing of life-long entry bans in all public order cases (without making a differentiation in accordance with the gravity of the offences and risks) is contrary to the Directive. A Member State might envisage varying timeframes for typical case categories, such as 10 years as a general standard rule for public order cases and 20 years in particularly serious circumstances.

Further clarification:

No unlimited entry bans: The length of the entry ban is a key element of the entry-ban decision. It must be determined ex-officio in advance in each individual case. The ECJ expressly confirmed this

in *Filev and Osmani*, C-297/12, (paras 27 and 34): *"It must be noted that it clearly follows from the terms '[t]he length of the entry ban shall be determined' that Member States are under an obligation to limit the effects in time of any entry ban in principle to a maximum of five years independently of an application made for that purpose by the relevant third-country national.(27) …. Article 11(2) of Directive 2008/115 must be interpreted as precluding a provision of national law …, which makes the limitation of the length of an entry ban subject to the making by the third-country national concerned of an application seeking to obtain the benefit of such a limit."*

The moment at which the clock starts ticking (when the entry ban starts applying) needs to be determined in advance: *normally* the clock should start ticking from the moment of departure or removal to a third country and not from the issuing date of the entry ban, since the EU entry ban cannot develop yet its effect in a situation in which the person has not yet left EU territory. In those cases in which it is not possible in practice to determine in advance a concrete date of departure, Member States may use another date (e.g. the issuing date).

11.6. Withdrawal/shortening/suspension of entry bans

Legal Basis: Return Directive – Article 11(3);

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

The possibility to suspend or withdraw an entry ban in those cases in which a returnee has left the territory of a Member State in full compliance with a return decision (subparagraph 1) should be used as an incentive to encourage voluntary departure. Member States shall provide a possibility in their national legislation and administrative practice to apply for withdrawal or suspension of an entry ban in these circumstances. An effort should be made to make such procedures easily accessible for the returnee and practically operational. Different possibilities exist for allowing the returnee to provide evidence as regards his/her departure from EU territory, such as: an exit stamp in the returnee´s passport, data in national border data systems or reporting back of the returnee at a consular representation of a Member State in a third country.

Shortening of entry bans: Member States are also free to shorten an existing entry ban in the circumstances addressed by Article 11(3). The possibility for Member States to withdraw an entry

ban under Article 11(3) can be interpreted as covering also a partial withdrawal (=shortening) of an entry ban.

Subparagraph 2: Victims of trafficking in human beings who have been granted a residence permit pursuant to Council Directive 2004/81/EC of 29 April 2004 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities shall not be subject of an entry ban without prejudice to paragraph 1, first subparagraph, point (b), and provided that the third-country national concerned does not represent a threat to public policy, public security or national security.

Victims of trafficking who had been previously granted a residence permit in accordance with Directive 2004/81/EC should not receive an entry ban, unless the person concerned did not comply with an obligation to return within a period of voluntary departure or if the person concerned represents a threat to public policy. This rule only applies to periods of illegal stay following *immediately* a legal stay covered by Directive 2004/81/EC. It does not create a "life-long" exemption for previous holders of permits under Directive 2004/81/EC.

Subparagraph 3: Member States may refrain from issuing, withdraw or suspend an entry ban in individual cases for humanitarian reasons.

Member States are free not to issue entry bans in individual cases for humanitarian reasons. The formulation of this exception is broad and allows Member States not to issue entry bans at all or to withdraw or suspend existing entry bans. This clause is optional and gives Member States the possibility to make use of it in accordance with their national legislation and administrative practice.

Subparagraph 4: Member States may withdraw or suspend an entry ban in individual cases or certain categories of cases for other reasons.

In cases of humanitarian catastrophes (such as earthquakes, other natural disasters or armed conflicts) in third countries which may lead to a mass influx of displaced persons, formal procedures for withdrawal of entry bans in individual cases may take too long and are not feasible. Therefore the possibility exists to provide for a horizontal suspension or withdrawal of entry bans related to the concerned groups of persons.

11.7. Sanctions for non-respect of entry ban

Non respect of an entry ban should be taken into consideration by Member States when considering the length of a further entry ban. In this context recital 14 of the Return Directive expressly provides: "*The length of the entry ban should be determined with due regard to all relevant circumstances of an individual case and should not normally exceed five years. In this context, particular account should be taken of the fact that the third-country national concerned has already been the subject of more than one return decision or removal order or has entered the territory of a Member State during an entry ban".*

The Return Directive allows Member States to provide for further sanctions under national administrative law (fine) – subject to the effet utile of the Directive and the relevant case law developed by the ECJ in this regard. When doing so, Member States should make no difference between entry bans issued by their own national authorities and authorities of other Member States as this would undermine the harmonised concept of an EU entry ban provided for in the Return Directive.

Member States may in principle declare the presence of third-country nationals who are subject of an administrative entry ban punishable as a criminal offence under criminal law. Any national measure in this field must, however, not undermine the effet utile and the harmonising effect of the relevant provisions of the Return Directive and the relevant case law developed by the ECJ in this regard. In *Filev and Osmani*, C-297/12, (para 37) the ECJ confirmed – implicitly - that it is possible to impose criminal sanctions for non-respect of a valid entry ban: "*It follows that a Member State may not impose criminal sanctions for breach of an entry ban falling within the scope of Directive 2008/115 if the continuation of the effects of that ban does not comply with Article 11(2) of that directive."* The ECJ is expected to provide further interpretation on the possibility for Member States to criminalise non-respect of an entry ban in an upcoming judgement in pending case *Skerdjan Celaj* (C-290/14).

Article 11(5) of the Return Directive clarifies, that the provisions on return-related entry bans apply without prejudice to the right to international protection under EU asylum acquis: This implies that previously issued entry bans under the Return Directive can never justify the return or penalisation of third-country nationals authorised to enter or stay in the EU as asylum seeker or as beneficiary of international protection. Such entry bans should be suspended (pending ongoing asylum procedures) or withdrawn (once international protection has been granted).

11.8. Consultation between Member States

Legal Basis: Return Directive – Article 11(4); Schengen Implementing Convention – Article 25

Where a Member State is considering issuing a residence permit or other authorisation offering a right to stay to a third-country national who is the subject of an entry ban issued by another Member State, it shall first consult the Member State having issued the entry ban and shall take account of its interests in accordance with Article 25 of the Convention implementing the Schengen Agreement.

Article 25 Schengen Implementing Convention provides:

1. Where a Member State considers issuing a residence permit, it shall systematically carry out a search in the Schengen Information System. Where a Member State considers issuing a residence permit to an alien for whom an alert has been issued for the purposes of refusing entry, it shall first consult the Member State issuing the alert and shall take account of its interests; the residence permit shall be issued for substantive reasons only, notably on humanitarian grounds or by reason of international commitments.

Where a residence permit is issued, the Member State issuing the alert shall withdraw the alert but may put the alien concerned on its national list of alerts.

1a. Prior to issuing an alert for the purposes of refusing entry within the meaning of Article 96, the Member States shall check their national records of long-stay visas or residence permits issued.

2. Where it emerges that an alert for the purposes of refusing entry has been issued for an alien who holds a valid residence permit issued by one of the Contracting Parties, the Contracting Party issuing the alert shall consult the Party which issued the residence permit in order to determine whether there are sufficient reasons for withdrawing the residence permit.

If the residence permit is not withdrawn, the Contracting Party issuing the alert shall withdraw the alert but may nevertheless put the alien in question on its national list of alerts.

3. Paragraphs 1 and 2 shall apply also to long-stay visas.

Article 25 SIC is a directly applicable provision and can be applied by Member States without transposing national legislation.

Only the Member State issuing the entry ban (Member State A) can lift the entry ban. If another Member State (Member State B) decides to issue a residence permit to the same person (after having carried out consultation with the Member State which had issued the entry ban), Member State A is obliged to withdraw the alert (Article 25(2) SIC) – but may nevertheless put the third-country national on its national list of alerts. The reasons underlying an existing entry ban issued by Member State A must be considered and taken into account by Member State B before issuing a residence permit (e.g. for family reunification purposes). In order to allow Member State B to

properly take into account the underlying reasons for the entry ban, it is essential that Member State A provides the relevant information to Member State B in due time.

Those Member States which do not yet fully apply Schengen rules and therefore cannot (yet) directly apply Article 25 SIC, should nevertheless follow the spirit of Article 11(4) and contact - if they become aware (through whatever source of information including information from the applicant) that a person is subject of an entry ban issued by another Member State - the authorities which issued the entry ban. Before issuing a residence permit to the person, the Member State should seek to "take account of the interest" of the Member State which issued the entry ban.

11.9. "Historic" entry bans

"Historic" entry bans issued before 24.12.2010 have to be adapted in line with the standards fixed in Article 11 (maximum of 5 year, individual assessment, obligation to withdraw/consider withdrawing in specific circumstances) if they develop effects for the period after 24.12.2010 and if they are not yet in line with the substantive safeguards of Article 11. Adaptation should take place either upon application of the concerned person at any moment or ex-officio at the earliest possible moment and in any case not later than at the occasion of the regular (3-yearly) review of entry bans foreseen for SIS alerts.

In *Filev and Osmani*, C-297/12, (paras 39-41 and 44) the ECJ expressly clarified: "*In that regard, it is important to note from the outset that that directive does not include a provision providing for transitional arrangements in relation to entry-ban decisions taken before it became applicable. None the less, it follows from the Court's settled case-law that new rules apply immediately, except in the event of a derogation, to the future effects of a situation which arose under the old rules…It follows that Directive 2008/115 is applicable to those effects which occur after the date of its applicability in the Member State concerned of entry-ban decisions taken under national rules which were applicable before that date. -- It follows that Article 11(2) of Directive 2008/115 precludes a continuation of the effects of entry bans of unlimited length made before the date on which Directive 2008/115 became applicable, .., beyond the maximum length of entry ban laid down by that provision, except where those entry bans were made against third-country nationals constituting a serious threat to public order, public security or national security."*

12. Procedural Safeguards

12.1. Right to good administration

Right to good administration (as enshrined in Article 41 CFR) is a fundamental right forming an integral part of EU legal order: In its judgement in G & R, the ECJ provided an important horizontal clarification on the right to be heard in relation to return and detention decisions (paras 31 and 32): "*… although the drafters of Directive 2008/115 thus intended to provide a detailed framework for the safeguards granted to the third-party nationals concerned as regards both the removal decision and the detention decision, they did not, however, specify whether, and under what conditions, observance of the right to be heard of those third-country nationals was to be ensured, nor did they specify the consequences of an infringement of that right, apart from the general requirement for release if the detention is not lawful. It is settled case-law that the rights of the defence, which include the right to be heard and the right to have access to the file, are among the fundamental rights forming an integral part of the European Union legal order and enshrined in the Charter of Fundamental Rights of the European Union. ... It is also true that observance of those rights is required even where the applicable legislation does not expressly provide for such a procedural requirement.*"

This judgement implies that Member States must always comply with the safeguards below when taking decisions related to return (i.e. return decision, entry-ban decisions, removal decisions, detention order etc…) even though this may not be expressly specified in the relevant Articles of the Return Directive:

1) the right of every person to be heard, before any individual measure which would affect him or her adversely is taken;
2) the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy;
3) the obligation of the administration to give reasons for its decisions.

Member States enjoy a significant margin of discretion how to grant the right to be heard in practice: The non-respect of this right renders a decision invalid only insofar as the outcome of the procedure would have been different if the right was respected. (ECJ in *G & R*, C-383/13). A Member State authority may fail to hear a third-country national specifically on the subject of a return decision where, after that authority has determined that the third-country national is staying illegally in the national territory within a preceding asylum procedure which fully respected that person's right to be heard, it is contemplating the adoption of a return decision. (ECJ in *Mukarubega*, C-166/13). The logic set out in *Mukarubega*: "*The right to be heard before the adoption of a return decision cannot be used in order to re-open indefinitely the administrative procedure, for the reason that the balance between the fundamental right of the person concerned to be heard before the adoption of a decision adversely affecting that person and the obligation of*

the Member States to combat illegal immigration must be maintained" can also be applied in different case constellations, such as those mentioned in Article 6(6) (decision on ending of legal stay combined with return decision).

The **right to be heard** includes a right to be heard on the possible application of Articles 5 and 6(2) to (5) of the directive and on the detailed arrangements for return. The authority must, however, not warn the third-country national, prior to the interview, that it is contemplating adopting a return decision, or disclose information on which it intends to rely as justification for that decision, or allow a period of reflection, provided that the third-country national has the opportunity effectively to present his point of view on the subject of the illegality of his stay and the reasons which might, under national law, justify that authority refraining from adopting a return decision. (ECJ in *Boudjlida*, C-249/13).

Taken into account that also Article 47 CFR (right to an effective remedy and to a fair trial) is among the fundamental rights forming an integral part of the European Union legal order and that observance of those rights is required even where the applicable legislation does not expressly provide for such a procedural requirement, the procedural safeguards contained in Articles 12 and 13 should be applied to *all* decisions related to return and must not be limited to the three types of decisions expressly mentioned in Article 12(1) (Return decision, entry ban decision and decision on removal).

Collection of information on smuggling: In line with the priorities established in the *EU Action Plan against Migrant Smuggling 2015-2020* (COM(2015)285) and in particular the need to improve gathering and sharing of information, the Commission recommends that Member States put in place adequate mechanisms in order to ensure systematic information gathering from migrants apprehended in an irregular situation, in full respects of fundamental rights and EU asylum acquis: When granting the right to be heard before adopting a return decision, Member States are encouraged to invite returnees to share information they may have related to modus operandi and routes of smuggling networks, as well as links with trafficking in human beings and other crimes, and on financial transfers. Information obtained in this context should be collected and exchanged between relevant (immigration, border, police) authorities and agencies, both at national and EU level in accordance with national law and best practices exchanged in relevant EU fora.

12.2. Decisions related to return

The Return Directive expressly regulates a number of different decisions related to return, that is:

1) Return decisions (Article 3(4) and Article 6(1));
2) Decisions on voluntary departure period as well as extension of such period (Article 7);
3) Removal decisions (Article 8(3));
4) Decisions on postponement of removal (Article 9);
5) Decisions on entry bans as well as on suspension or withdrawal of entry ban (Article 11);
6) Detention decisions as well as prolongation of detention (Article 15).

Most of the above decisions are ancillary to the return decision and should normally be adopted together with the return decision in one administrative act: return decisions may include a period of voluntary departure (Article 7), an entry ban (Article 11) and – possibly but not necessarily – a decision ordering the removal (in case of non-compliance with an eventual possibility to depart voluntarily).

Subsequent changes of these ancillary decisions are possible in certain cases:

– an entry ban may be imposed at a later stage as an ancillary and subsequent element of the already issued return decision if the person has not complied with the obligation to return, within the period for voluntary departure (Article 11(1)(b));
– an already issued entry ban may be withdrawn or suspended (Article 11(3-5));
– an already granted period of voluntary departure may be extended (Article 7(2));
– an already executable return decision (or removal order) may be postponed (Article 9).

Article 6(6) confirms a general principle, allowing Member States to combine several different decisions (including decisions not directly related to return) within one administrative or judicial act, provided the relevant safeguards and provisions for each individual decision are respected. Decisions on ending of legal stay (such as the rejection of an asylum application or the withdrawal of a visa or non-renewal of a residence permit) may therefore be adopted either separately or together with a return decision in a single administrative or judicial act.

Concrete examples:

- If a Member State decides to cancel a visa and to issue the third-country national with a time limit of 7 days to depart voluntarily from the territory of the Member State, is that decision a return decision in the context of the Return Directive? Or is it covered by other EU rules concerning visas?

⇒ Such decision may consist of two components: a visa revocation decision and a return decision within the meaning of the Return Directive. Explanation: If the visa

is cancelled with immediate effect, the person will be "illegally staying" within the meaning of Article 3(2) of the Return Directive and Article 6 (obligation to issue a return decision) as well as Article 7 (granting of period of voluntary departure) apply. The cancellation of the visa may – in parallel – be subject of an appeal in accordance with visa rules contained in the Visa Code (this possibility of adopting several decisions together with a return decision is expressly referred to in Article 6(6)).

- If a third-country national is encountered on the territory with the required visa, but nevertheless does (no longer) meet the conditions for stay (Article 5 SBC), it would seem that the Member State can suffice with issuing a return decision. Would this return decision (perhaps accompanied by an entry ban) automatically mean that the visa has lost validity?

  ⇒ According to Article 34(2) Visa Code: "a visa shall be revoked where it becomes evident that the conditions (=SBC entry conditions) for issuing it are no longer met". The authorities, which take a return decision, must also make sure that the visa is revoked. Both decisions can, however, be done within one administrative act. Issuing a return decision and letting the person depart with his/her valid (uniform) visa must be avoided.

- Can a decision rejecting an asylum application also impose an obligation to return?

  ⇒ Yes. The rejection of an asylum request and a return decision may be issued within one act in accordance with Article 6(6). – (Such a combined act consists - strictly logically speaking – of two subsequent and interrelated decisions, separated by a "logical moment".)

12.3. Form of decisions and translation

Legal Basis: Return Directive – Article 12(1)-(3)

1. Return decisions and, if issued, entry-ban decisions and decisions on removal shall be issued in writing and give reasons in fact and in law as well as information about available legal remedies. The information on reasons in fact may be limited where national law allows for the right to information to be restricted, in particular in order to safeguard national security, defence, public security and for the prevention, investigation, detection and prosecution of criminal offences.

A written decision is the basic cornerstone of the procedural safeguards provided for in the Return Directive. It is not possible to waive this requirement. The information provided to the returnee should, however, not be limited to references to the available legal remedies: Member States are encouraged to also provide other information concerning practical means of compliance with the removal order. It is recommended that the returnee should be given information as to, for instance, whether the Member State may contribute to the transportation costs, whether the returnee could benefit from a (voluntary) return programme or whether an extension of the deadline to comply with the return decision may be obtained. The returnee should also be informed of the consequences of not complying with the obligation to return in order to encourage such a person to depart voluntarily.

In accordance with Article 6(2)(2nd) of the Employers Sanctions Directive 2009/52/EC[9], returnees shall be informed about their right under the said Directive to claim back payment of outstanding remuneration from their employer as well as about available complaint mechanisms. This information could also be included in or attached to the return decision.

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

The request to receive a translation may be formulated by the returnee or his/her legal representative. The Member State is at liberty to choose whether a written or oral translation is provided warranting of course that the third-country national can understand the context and content. It is not possible to require a fee for providing a translation since this would undermine the spirit of the provision which is to provide the returnee with the necessary information to allow him/her to fully understand his/her legal situation.

It is up to national implementing legislation and administrative practice to decide, what language the third-country national is reasonably presumed to understand. This assessment may be done in the same way and according to the same criteria as in asylum procedures, taking into account that due to the complexity of asylum procedures the requirements for translation in this area may be higher (an analogous provision referring to the notion of a language the applicant is "*reasonably supposed to understand*" can be found in Article 12 of the recast Asylum Procedures Directive 2013/32/EU, Article 22 of the recast Qualification Directive 2011/95/EU and in Article 5 of the

[9] Switzerland, Norway, Iceland and Liechtenstein are not bound by this directive.

recast Reception Conditions Directive 2013/33/EU). This provision requires Member States to make all reasonable efforts to provide for a translation into a language the person concerned actually understands and the non-availability of interpreters may only be a valid excuse in cases of extremely rare languages for which there is an objective lack of interpreters. A situation in which translators into the relevant language exist, but are not available for reasons internal to the administration cannot justify non-translation.

The possibility to use templates in order to rationalise the work of the administration isn´t limited to the scope of application of 12(3) (see below). As long as the template allows providing an individualised translation of the decision in a language which the person understands or may reasonably be presumed to understand, such translation still complies with Article 12(2) and there is no need to use/refer to the derogation of Article 12(3).

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

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

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

The use of a standard form for return under Article 12(3) is a derogation to the general rules, which can only be used in those cases in which a third-country national has illegally entered the territory of a Member State. The use of a standard form in accordance with Article 12(3) is an option and not an obligation for Member States. Attention must be paid to the fact that the illegal entry cases covered by Article 12(3) are not always the same as the "border and border-like" cases described in Article 2(2)(a). Example: An illegally staying third-country national who is apprehended in the territory of a Member State three months after his/her illegal entry is not covered by Article 2(2)(a) but may still be covered by the exception of Article 12(3).

Illegal crossing of the internal borders: Paragraph 3 applies to third-country nationals "who have illegally entered the territory of a Member State and who have not subsequently obtained an authorisation or a right to stay in that Member State." In the specific context of this provision of the Return Directive, the term "illegal entry" may also cover cases in which an illegally staying third-

country national entered from another Member State in non-compliance with the conditions for entry and stay applicable in that Member State. Attention should be paid to the fact that in these specific cases (entry from another Member State) Article 6(2) or 6(3) may be applicable.

Article 12(3) contains no derogation regarding the applicable legal remedies. The legal remedies mentioned in Article 13(1) therefore have to be provided for also when the standard form mentioned in Article 12(3) is used.

12.4. Legal remedies

Legal Basis: Return Directive – Article 13(1) and (2)

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

Effective remedies should be provided as regards all decisions related to return. The term "decisions related to return" should be understood broadly, covering decisions on all issues regulated by the Return Directive, including return decisions, decisions granting or extending a period of voluntary departure, removal decisions, decisions on postponement of removal, decisions on entry bans as well as on suspension or withdrawal of entry bans. The remedies applicable in case of detention decisions as well as prolongation of detention are regulated in more detail in Article 15, dealing with detention (see below).

Nature of reviewing body: In line with Article 6 and 13 ECHR and Article 47 CFR, the appeals body must in substance be an independent and impartial tribunal. Article 13(1) is closely inspired by CoE Guideline 5.1 and it should be interpreted in accordance with relevant ECtHR case-law. In line with this case-law the reviewing body can also be an administrative authority provided this authority is composed of members who are impartial and who enjoy safeguards of independence.

Several safeguards exist to counter the risk of an eventual abuse of the possibility to appeal: Article 13 does not provide for an automatic suspensive effect in all circumstances (para 2) and free legal assistance may be limited if the appeal is unlikely to succeed (para 4). Attention should also be paid to the general principle of Union law of "res judicata" – as expressly referred to in recital 36 of the recast Asylum Procedures Directive 2013/32/EU: "Where an applicant makes a subsequent application without presenting new evidence or arguments, it would be disproportionate to oblige

Member States to carry out a new full examination procedure. In those cases, Member States should be able to dismiss an application as inadmissible in accordance with the res judicata principle."

2. The authority or body mentioned in paragraph 1 shall have the power to review decisions related to return, as referred to in Article 12(1), including the possibility of temporarily suspending their enforcement, unless a temporary suspension is already applicable under national legislation.

Suspensive effect: The appeals body must have the power to suspend the enforcement in individual cases. It should be clearly provided for in national legislation that the reviewing body itself (the body reviewing the decision related to return) has the power to suspend within the frame of one procedure.

Obligation to grant suspensive effect in case of risk of refoulement: ECtHR case-law requires automatic suspensive effect in cases in which Article 3 ECHR (risk of torture or inhuman or degrading treatment upon return) is at stake (see Rule 39, Rules of the ECtHR). Article 13 Return Directive – interpreted in conjunction with Articles 5 and 9 of the Return Directive – obliges the reviewing body to use its right to grant suspensive effect in line with this requirement if the principle of non-refoulement is at stake. When the appeal refers to other reasons (e.g. procedural shortcomings, family unity, social rights) and no irreparable damage to life is at stake, it may be legitimate in certain constellations not to grant suspensive effect.

Obligation to grant suspensive effect in case of risk of grave and irreversible deterioration of state of health: In its judgement in *Abdida*, C-562/13, para 53, the ECJ confirmed: *"Articles 5 and 13 of Directive 2008/115, taken in conjunction with Articles 19(2) and 47 of the Charter, must be interpreted as precluding national legislation which does not make provision for a remedy with suspensive effect in respect of a return decision whose enforcement may expose the third country national concerned to a serious risk of grave and irreversible deterioration in his state of health."*

12.5. Linguistic assistance and free legal aid

Legal Basis: Return Directive – Article 13(3) and (4); Articles 20 and 21 of recast Asylum Procedures Directive 2013/32/EU (replacing Article 15(3) to (6) of Asylum Procedures Directive 2005/85/EC);

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

Linguistic assistance implies not only an obligation to provide for a translation of a decision (this is already covered by Article 12(2)) but also an obligation to make available assistance by interpreters

in order to allow the third-country national to exercise the procedural rights afforded to him/her under Article 13. In this context it should be recalled that in the case of Conka v. Belgium (Judgment of 5 February 2002, No. 51564/99) the ECtHR identified the availability of interpreters as one of the factors which affect the accessibility of an effective remedy. The rights of the third-county national to receive linguistic assistance should be granted by Member States in a way which provides the person concerned with a concrete and practical possibility to make use of it ("effet utile" of the provision).

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

Legal assistance and legal representation: Paragraph 4 specifies in which cases and under which conditions Member States have to cover the costs for legal advice and representation - referring in essence to the conditions enumerated in the Asylum Procedures Directive. Member States must provide both legal assistance and legal representation if the conditions foreseen in the Directive and national implementing legislation are met.

The request for free legal assistance and/or legal representation can be made by the returnee or his/her representative at any appropriate moment of the procedure.

Provision of legal advice by administrative authorities: Legal advice may in principle be offered also by the administrative authorities responsible for issuing the return decisions, if the information provided for is objective and unbiased ("effet utile"). It is important that the information be provided by a person who acts impartially/independently so as to avoid possible conflicts of interests. This information cannot be provided therefore by the person deciding on or reviewing the case, for instance. A good practice, already in use in some Member States, is to separate between the decision making authorities and those providing legal and procedural information. However, should a Member State decide to allocate the latter responsibility to the decision making authorities, a clear separation of tasks should be ensured for the personnel involved (e.g. by creating a separate and independent section in charge only of providing legal and procedural information).

Conditions which may be imposed – reference to Article 15(3) to (6) of Directive 2005/85/EC: The reference in the Return Directive to certain conditions/limitations which Member States may foresee in respect of free legal aid is a dynamic reference and must now be read as reference to Articles 20 and 21 of the recast Asylum Procedures Directive 2013/32/EU.

Possible conditions which can be imposed by Member States: In accordance with the abovementioned provisions, Member States *may* (but need not) provide that the free legal assistance and representation is only granted:

- where the appeal is considered by a court or tribunal or other competent authority to have tangible prospect of success;
- to those who lack sufficient resources;
- through the services provided by legal advisers or other counsellors specifically designated by national law to assist and represent applicants;
- in first instance appeal procedures and not for further appeals or reviews.

Member States may also:

- impose monetary and/or time limits on the provision of free legal assistance and representation, provided that such limits do not arbitrarily restrict access to this right;
- provide that, as regards fees and other costs, the treatment of applicants shall not be more favourable than the treatment generally accorded to their nationals in matters pertaining to legal assistance;
- demand to be reimbursed wholly or partially for any costs granted if and when the applicant's financial situation has improved considerably or if the decision to grant such costs was taken on the basis of false information supplied by the applicant.

Effective remedy against refusal to grant free legal aid: Where a decision not to grant free legal assistance and representation is taken by an authority which is not a court or tribunal, Member States shall ensure that the applicant has the right to an effective remedy before a court or tribunal against that decision. The right to an effective remedy and to a fair trial is among the fundamental rights forming an integral part of the European Union legal order and observance of those rights is required even where the applicable legislation does not expressly provide for such a procedural requirement.

13. Safeguards pending return

Legal Basis: Return Directive – Article 14(1)

Member States shall, with the exception of the situation covered in Articles 16 and 17, ensure that the following principles are taken into account as far as possible in relation to third-country nationals during the period for voluntary departure granted in accordance with Article 7 and during periods for which removal has been postponed in accordance with Article 9:

(a) family unity with family members present in their territory is maintained;

(b) emergency health care and essential treatment of illness are provided;

(c) minors are granted access to the basic education system subject to the length of their stay;

(d) special needs of vulnerable persons are taken into account.

Historic reminder/explanation: The Return Directive leaves Member States the choice of either issuing return decisions to illegally staying third-country nationals or to grant permits (regularise) these persons. This approach should help to reduce grey areas. It may, however, also increase in practice the absolute number of cases in which Member States issue return decisions which cannot be enforced due to practical or legal obstacles for removal (e.g. delays in obtaining the necessary papers from third countries and non-refoulement cases). In order to avoid a legal vacuum for these persons, the Commission had proposed to provide for a minimum level of conditions of stay for those illegally staying third-country nationals for whom the enforcement of the return decision has been postponed or who cannot be removed by referring to the substance of a set of conditions already laid down in Articles 7 to 10, Article 15 and Articles 17 to 20 of the Reception Conditions Directive 2003/9/EC, covering – in essence – four basic rights: 1. family unity; 2. health care, 3. schooling and education for minors and 4. respect for special needs of vulnerable persons. Other important rights under the Reception Conditions Directive, such as access to employment and material reception conditions were not referred to. During the negotiations, Member States expressed concern that references to the Reception Conditions Directive might be perceived as an "upgrading" of the situation of irregular migrants and thus send a wrong policy message. Therefore a "self-standing" list of rights was established.

The scope of situations covered by Article 14(1) is broad: It covers the period of voluntary departure as well as any period for which removal has been formally or de-facto postponed in accordance with Article 9 Return Directive (appeal with suspensive effect; possible violation of non-refoulement principle; health reasons, technical reasons, failure of removal efforts due to lack of identification and others). Periods spent in detention are expressly excluded – since the related safeguards are regulated elsewhere (see section 15 - detention conditions).

The provision of emergency health care is a basic minimum right and access to it must not be made dependent on the payment of fees.

Access to education: The limitation of “subject to the length of their stay” should be interpreted restrictively. In cases of doubt about the likely length of stay before return, access to education should rather be granted than not be granted. A national practice where access to the education system is normally only established if the length of the stay is more than fourteen days may be considered as acceptable. As regards practical problems, such as cases in which the minor does not have a document proving the education already obtained in other countries or cases in which the minor does not speak any language in which education can be provided in the Member State, appropriate answers need to be found at national level, taking into account the spirit of the Directive

and relevant international law instruments such as the 1989 Convention of the Rights of the Child and General Comment No. 6 thereto. Inspiration may also be drawn from the asylum acquis (in particular Article 14 of the Reception Conditions Directive 2013/33). In its judgement in case, *Abdida* (C-562/13), the ECJ found that Member States are obliged to also cover other basic needs , in order to ensure that emergency health care and essential treatment of illness are in fact made available during the period in which that Member State is required to postpone removal. It is for the Member States to determine the form in which such provision for the basic needs of the third country national concerned is to be made.

The logic upon which the ECJ relied to establish this obligation was that the requirement to provide emergency health care and essential treatment of illness under Article 14(1)(b) may be rendered meaningless if there were not also a concomitant requirement to make provision for the basic needs of the third country national concerned. Based on this logic developed by the ECJ, the Commission considers that enjoyment of the other rights enumerated in Article 14(1) (such as in particular: access to education and taking into account needs of vulnerable persons) also give rise to a concomitant requirement to make provision for the basic needs of the third country national concerned.

Even though there is no general legal obligation under Union law to make provision for the basic needs of *all* third country nationals pending return, the Commission encourages Member States to do so under national law, in order to assure humane and dignified conditions of life for returnees

13.1. Written confirmation

Legal Basis: Return Directive – Article 14(2)

Member States shall provide the persons referred to in paragraph 1 with a written confirmation in accordance with national legislation that the period for voluntary departure has been extended in accordance with Article 7(2) or that the return decision will temporarily not be enforced.

Form of the written confirmation: Member States enjoy wide discretion. The confirmation can either be a separate paper issued by the national authorities or part of a formal decision related to return. It is important that it allows the returnee to clearly demonstrate – in case of a police control – that he/she is already subject of a pending return decision and that he/she benefits from a period of voluntary departure, a formal postponement of removal or that he/she is subject of a return decision which can temporarily not be enforced. The confirmation should specify, if possible, the length of the period of voluntary departure or the postponement. Recital 12 of the Return Directive specifies:

"*In order to be able to demonstrate their specific situation in the event of administrative controls or checks, such persons should be provided with written confirmation of their situation. Member States should enjoy wide discretion concerning the form and format of the written confirmation and should also be able to include it in decisions related to return adopted under this Directive."* In Member States in which data exchange systems allow for the quick verification of the status of irregular migrants in case of police controls on the basis of certain personal data or reference numbers, the written confirmation requirement can be considered as fulfilled if the person is provided with (or already owns) documents or papers containing these personal data or reference numbers.

13.2. Situations of protracted irregularity

No obligation to grant a permit to non-removable returnees: Member States are not obliged to grant a permit to returnees once it becomes clear that there is no more reasonable prospect of removal, but Member States are free to do so at any moment. In this regard the ECJ expressly clarified in *Mahdi*, C-146/14, paras 87 and 88: " … *the purpose of the directive is not to regulate the conditions of residence on the territory of a Member State of third-country nationals who are staying illegally and in respect of whom it is not, or has not been, possible to implement a return decision. - However, Article 6(4) of Directive 2008/115 enables the Member States to grant an autonomous residence permit or other authorisation offering a right to stay for compassionate, humanitarian or other reasons to a third-country national staying illegally on their territory".*

Criteria to take into account for granting permits: As highlighted above, there is no legal obligation to issue permits to non-removable returnees for Member States and Member States enjoy broad discretion. It is recommended that the assessment criteria that could be taken into account by Member States include both individual (case related) as well as horizontal (policy related) elements such as in particular:

– the cooperative/non-cooperative attitude of the returnee;
– the length of factual stay of the returnee in the Member State;
– integration efforts made by the returnee;
– personal conduct of the returnee;
– family links;
– humanitarian considerations;
– the likelihood of return in the foreseeable future;
– need to avoid rewarding irregularity;

– impact of regularisation measures on migration pattern of prospective (irregular) migrants;
– likelihood of secondary movements within Schengen area.

14. Detention

As already set out above, the procedural safeguards listed in Articles 12 (form and translation) and Article 13 (effective remedy and free legal aid) of the Return Directive are express manifestations of the right to good administration (Article 41 CFR) as well as the right to an effective remedy and a fair trial (Article 47 CFR) forming an integral part of the European Union legal order and observance of those rights is required also with regard to detention decisions.

On top of these general requirements, Article 15 of the Return Directive sets out certain requirements specifically applicable in relation to detention decisions.

14.1. Circumstances justifying detention

Legal Basis: Return Directive – Article 15(1)

Unless other sufficient but less coercive measures can be applied effectively in a specific case, Member States may only keep in detention a third-country national who is the subject of return procedures in order to prepare the return and/or carry out the removal process, in particular when:

(a) there is a risk of absconding or
(b) the third-country national concerned avoids or hampers the preparation of return or the removal process.

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

Imposing detention for the purpose of removal is a serious intrusion into the fundamental right of liberty of persons and therefore subject to strict limitations.

Obligation to impose detention only as a measure of last resort: Article 8(1) of the Return Directive obliges Member States to take "all necessary measures to enforce the return decision". The possibility to impose detention is one of the possible measures which may be used by Member States as a measure of last resort. The ECJ has in this context expressly highlighted in *El Dridi*, C-61/11, para 41 that the Return Directive foresees a "*a gradation of the measures to be taken in order to enforce the return decision, a gradation which goes from the measure which allows the person*

concerned the most liberty, namely granting a period for his voluntary departure, to measures which restrict that liberty the most, namely detention in a specialised facility." An obligation on Member States to apply detention therefore only exists in situations in which it is clear that the use of detention is the only way to make sure that the return process can be prepared and the removal process can be carried out. Any detention shall be for as short a period as possible and only maintained as long as removal arrangements are in progress and executed with due diligence.

Reasons for detention: The sole legitimate objective of detention under the Return Directive is to prepare the return and/or to carry out the removal process, in particular when there is 1) a risk of absconding or; 2) avoidance or hampering of the preparation of return or the removal process by the returnee. Even though the wording of the Return Directive is phrased as an indicative listing ("in particular"), these two concrete case constellations cover the main case scenarios encountered in practice. The existence of a reason for detention - and the non-availability of less coercive measures – must be individually assessed in each case. A refusal of entry at the border, the existence of a SIS record, lack of documentation, lack of residence, absence of cooperation and other relevant indications/criteria need to be taken into account when assessing whether there is a risk of absconding and a resulting need for detention (see section 1.6. above).

No detention for public order reasons: The possibility of maintaining or extending detention for public order reasons is not covered by the text of the Directive and Member States are not allowed to use immigration detention for the purposes of removal as a form of "light imprisonment". The primary purpose of detention for the purposes of removal is to assure that returnees do not undermine the execution of the obligation to return by absconding. It is not the purpose of Article 15 to protect society from persons which constitute a threat to public policy or security. The - legitimate - aim to "protect society" should rather be addressed by other pieces of legislation, in particular criminal law, criminal administrative law and legislation covering the ending of legal stay for public order reasons. See also ECJ in *Kadzoev*, C-357/09, para 70: "*The possibility of detaining a person on grounds of public order and public safety cannot be based on Directive 2008/115. None of the circumstances mentioned by the referring court (aggressive conduct; no means of support; no accommodation) can therefore constitute in itself a ground for detention under the provisions of that directive."* The past behaviour/conduct of a person posing a risk to public order and safety (e.g. non-compliance with administrative law in other fields than migration law or infringements of criminal law) may, however, be taken into account when assessing whether there is a risk of absconding (see section 1.6. above): If the past behaviour/conduct of the person concerned allows drawing the conclusion that the person will probably not act in compliance with the law and avoid return, this may justify a prognosis that there is a risk of absconding.

Obligation to provide for alternatives to detention: Article 15(1) must be interpreted as requiring each Member State to provide in its national legislation for alternatives to detention; this is also consistent with the terms of Recital 16 to the Directive ("*..if application of less coercive measures would not be sufficient*"). In *El Dridi*, C-61/11, para 39, the ECJ confirmed: *"..it follows from recital 16 in the preamble to that directive and from the wording of Article 15(1) that the Member States must carry out the removal using the least coercive measures possible. It is only where, in the light of an assessment of each specific situation, the enforcement of the return decision in the form of removal risks being compromised by the conduct of the person concerned that the Member States may deprive that person of his liberty and detain him."*

Benefits and risks - alternatives to detention

The benefits of providing for alternatives to detention (examples include: residence restrictions, open houses for families, case-worker support, regular reporting, surrender of ID/travel documents, bail, electronic monitoring, etc.) may include higher return rates (including voluntary departure), improved co-operation with returnees in obtaining necessary documentation, financial benefits (less cost for the State) and less human cost (avoidance of hardship related to detention).

Risks include an increased likelihood of absconding, possible creation of pull factors (alternative detention facilities such as family houses may be perceived as attractive for potential irregular immigrants) and possible social tensions in the neighbourhood of open centres.

Recommendation: The challenge is to find intelligent solutions with an appropriate mix of rewards and deterrents. A complete absence of deterrents may lead to insufficient removal rates. At the same time an overly repressive system with systematic detention may also be inefficient, since the returnee has little incentive or encouragement to co-operate in the return procedure. Tailored individual coaching, which empowers the returnee to take in hand his/her own return has proven to be successful. A systematic horizontal coaching of all potential returnees, covering advice on possibilities for legal stay/asylum as well as on voluntary/enforced return from an early stage (and not only once forced removal decisions are taken) should be aimed at.

Further clarification:

- Being subject of return procedures: The formal requirement to "be subject of a return procedure" in Article 15(1) is not synonymous with "to be subject of a return decision". Detention may already be imposed – if all conditions of Article 15 are fulfilled - before a formal return decision is taken

(e.g. while the preparations of the return decision are under way and a return decision has not yet been issued).

Concrete examples:

- An illegally staying third-country national may hide (not disclose) his/her identity in order to avoid removal. Is it legitimate to maintain detention in such circumstances, in order to exercise pressure on the third-country national to co-operate and thus make his/her removal possible?

  ⇒ *This kind of detention is covered by Article 15: Article 15(1)(b) expressly mentions "avoiding or hampering the return process" as a reason for detaining; Article 15(6)(a) lists "lack of cooperation" as one of the two cases which may justify an extension of the maximum detention period for 12 months and the overall objective and finality of this kind of detention ("Beugehaft" or "Durchsetzungshaft") is removal - not penalisation. Of course any detention for the purpose of removal must respect Article 15(4): "When it appears that a reasonable prospect of removal no longer exists for legal or other considerations or the conditions laid down in paragraph 1 no longer exist, detention ceases to be justified and the person concerned shall be released immediately." This implies that in those cases in which it becomes clear that there are no more reasonable prospects of removal detention must be ended (for instance when it becomes clear that the papers to be issued by a third country will come too late or will not be issued at all, even if the detainee would cooperate).*

- Is it possible to maintain detention if a returnee submits an asylum application?

⇒ *Answer provided by ECJ in Arslan, C-534/11: "Article 2(1) of Directive 2008/115, … does not apply to a third-country national who has applied for international protection within the meaning of Directive 2005/85 during the period from the making of the application to the adoption of the decision at first instance on that application or, as the case may be, until the outcome of any action brought against that decision is known." (para 49) "Directives 2003/9 and 2005/85 do not preclude a third-country national who has applied for international protection within the meaning of Directive 2005/85 after having been detained under Article 15 of Directive 2008/115 from being kept in detention on the basis of a provision of national law, where it appears, after an assessment on a case-by-case basis of all the relevant circumstances, that the application was made solely to delay or jeopardise the enforcement of the return decision and that it is objectively necessary to maintain detention to prevent the person concerned from permanently evading his return."(para 63)*
NB: The above reference to "national law" (underlined) relates to national rules on asylum related

detention, transposing – as the case may be – the detention related requirements of the EU asylum acquis.

14.2. Form and initial review of detention

Legal Basis: Return Directive – Article 15(2)

Detention shall be ordered by administrative or judicial authorities.

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

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

(a) either provide for a speedy judicial review of the lawfulness of detention to be decided on as speedily as possible from the beginning of detention;

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

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

Judicial authorities may consist of judges, but need not necessarily be composed of judges. In line with relevant ECtHR case-law they must have characteristics of independence, impartiality and offer judicial guarantees of an adversial procedure.

Scope of judicial review: The review must assess all aspects expressly referred to in Article 15, taking into account both the questions of law (correctness of the detention procedure and of the decision on detention from the procedural/legal point of view) and questions of facts (the personal situation of the detainee,, family links in the country, guarantees of the departure from the territory, reasonable prospect of removal etc.)

Maximum duration of "speedy judicial review": The text of the Return Directive is inspired by the wording of Article 5(4) ECHR which requires a "speedy judicial review by a Court". Pertinent ECtHR case law clarifies that an acceptable maximum duration ("reasonable time") cannot be defined in the abstract. It must be determined in the light of the circumstances of each case, taking into account the complexity of the proceedings as well as the conduct by the authorities and the

applicant. Taking a decision within *less than one week* can certainly be considered as *best practice* which is compliant with the legal requirement of speediness.

Requirement of written decision also applies to prolongation decisions: The requirement to issue a written decision with reasons also applies to decisions concerning prolongation of detention. In *Mahdi*, C-146/14, the ECJ expressly clarified (para 44): "*The requirement that a decision be adopted in writing must be understood as necessarily covering all decisions concerning extension of detention, given that (i) detention and extension of detention are similar in nature since both deprive the third-country national concerned of his liberty in order to prepare his return and/or carry out the removal process and (ii) in both cases the person concerned must be in a position to know the reasons for the decision taken concerning him.*"

Right to be heard applies to detention decisions and decisions on prolongation of detention. However, the non-respect of this right renders a decision invalid only insofar as the outcome of the procedure would have been different if the right was respected. See ECJ in *G & R*, C-383/13: *"…European Union law, in particular Article 15(2) and (6) of Directive 2008/115/EC, must be interpreted as meaning that, where the extension of a detention measure has been decided in an administrative procedure in breach of the right to be heard, the national court responsible for assessing the lawfulness of that extension decision may order the lifting of the detention measure only if it considers, in the light of all of the factual and legal circumstances of each case, that the infringement at issue actually deprived the party relying thereon of the possibility of arguing his defence better, to the extent that the outcome of that administrative procedure could have been different."* (See also introduction to section 12).

14.3. Regular review of detention

Legal Basis: Return Directive – Article 15(3)

In every case, detention shall be reviewed at reasonable intervals of time either on application by the third-country national concerned or ex officio.

No written review decision required under Article 15(3) 1st sentence: This was clarified by the ECJ in *Mahdi*, C-146/14, para 47: "*the provisions of Article 15 of Directive 2008/115 do not require the adoption of a written 'review measure' …. The authorities which carry out the review of a third-country national's detention at regular intervals pursuant to the first sentence of Article 15(3) of the directive are therefore not obliged, at the time of each review, to adopt an express measure in*

writing that states the factual and legal reasons for that measure." Member States are, however, free to adopt a written review decision in accordance with national law.

Combined review and prolongation decisions must be adopted in writing: In its judgement *Mahdi*, C-146/14, the ECJ clarified (para 48): "*In such a case, the review of the detention and the decision on the further course to take concerning the detention occur in the same procedural stage. Consequently, that decision must fulfil the requirements of Article 15(2) of Directive 2008/115*."

In the case of prolonged detention periods, reviews shall be subject to the supervision of a judicial authority.

Meaning of "prolonged detention": Article 15(3) 2nd sentence requires an ex-officio judicial control/supervision in cases of "prolonged detention". This implies the need for action by judicial authorities, also in those cases in which the concerned person does not appeal. Based on a linguistic comparison of the term "prolonged detention" (DE: "Bei längerer Haftdauer"; FR: "En cas de périodes de rétention prolongées"; NL: In het geval van een lange periode van bewaring ES: En caso de periodos de internamiento prolongados IT: Nel caso di periodi di trattenimento prolungati;….) it is clear that this term refers in substance to "a long period of detention" independently of the fact that a formal decision on prolongation was already taken or not. The Commission considers that an interval of 6 months for the first ex-officio judicial review is certainly too long, whilst a three monthly ex-officio judicial review may be considered at the limit of what might still be compatible with 15(3), provided that there is also a possibility to launch individual reviews upon application if needed.

Powers of the supervising judicial authority: A review mechanism which only examines questions of law and not questions of fact is not sufficient. The judicial authority must have the power to decide both on the facts and legal issues. See ECJ in *Mahdi*, C-146/14, para 62: *"… the judicial authority having jurisdiction must be able to substitute its own decision for that of the administrative authority or, as the case may be, the judicial authority which ordered the initial detention and to take a decision on whether to order an alternative measure or the release of the third-country national concerned. To that end, the judicial authority ruling on an application for extension of detention must be able to take into account both the facts stated and the evidence adduced by the administrative authority and any observations that may be submitted by the third-country national. Furthermore, that authority must be able to consider any other element that is relevant for its decision should it so deem necessary…."*

14.4. Ending of detention

Legal Basis: Return Directive – Article 15(4)-(6)

4. When it appears that a reasonable prospect of removal no longer exists for legal or other considerations or the conditions laid down in paragraph 1 no longer exist, detention ceases to be justified and the person concerned shall be released immediately.

5. Detention shall be maintained for as long a period as the conditions laid down in paragraph 1 are fulfilled and it is necessary to ensure successful removal. Each Member State shall set a limited period of detention, which may not exceed six months.

6. Member States may not extend the period referred to in paragraph 5 except for a limited period not exceeding a further twelve months in accordance with national law in cases where regardless of all their reasonable efforts the removal operation is likely to last longer owing to:

(a) a lack of cooperation by the third-country national concerned, or
(b) delays in obtaining the necessary documentation from third countries.

Detention must be ended and the returnee released in a number of different situations, such as in particular if

- there is no more reasonable prospect of removal;
- removal arrangements aren´t properly followed up by the authorities;
- the maximum time limits for detention have been reached.

Furthermore an end should be given to detention on a case by case basis if alternatives to detention become an appropriate option.

14.4.1. Absence of reasonable prospect of removal

Absence of reasonable prospect of removal: In *Kadzoev*, C-357/09, para 67, the ECJ provided a clarifying interpretation of the meaning of "reasonable prospect": *Only a real prospect that removal can be carried out successfully, having regard to the periods laid down in Article 15(5) and (6), corresponds to a reasonable prospect of removal. That reasonable prospect does not exist where it appears unlikely that the person concerned will be admitted to a third country, having regard to those periods.*

Absence of reasonable prospect" is not the same as "impossibility to enforce": "Impossibility to enforce" is a more categorical assertion and more difficult to demonstrate than “absence of reasonable prospect" which refers to certain degree of likeliness only.

Periods of detention which should be taken into account when assessing the "reasonable prospect of removal": Given the emphasis put by Article 15 (as well as recital 6) on a concrete individual case-by-case assessment for determining the proportionality of deprivation of liberty, regard must always be taken of the maximum detention periods for the concerned individual in the concrete case. This means that the maximum periods laid down by national law of the concerned Member State are relevant. This also implies that a returnee should not be detained in a Member State if it appears unlikely from the beginning that the person concerned will be admitted to a third country within the maximum detention period allowed under the legislation of that Member State. (NB: In *Kadzoev*, C-357/09, the ECJ referred to the maximum periods under the Directive, since these were the same as the maximum periods under the applicable legislation in the concerned Member State.)

Once the maximum periods of detention have been reached, Article 15(4) isn´t applicable anymore and the person must in any event be released immediately. See ECJ in *Kadzoev*, C-357/09, paras 60 and 61: *"It is clear that, where the maximum duration of detention provided for in Article 15(6) of Directive 2008/115 has been reached, the question whether there is no longer a ‘reasonable prospect of removal’ within the meaning of Article 15(4) does not arise. In such a case the person concerned must in any event be released immediately. Article 15(4) of Directive 2008/115 can thus only apply if the maximum periods of detention laid down in Article 15(5) and (6) of the directive have not expired."*

Concrete examples:

- Is it legitimate to maintain detention if the third-country national for the time being is protected from removal because of the principle of non refoulement?

  ⇒ *If removal becomes unlikely – e.g. because of a likely permanent non-refoulement issue - persons must be released under Article 15(4). If the non-refoulement issue is only of limited and temporary nature (e.g. a credible diplomatic assurance from the country of return is likely to be issued shortly; the returnee is temporarily in need for vital medical treatment which is not available in country of return) detention may be maintained – if there is still a reasonable prospect of removal.*

14.4.2. Reaching the maximum period of detention

Article 15(5) and (6) obliges Member States to fix under national law[10] maximum time limits for detention which may not exceed 6 months (in regular cases) or 18 months (in two qualified cases: lack of cooperation by the returnee or delays in obtaining the necessary documentation from third countries).

The – sometimes shorter – maximum detention periods fixed by national law prevail over the 6/18 months deadline provided for by the Return Directive: In the handling of concrete cases, the maximum periods fixed by national law (in compliance with the Return Directive) and not the maximum periods fixed by the Return Directive must be applied. This implies that a Member State which has fixed a national maximum of e.g. 12 months for non-cooperating returnees cannot maintain detention beyond 12 months, even though Article 15(6) provides for a frame of up to 18 months.

Return Directive complies with ECtHR case-law on length of detention: In *El-Dridi*, para 43, the ECJ recognised that the Return Directive endorses the relevant ECtHR case law and Council of Europe standards: *"Directive 2008/115 is … intended to take account both of the case-law of the European Court of Human Rights, according to which the principle of proportionality requires that the detention of a person against whom a deportation or extradition procedure is under way should not continue for an unreasonable length of time, that is, its length should not exceed that required for the purpose pursued (see, inter alia, ECtHR, Saadi v United Kingdom, 29 January 2008, , § 72 and 74), and of the eighth of the 'Twenty guidelines on forced return' adopted on 4 May 2005 by the Committee of Ministers of the Council of Europe, referred to in recital 3 in the preamble to the directive. According to that guideline, any detention pending removal is to be for as short a period as possible."* Notwithstanding new developments in ECtHR jurisprudence, Member States can therefore normally rely on the fact that compliance with the rules fixed by the Return Directive also implies compliance with ECtHR jurisprudence (principle of equivalence set forth by ECtHR in Bosphorus case).

Examples for reasons justifying/not-justifying prolonged detention under Article 15(6):

– An absence of identity documents as such is not sufficient to justify prolonged detention. See ECJ in *Mahdi*, C-146/14, (para 73): *"…the fact that the third-country national concerned has no identity documents cannot, on its own, be a ground for extending detention under Article 15(6) of Directive 2008/115."*

[10] An overview on the different time-limits applicable under national law can be found at: http://ec.europa.eu/smart-regulation/evaluation/search/download.do?documentId=10737855 (page 44-50). This overview reflects the situation of December 2013 and some national rules have changed in the meantime.

– Non-cooperation in obtaining identity documents may justify prolonged detention if there is a causal link between the non-cooperation and non-return. See ECJ in *Mahdi*, C-146/14, (para 85): *"… only if an examination of his conduct during the period of detention shows that he has not cooperated in the implementation of the removal operation and that it is likely that that operation lasts longer than anticipated because of that conduct, …"*

Further clarification:

Taking into account periods of detention as an asylum seeker: When calculating the period of detention for the purpose of removal, periods of detention as asylum seeker need not be taken into account, since detention for removal purposes and detention of asylum seekers fall under different legal rules and regimes. If, however, due to administrative shortcomings or procedural mistakes no proper decision on imposing asylum related detention was taken and the person remained in detention based on the national rules on detention for the purpose of removal, then this period must be taken into account (see ECJ in *Kadzoev*, C-357/09, paras 45 and 48: *"Detention for the purpose of removal governed by Directive 2008/115 and detention of an asylum seeker in particular under Directives 2003/9 and 2005/85 and the applicable national provisions thus fall under different legal rules. Consequently, … a period during which a person has been held in a detention centre on the basis of a decision taken pursuant to the provisions of national and Community law concerning asylum seekers may not be regarded as detention for the purpose of removal within the meaning of Article 15 of Directive 2008/115."* And para 47*: "Should it prove to be the case that no decision was taken on Mr Kadzoev's placement in the detention centre in the context of the procedures opened following his applications for asylum, referred to in paragraph 19 above, so that his detention remained based on the previous national rules on detention for the purpose of removal or on the provisions of Directive 2008/115, Mr Kadzoev's period of detention corresponding to the period during which those asylum procedures were under way would have to be taken into account in calculating the period of detention for the purpose of removal mentioned in Article 15(5) and (6) of Directive 2008/115."*

Taking into account periods of detention pending preparation of Dublin transfer: The same logic as set out above (in relation to periods of detention as asylum seeker) applies.

Taking into account periods of detention during which an appeal with suspensive effect is pending: Such periods must be taken into account. See ECJ in *Kadzoev*, paras 53-54: *"The period of detention completed by the person concerned during the procedure in which the lawfulness of the removal decision is the subject of judicial review must … be taken into account for calculating the*

maximum duration of detention laid down in Article 15(5) and (6) of Directive 2008/115. If it were otherwise, the duration of detention for the purpose of removal could vary, sometimes considerably, from case to case within a Member State or from one Member State to another because of the particular features and circumstances peculiar to national judicial procedures, which would run counter to the objective pursued by Article 15(5) and (6) of Directive 2008/115, namely to ensure a maximum duration of detention common to the Member States".

Taking into account periods of detention for the purpose of removal spent in (another) Member State A, immediately followed by pre-removal detention in Member State B (Such a situation may for instance arise in the context of the transfer of an irregular migrant from Member State A to Member State B under a bilateral readmission agreement covered by Article 6(3)): The Commission considers that the absolute 18 months threshold of uninterrupted pre-removal detention should not be exceeded, in view of the need to respect the effet utile of the maximum time limit fixed by Article 15(6). An exchange of information between Member States on periods of detention already spent in another Member State as well as an eventual possibility for Member State B to refuse transfer from Member State A if Member State A made the request excessively late should be addressed under the relevant bilateral readmission agreements.

Taking into account periods of detention completed before the rules in the Return Directive became applicable: Such periods must be taken into account (see ECJ in *Kadzoev*, C-357/09, paras 36-38).

14.5. Re-detention of returnees

The maximum deadlines for detention prescribed by the Return Directive must not be undermined by re-detaining returnees immediately, following their release from detention.

Re-detention of the same person at a later stage may only be legitimate if an important change of relevant circumstance has taken place (for instance the issuing of necessary papers by a third country or an improvement of the situation in the country of origin, allowing for safe return), if this change gives rise to a "reasonable prospect of removal" in accordance with Article 15(4) and if all other conditions for imposing detention under Article 15 are fulfilled.

14.6. Application of less coercive measures after ending of detention

Less coercive measures, such as regular reporting to the authorities, deposit of an adequate financial guarantee, submission of documents or the obligation to stay at a certain place may be imposed as long as and to the extent that they can still be considered a "necessary measure" to enforce return.

Unlike for detention, there are no absolute maximum time limits foreseen for the application of less coercive measures.

If, however, the nature and intensity of a less coercive measures is similar or equal to deprivation of liberty (such as the imposition of an unlimited obligation to stay at a specific facility, without possibility to leave such facility) it must be considered as a *de facto* continuation of detention and the time limits foreseen in Article 15(5) and (6) apply.

15. Detention conditions

Legal Basis: Return Directive – Article 16

1. Detention shall take place as a rule in specialised detention facilities. Where a Member State cannot provide accommodation in a specialised detention facility and is obliged to resort to prison accommodation, the third-country nationals in detention shall be kept separated from ordinary prisoners

2. Third-country nationals in detention shall be allowed — on request — to establish in due time contact with legal representatives, family members and competent consular authorities.

3. Particular attention shall be paid to the situation of vulnerable persons. Emergency health care and essential treatment of illness shall be provided.

4. Relevant and competent national, international and non-governmental organisations and bodies shall have the possibility to visit detention facilities, as referred to in paragraph 1, to the extent that they are being used for detaining third-country nationals in accordance with this Chapter. Such visits may be subject to authorisation.

5. Third-country nationals kept in detention shall be systematically provided with information which explains the rules applied in the facility and sets out their rights and obligations. Such information shall include information on their entitlement under national law to contact the organisations and bodies referred to in paragraph 4.

15.1. Initial Police custody

Initial police arrest for identification purposes is covered by national law. This is expressly highlighted in Recital 17 of the Return Directive: *"Without prejudice to the initial apprehension by law-enforcement authorities, regulated by national legislation, detention should, as a rule, take*

place in specialised detention facilities". This clarifies that during an initial period national law may continue to apply. Even though this is no legal obligation, Member States are encouraged to make sure already at this stage that irregular migrants are kept separated from ordinary prisoners.

Length of the initial apprehension period during which suspected irregular migrants may be kept in police custody: A brief, but reasonable time. See answer provided by ECJ in *Achughbabian* (point 31): *" It should be held, in that regard, that the competent authorities must have a brief but reasonable time to identify the person under constraint and to research the information enabling it to be determined whether that person is an illegally-staying third-country national. Determination of the name and nationality may prove difficult where the person concerned does not cooperate. Verification of the existence of an illegal stay may likewise prove complicated, particularly where the person concerned invokes a status of asylum seeker or refugee. That being so, the competent authorities are required, in order to prevent the objective of Directive 2008/115, as stated in the paragraph above, from being undermined, to act with diligence and take a position without delay on the legality or otherwise of the stay of the person concerned."* Even though there is no detailed binding timeframe, the Commission encourages Member States to make sure that a transfer to a specialised detention facility for irregular migrants normally takes place within 48 hours after apprehension (exceptionally, longer periods may be admissible in case of remote geographic locations).

15.2. Use of specialised facilities as a general rule

Use of specialised facilities is the general rule: Returnees are no criminals and deserve treatment different from ordinary prisoners. The use of specialised facilities is therefore the general rule foreseen by the Return Directive. Member States are required to detain illegally staying third-country nationals for the purpose of removal in specialised detention facilities, and not in ordinary prisons. This implies an obligation on Member States to make sure that sufficient places in detention facilities are available, in order to tackle foreseeable irregular migration challenges.

Exceptions to the general rule: The derogation foreseen in Article 16(1) which allows Member States to house pre-removal detainees in exceptional cases in ordinary prisons must be interpreted restrictively. This was expressly confirmed by the ECJ in *Bero* (C-473/13) and *Bouzalmate* (C-514/13) para 25*:* "*The second sentence of ... Article 16(1) … lays down a derogation from that principle, which, as such, must be interpreted strictly (see, to this effect, the judgment in Kamberaj, C-571/10, EU:C:2012:233, paragraph 86).*

Unpredictable peaks in the number of detainees: The derogation foreseen in Article 16(1) may be applied when unforeseen peaks in the number of detainees caused by unpredictable quantitative fluctuations inherent to the phenomenon of irregular migration (not yet reaching the level of an "emergency situation" expressly regulated in Article 18) cause a problem to place detainees in special facilities in a Member State which otherwise disposes of an adequate/reasonable number of specialised facilities.

Aggressive detainees: Returnees in detention should be protected from aggressive or inappropriate behaviour of other returnees. Member States are encouraged to look for practical ways for addressing this challenge within the specialised facilities and without resorting to prison accommodation. Possible solutions might include reserving certain parts/wings of detention centres to aggressive persons, or to have special detention centres reserved for this category of persons.

Absence of special detention facilities in a regional part of a Member State: The absence of special detention facilities in a regional part of a Member State - while in another part of the same Member State they exist - cannot justify per se a stay in an ordinary prison. This was expressly confirmed by the ECJ in *Bero*, C-473/1) and *Bouzalmate*, C-514/13, (para 32) "*Article 16(1) of Directive 2008/115 must be interpreted as requiring a Member State, as a rule, to detain illegally staying third-country nationals for the purpose of removal in a specialised detention facility of that State even if the Member State has a federal structure and the federated state competent to decide upon and carry out such detention under national law does not have such a detention facility."*

Brief detention periods: The fact that detention is likely to last for a brief period (such as 7 days) only, is no legitimate reason to exceptionally resort to prison accommodation.

Detention in closed medical/psychiatric institutions: Pre-removal detention in closed medical/psychiatric institutions or together with persons detained on medical grounds is not envisaged by Article 16(1) and would run contrary to its effet utile.

15.3. Separation from ordinary prisoners

Obligation to keep returnees and prisoners separated is an absolute requirement: The Return Directive provides for an unconditional obligation requiring illegally staying third-country nationals to be kept separated from ordinary prisoners when a Member State cannot provide, exceptionally, accommodation for those third-country nationals in specialised detention facilities.

Ex-prisoners subject of subsequent return: Once the prison sentence has come to an end and the person should have been normally released, rules for detention for the purpose of removal (including the obligation under Article 16(1) to carry out detention in specialised facilities) start applying. If the preparation for removal and possibly also the removal itself is carried out in a period still covered by the prison sentence, prison accommodation can be maintained (since this is still covered by the sentence for the previously committed crime). Member States are encouraged to start the identification process necessary for removal already well in advance while persons are still serving their prison sentence in a prison.

Aggressive detainees: Aggressive or inappropriate behaviour of returnees does not justify to detain these persons together with ordinary prisoners unless an act of aggression is qualified as crime and a related prison sentence was imposed by a Court.

The term “ordinary prisoners” covers both convicted prisoners and prisoners on remand: This is confirmed by Guideline 10 paragraph 4 of the "20 Guidelines on forced return" of the Committee of Ministers of the Council of Europe, 4.5.2005, which explicitly highlights that "*persons detained pending their removal from the territory should not normally be held together with ordinary prisoners, convicted or on remand."* Detainees must therefore also be separated from prisoners on remand.

Agreement by returnee to be detained together with prisoners is not possible: In *Pham,* C-474/13, paras 21 and 22, the ECJ expressly confirmed: "*In that regard, the obligation requiring illegally staying third-country nationals to be kept separated from ordinary prisoners, laid down in the second sentence of Article 16(1) of that directive, is more than just a specific procedural rule for carrying out the detention of third-country nationals in prison accommodation and constitutes a substantive condition for that detention, without observance of which the latter would, in principle, not be consistent with the directive. In this context, a Member State cannot take account of the wishes of the third-country national concerned.*"

15.4. Material detention conditions

Return Directive – Article 16; CoE Guideline on forced return No 10 ("conditions of detention pending removal"); CPT standards; 2006 European Prison Rules;

The Return Directive itself provides for a number of concrete safeguards. Member States are obliged:

- to provide emergency health care and essential treatment of illness.

- to pay attention to the situation of vulnerable persons;
- to provide detainees with information which explains the rules applied in the facility and sets out their rights and obligations. It is recommended that this information should be given as soon as possible and not later than 24 hours after arrival;
- to allow detainees to establish contact with legal representatives, family members and competent consular authorities;
- to provide relevant and competent national, international and non-governmental organisations and bodies the possibility to visit detention facilities. This right must be granted directly to the concerned bodies, independently of a concrete invitation from the detainee.

As regards those issues which are not expressly regulated by the Return Directive, Member States need to comply with relevant Council of Europe standards, in particular the "CPT standards": The Return Directive does not regulate certain material detention conditions, such as the size of rooms, access to sanitary facilities, access to open air, nutrition, etc. during detention. Its recital 17 confirms, however, that detainees must be treated in a 'humane and dignified manner' with respect for their fundamental rights and in compliance with international law. Whenever Member States impose detention for the purpose of removal, this must be done under conditions that comply with Article 4 CFR, which prohibits inhuman or degrading treatment. The practical impact of this obligation on Member States is set out in more detail in particular in:

1) the Council of Europe Guideline on forced return No 10 ("conditions of detention pending removal");
2) the standards established by the Council of Europe Committee on the Prevention of Torture ('CPT standards', document CPT/Inf/E (2002) 1 — Rev. 2013, available at: www.cpt.coe.int/en/docsstandards.htm), addressing specifically the special needs and status of irregular migrants in detention;
3) the 2006 European Prison Rules (Recommendation Rec(2006)2 of the Committee of Ministers to Member States) as basic minimum standards on all issues not adressed by the abovementioned standards;
4) the UN Standard Minimum Rules for the Treatment of Prisoners (approved by the Economic and Social Council by its resolutions 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977).

These standards represent a generally recognised description of the detention-related obligations which should be complied with by Member States in any detention as an absolute minimum, in

order to ensure compliance with ECHR obligations and obligations resulting from the CFR when applying EU law:

CoE Guideline 10 - Conditions of detention pending removal

1. Persons detained pending removal should normally be accommodated within the shortest possible time in facilities specifically designated for that purpose, offering material conditions and a regime appropriate to their legal situation and staffed by suitably qualified personnel.

2. Such facilities should provide accommodation which is adequately furnished, clean and in a good state of repair, and which offers sufficient living space for the numbers involved. In addition, care should be taken in the design and layout of the premises to avoid, as far as possible, any impression of a "carceral" environment. Organised activities should include outdoor exercise, access to a day room and to radio/television and newspapers/magazines, as well as other appropriate means of recreation.

3. Staff in such facilities should be carefully selected and receive appropriate training. Member states are encouraged to provide the staff concerned, as far as possible, with training that would not only equip them with interpersonal communication skills but also familiarise them with the different cultures of the detainees. Preferably, some of the staff should have relevant language skills and should be able to recognise possible symptoms of stress reactions displayed by detained persons and take appropriate action. When necessary, staff should also be able to draw on outside support, in particular medical and social support.

4. Persons detained pending their removal from the territory should not normally be held together with ordinary prisoners, whether convicted or on remand. Men and women should be separated from the opposite sex if they so wish; however, the principle of the unity of the family should be respected and families should therefore be accommodated accordingly.

5. National authorities should ensure that the persons detained in these facilities have access to lawyers, doctors, non-governmental organisations, members of their families, and the UNHCR, and that they are able to communicate with the outside world, in accordance with the relevant national regulations. Moreover, the functioning of these facilities should be regularly monitored, including by recognised independent monitors.

6. Detainees shall have the right to file complaints for alleged instances of ill-treatment or for failure to protect them from violence by other detainees. Complainants and witnesses shall be

protected against any ill-treatment or intimidation arising as a result of their complaint or of the evidence given to support it.

7. Detainees should be systematically provided with information which explains the rules applied in the facility and the procedure applicable to them and sets out their rights and obligations. This information should be available in the languages most commonly used by those concerned and, if necessary, recourse should be made to the services of an interpreter. Detainees should be informed of their entitlement to contact a lawyer of their choice, the competent diplomatic representation of their country, international organisations such as the UNHCR and the International Organization for Migration (10M), and non-governmental organisations. Assistance should be provided in this regard.

CPT-standards on immigration detention – extracts

29. (detention facilities). ….Obviously, such centres should provide accommodation which is adequately-furnished, clean and in a good state of repair, and which offers sufficient living space for the numbers involved. Further, care should be taken in the design and layout of the premises to avoid as far as possible any impression of a carceral environment. As regards regime activities, they should include outdoor exercise, access to a day room and to radio/television and newspapers/magazines, as well as other appropriate means of recreation (e.g. board games, table tennis). The longer the period for which persons are detained, the more developed should be the activities which are offered to them.

The staff of centres for immigration detainees has a particularly onerous task. Firstly, there will inevitably be communication difficulties caused by language barriers. Secondly, many detained persons will find the fact that they have been deprived of their liberty when they are not suspected of any criminal offence difficult to accept. Thirdly, there is a risk of tension between detainees of different nationalities or ethnic groups. Consequently, the CPT places a premium upon the supervisory staff in such centres being carefully selected and receiving appropriate training. As well as possessing well-developed qualities in the field of interpersonal communication, the staff concerned should be familiarised with the different cultures of the detainees and at least some of them should have relevant language skills. Further, they should be taught to recognise possible symptoms of stress reactions displayed by detained persons (whether post-traumatic or induced by socio-cultural changes) and to take appropriate action.

79. Conditions of detention for irregular migrants should reflect the nature of their deprivation of liberty, with limited restrictions in place and a varied regime of activities. For example, detained irregular migrants should have every opportunity to remain in meaningful contact with the outside world (including frequent opportunities to make telephone calls and receive visits) and should be restricted in their freedom of movement within the detention facility as little as possible. Even when conditions of detention in prisons meet these requirements – and this is certainly not always the case – the CPT considers the detention of irregular migrants in a prison environment to be fundamentally flawed, for the reasons indicated above.

82. The right of access to a lawyer should include the right to talk with a lawyer in private, as well as to have access to legal advice for issues related to residence, detention and deportation. This implies that when irregular migrants are not in a position to appoint and pay for a lawyer themselves, they should benefit from access to legal aid.

Further, all newly arrived detainees should be promptly examined by a doctor or by a fully-qualified nurse reporting to a doctor. The right of access to a doctor should include the right – if an irregular migrant so wishes – to be examined by a doctor of his/her choice; however, the detainee might be expected to meet the cost of such an examination.

Notifying a relative or third party of one's choice about the detention measure is greatly facilitated if irregular migrants are allowed to keep their mobile phones during deprivation of liberty or at least to have access to them.

90. The assessment of the state of health of irregular migrants during their deprivation of liberty is an essential responsibility in relation to each individual detainee and in relation to a group of irregular migrants as a whole. The mental and physical health of irregular migrants may be negatively affected by previous traumatic experiences. Further, the loss of accustomed personal and cultural surroundings and uncertainty about one's future may lead to mental deterioration, including exacerbation of pre-existing symptoms of depression, anxiety and post-traumatic disorder.

91. At a minimum, a person with a recognised nursing qualification must be present on a daily basis at all centres for detained irregular migrants. Such a person should, in particular, perform the initial medical screening of new arrivals (in particular for transmissible diseases, including tuberculosis), receive requests to see a doctor, ensure the provision and distribution of prescribed medicines, keep the medical documentation and supervise the general conditions of hygiene.

2006 European Prison Rules – Extracts

Accommodation

18.1 The accommodation provided for prisoners, and in particular all sleeping accommodation, shall respect human dignity and, as far as possible, privacy, and meet the requirements of health and hygiene, due regard being paid to climatic conditions and especially to floor space, cubic content of air, lighting, heating and ventilation.

18.2 In all buildings where prisoners are required to live, work or congregate:

a. the windows shall be large enough to enable the prisoners to read or work by natural light in normal conditions and shall allow the entrance of fresh air except where there is an adequate air conditioning system;

b. artificial light shall satisfy recognised technical standards; and

c. there shall be an alarm system that enables prisoners to contact the staff without delay.

Hygiene

19.1 All parts of every prison shall be properly maintained and kept clean at all times.

19.2 When prisoners are admitted to prison the cells or other accommodation to which they are allocated shall be clean.

19.3 Prisoners shall have ready access to sanitary facilities that are hygienic and respect privacy.

19.4 Adequate facilities shall be provided so that every prisoner may have a bath or shower, at a temperature suitable to the climate, if possible daily but at least twice a week (or more frequently if necessary) in the interest of general hygiene.

19.5 Prisoners shall keep their persons, clothing and sleeping accommodation clean and tidy.

19.6 The prison authorities shall provide them with the means for doing so including toiletries and general cleaning implements and materials.

19.7 Special provision shall be made for the sanitary needs of women.

Clothing and bedding

20.1 Prisoners who do not have adequate clothing of their own shall be provided with clothing suitable for the climate.

20.2 Such clothing shall not be degrading or humiliating.

20.3 All clothing shall be maintained in good condition and replaced when necessary.

20.4 Prisoners who obtain permission to go outside prison shall not be required to wear clothing that identifies them as prisoners.

21. Every prisoner shall be provided with a separate bed and separate and appropriate bedding, which shall be kept in good order and changed often enough to ensure its cleanliness.

Nutrition

22.1 Prisoners shall be provided with a nutritious diet that takes into account their age, health, physical condition, religion, culture and the nature of their work.

22.2 The requirements of a nutritious diet, including its minimum energy and protein content, shall be prescribed in national law.

22.3 Food shall be prepared and served hygienically.

22.4 There shall be three meals a day with reasonable intervals between them.

22.5 Clean drinking water shall be available to prisoners at all times.

22.6 The medical practitioner or a qualified nurse shall order a change in diet for a particular prisoner when it is needed on medical grounds.

Prison regime

25.1 The regime provided for all prisoners shall offer a balanced programme of activities.

25.2 This regime shall allow all prisoners to spend as many hours a day outside their cells as are necessary for an adequate level of human and social interaction.

25.3 This regime shall also provide for the welfare needs of prisoners.

25.4 Particular attention shall be paid to the needs of prisoners who have experienced physical, mental or sexual abuse.

Exercise and recreation

27.1 Every prisoner shall be provided with the opportunity of at least one hour of exercise every day in the open air, if the weather permits.

27.2 When the weather is inclement alternative arrangements shall be made to allow prisoners to exercise.

27.3 Properly organised activities to promote physical fitness and provide for adequate exercise and recreational opportunities shall form an integral part of prison regimes.

27.4 Prison authorities shall facilitate such activities by providing appropriate installations and equipment.

27.5 Prison authorities shall make arrangements to organise special activities for those prisoners who need them.

27.6 Recreational opportunities, which include sport, games, cultural activities, hobbies and other leisure pursuits, shall be provided and, as far as possible, prisoners shall be allowed to organise them.

27.7 Prisoners shall be allowed to associate with each other during exercise and in order to take part in recreational activities.

Freedom of thought, conscience and religion

29.1 Prisoners' freedom of thought, conscience and religion shall be respected.

29.2 The prison regime shall be organised so far as is practicable to allow prisoners to practise their religion and follow their beliefs, to attend services or meetings led by approved representatives of such religion or beliefs, to receive visits in private from such representatives of their religion or beliefs and to have in their possession books or literature relating to their religion or beliefs.

29.3 Prisoners may not be compelled to practise a religion or belief, to attend religious services or meetings, to take part in religious practices or to accept a visit from a representative of any religion or belief.

Ethnic or linguistic minorities

38.1 Special arrangements shall be made to meet the needs of prisoners who belong to ethnic or linguistic minorities.

38.2 As far as practicable the cultural practices of different groups shall be allowed to continue in prison.

38.3 Linguistic needs shall be met by using competent interpreters and by providing written material in the range of languages used in a particular prison.

Health care.

40.3 Prisoners shall have access to the health services available in the country without discrimination on the grounds of their legal situation.

40.4 Medical services in prison shall seek to detect and treat physical or mental illnesses or defects from which prisoners may suffer.

40.5 All necessary medical, surgical and psychiatric services including those available in the community shall be provided to the prisoner for that purpose.

Medical and health care personnel

41.1 Every prison shall have the services of at least one qualified general medical practitioner.

41.2 Arrangements shall be made to ensure at all times that a qualified medical practitioner is available without delay in cases of urgency.

41.3 Where prisons do not have a full-time medical practitioner, a part-time medical practitioner shall visit regularly.

41.4 Every prison shall have personnel suitably trained in health care.

41.5 The services of qualified dentists and opticians shall be available to every prisoner.

Duties of the medical practitioner

42.1 The medical practitioner or a qualified nurse reporting to such a medical practitioner shall see every prisoner as soon as possible after admission, and shall examine them unless this is obviously unnecessary.

42.2 The medical practitioner or a qualified nurse reporting to such a medical practitioner shall examine the prisoner if requested at release, and shall otherwise examine prisoners whenever necessary.

42.3 When examining a prisoner the medical practitioner or a qualified nurse reporting to such a medical practitioner shall pay particular attention to:

a. observing the normal rules of medical confidentiality;

b. diagnosing physical or mental illness and taking all measures necessary for its treatment and for the continuation of existing medical treatment;

c. recording and reporting to the relevant authorities any sign or indication that prisoners may have been treated violently;

d. dealing with withdrawal symptoms resulting from use of drugs, medication or alcohol;

e. identifying any psychological or other stress brought on by the fact of deprivation of liberty;

f. isolating prisoners suspected of infectious or contagious conditions for the period of infection and providing them with proper treatment;

g. ensuring that prisoners carrying the HIV virus are not isolated for that reason alone;

h. noting physical or mental defects that might impede resettlement after release;

i. determining the fitness of each prisoner to work and to exercise; and

j. making arrangements with community agencies for the continuation of any necessary medical and psychiatric treatment after release, if prisoners give their consent to such arrangements.

Health care provision

46.1 Sick prisoners who require specialist treatment shall be transferred to specialised institutions or to civil hospitals, when such treatment is not available in prison.

46.2 Where a prison service has its own hospital facilities, they shall be adequately staffed and equipped to provide the prisoners referred to them with appropriate care and treatment.

16. Detention of minors and families

Legal Basis: Return Directive – Article 17

1. Unaccompanied minors and families with minors shall only be detained as a measure of last resort and for the shortest appropriate period of time.

2. Families detained pending removal shall be provided with separate accommodation guaranteeing adequate privacy.

3. Minors in detention shall have the possibility to engage in leisure activities, including play and recreational activities appropriate to their age, and shall have, depending on the length of their stay, access to education.

4. Unaccompanied minors shall as far as possible be provided with accommodation in institutions provided with personnel and facilities which take into account the needs of persons of their age.

5. The best interests of the child shall be a primary consideration in the context of the detention of minors pending removal.

Also in the context of detention of minors and families, the principles already applicable according to the general rules on detention in Article 15 (detention only as a measure of last resort, preference to be given to alternatives, individual assessment of each case,…) should be scrupulously applied. The best interests of the child must always be a primary consideration in the context of detention of minors and families.

The text of Article 17 of the Return Directive corresponds closely to the text of *CoE Guideline 11. – Children and families*. Further concrete guidance can be found in the commentary to this Guideline:

CoE Guideline 11 – Children and families

Commentary

1. Paragraphs 1, 3 and 5 of this Guideline are inspired from the relevant provisions of the Convention on the Rights of the Child, adopted and opened for signature, ratification and accession by General Assembly Resolution 44/25 of 20 November 1989 and ratified by all the member states of the Council of Europe. With respect to paragraph 2, it could be recalled that the right to respect for family life granted under Article 8 ECHR also applies in the context of detention.

2. Concerning the deprivation of liberty of children, Article 37 of the Convention on the Rights of the Child provides in particular that "arrest, detention or imprisonment of a child shall be in

conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time" (Article. 37(b). According to Article 20(1) of this Convention, "A child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State".

3. Inspiration was also found in para. 38 of the United Nations Rules for the protection of juveniles deprived of their liberty, adopted by General Assembly Resolution 45/113 of 14 December 1990, which apply to any deprivation of liberty, understood as "any form of detention or imprisonment or the placement of a person in a public or private custodial setting, from which this person is not permitted to leave at will, by order of any judicial, administrative or other public authority" (para. 11, b). According to para. 38: "Every juvenile of compulsory school age has the right to education suited to his or her needs and abilities and designed to prepare him or her for return to society. Such education should be provided outside the detention facility in community schools wherever possible and, in any case, by qualified teachers through programmes integrated with the education system of the country so that, after release, juveniles may continue their education without difficulty. Special attention should be given by the administration of the detention facilities to the education of juveniles of foreign origin or with particular cultural or ethnic needs. Juveniles who are illiterate or have cognitive or learning difficulties should have the right to special education".

4. The last paragraph reflects the guiding principle of the Convention on the rights of the child whose Article 3(1) states that "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration". As a matter of course, this also applies to decisions concerning the holding of children facing removaI from the territory.

As regards detention of children, the 'CPT standards' provide for the following rules which should be respected by Member States whenever they apply – exceptionally and as a measure of last resort – detention:

CPT-standards related to detention of minors - extracts

97. The CPT considers that every effort should be made to avoid resorting to the deprivation of liberty of an irregular migrant who is a minor. Following the principle of the "best interests of the child", as formulated in Article 3 of the United Nations Convention on the Rights of the Child, detention of children, including unaccompanied and separated children, is rarely justified and, in the Committee's view, can certainly not be motivated solely by the absence of residence status.

When, exceptionally, a child is detained, the deprivation of liberty should be for the shortest possible period of time; all efforts should be made to allow the immediate release of unaccompanied or separated children from a detention facility and their placement in more appropriate care. Further, owing to the vulnerable nature of a child, additional safeguards should apply whenever a child is detained, particularly in those cases where the children are separated from their parents or other carers, or are unaccompanied, without parents, carers or relatives.

98. As soon as possible after the presence of a child becomes known to the authorities, a professionally qualified person should conduct an initial interview, in a language the child understands. An assessment should be made of the child's particular vulnerabilities, including from the standpoints of age, health, psychosocial factors and other protection needs, including those deriving from violence, trafficking or trauma. Unaccompanied or separated children deprived of their liberty should be provided with prompt and free access to legal and other appropriate assistance, including the assignment of a guardian or legal representative. Review mechanisms should also be introduced to monitor the ongoing quality of the guardianship.

99. Steps should be taken to ensure a regular presence of, and individual contact with, a social worker and a psychologist in establishments holding children in detention. Mixed-gender staffing is another safeguard against ill-treatment; the presence of both male and female staff can have a beneficial effect in terms of the custodial ethos and foster a degree of normality in a place of detention. Children deprived of their liberty should also be offered a range of constructive activities (with particular emphasis on enabling a child to continue his or her education).

100. In order to limit the risk of exploitation, special arrangements should be made for living quarters that are suitable for children, for example, by separating them from adults, unless it is considered in the child's best interests not to do so. This would, for instance, be the case when children are in the company of their parents or other close relatives. In that case, every effort should be made to avoid splitting up the family.

131. Effective complaints and inspection procedures are basic safeguards against ill-treatment in all places of detention, including detention centres for juveniles. Juveniles (as well as their parents or legal representatives) should have avenues of complaint open to them within the establishments' administrative system and should be entitled to address complaints – on a confidential basis – to an independent authority. Complaints procedures should be simple, effective and child-friendly, particularly regarding the language used. Juveniles (as well as their parents or legal

representatives) should be entitled to seek legal advice about complaints and to benefit from free legal assistance when the interests of justice so require.

132. The CPT also attaches particular importance to regular visits to all detention centres for juveniles by an independent body, such as a visiting committee, a judge, the children's Ombudsman or the National Preventive Mechanism (established under the Optional Protocol to the United Nations Convention against Torture – OPCAT) with authority to receive – and, if necessary, take action on – juveniles' complaints or complaints brought by their parents or legal representatives, to inspect the accommodation and facilities and to assess whether these establishments are operating in accordance with the requirements of national law and relevant international standards. Members of the inspection body should be proactive and enter into direct contact with juveniles, including by interviewing inmates in private.

17. Emergency situations

Legal Basis: Return Directive – Article 18

1. In situations where an exceptionally large number of third-country nationals to be returned places an unforeseen heavy burden on the capacity of the detention facilities of a Member State or on its administrative or judicial staff, such a Member State may, as long as the exceptional situation persists, decide to allow for periods for judicial review longer than those provided for under the third subparagraph of Article 15(2) and to take urgent measures in respect of the conditions of detention derogating from those set out in Articles 16(1) and 17(2).

2. When resorting to such exceptional measures, the Member State concerned shall inform the Commission. It shall also inform the Commission as soon as the reasons for applying these exceptional measures have ceased to exist.

3. Nothing in this Article shall be interpreted as allowing Member States to derogate from their general obligation to take all appropriate measures, whether general or particular, to ensure fulfilment of their obligations under this Directive.

Scope of possible derogations limited to three provisions: Article 18 provides for a possibility for Member States not to apply three detention related provisions of the Directive (namely: the obligation to provide for a speedy initial judicial review of detention; the obligation to detain only in specialised facilities and the obligation to provide separate accommodation guaranteeing

adequate privacy to families) in emergency situations involving the sudden arrival of large numbers of irregular migrants. Derogations to other rules contained in the Return Directive are not possible.

Transposition into national law is a precondition for a possible application of the emergency clause: Article 18 describes and limits the situations covered, as well as the scope of possible derogations and information obligations to the Commission. If a Member State wishes to have the option to apply this safeguard clause in case of emergency situations, it must have properly transposed it beforehand[11] – as a possibility and in line with the criteria of Article 18 – into its national legislation. (NB: contrary to safeguard clauses contained in Regulations (e.g. those in the SBC related to the reintroduction of internal border control) safeguard clauses in Directives must be transposed into national law before they can be used.)

Information concerning a possible use of the emergency clause should be passed by Member States to the Commission by means of the usual official channels, i.e. via the Permanent Representation to the Secretariat General of the European Commission.

18. Transposition, interpretation and transitional arrangements

Direct effect of the Return Directive in case of insufficient or belated transposition: According to the doctrine developed by the ECJ, provisions of a directive which confer rights on individuals and which are sufficiently clear and unconditional become directly applicable as of the end of the time limit for the implementation of the Directive. Many of the provisions of the Return Directive fulfil these requirements and have to be directly applied by national administrative and judicial authorities in those cases in which Member States have not transposed (or insufficiently transposed) certain provisions of the Directive. This applies in particular to the provisions related to:

- respect for the principle of non-refoulement (Articles 5 and 9);
- the requirement that persons to be returned should normally be offered an appropriate period for voluntary departure of between seven and thirty days (Article 7);
- limitations on the use of coercive measures in connection with forced returns (Article 8);
- right of unaccompanied minors who are subject of return procedures to receive assistance by appropriate bodies other than the authorities enforcing return and the obligation on Member States to make sure that unaccompanied minors are only

[11] As regards the specific situation of Switzerland, Norway, Iceland and Liechtenstein: see related footnote in section 2. above.

returned to a member of their family, a nominated guardian or adequate reception facilities in the State of return (Article 10);

- limitations on the length of entry bans and need for individualised case by case examination; (Article 11) (This was expressly confirmed by ECJ in *Filev-Osmani*, C-297/12, para 55);
- procedural safeguards, including the right to a written, reasoned return decision, as well as the right to an effective remedy and to legal and linguistic assistance (Articles 12 and 13);
- limitations on the use of detention and maximum time limits for detention (Article 15) and right to human and dignified detention conditions (Article 16). (This was expressly confirmed by ECJ in *El Dridi*, C-61/11 (paras 46 and 47);
- limitations and special safeguards relating to the detention of minors and families (Article 17).

Preliminary references to ECJ: Article 267 TFEU gives the ECJ jurisdiction to give preliminary rulings concerning the interpretation and validity of the Return Directive. Where such a question is raised before any court or tribunal of a Member State, that court or tribunal *may*, if it considers that a decision on the question is necessary to enable it to give judgment, request the ECJ to give a ruling thereon. Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal *shall* bring the matter before the Court. If such a question is raised in a case pending before a court or tribunal with regard to a person in detention, the ECJ shall act by means of an accelerated urgency procedure. Preliminary references have already played an important role for assuring a harmonized interpretation of several key provisions of the Return Directive. See summary of ECJ references in the introductory section of this Handbook.

Members of courts or tribunals in Member States are encouraged to make continued use of preliminary references and to ask for authentic interpretation to the ECJ whenever this appears necessary.

Transitional arrangements for cases/procedures related to periods before 24.12.2010: Member States must make sure that all persons covered by the scope of the Directive benefit from the substantive safeguards and rights accorded by the Directive as of 24.12.2010 (as of accession date in case of new Member States). Whilst it may be legitimate to continue national return procedures launched in accordance with pre-transposition national legislation, this must not undermine in substance the rights afforded by the Directive (such as, for example, limitation on detention and use

of coercive measures, procedural safeguards including right to a written decision and to appeal against it, priority for voluntary departure): For any return not already carried out by 24.12.2010, a written return decision must be issued in accordance with the terms of Article 12 of the Directive, and an effective remedy against this decision must be afforded in accordance with the terms of Article 13 of the Directive. "Historic" entry bans issued before 24.12.2010 must be adapted to the requirements of the Return Directive (see section 11.9. (historic entry bans) above). Periods of detention completed before the rules in the Return Directive became applicable must be taken into account for the calculation of the overall maximum time limit provided for in the Return Directive (see section 14.4.2. (maximum detention periods) above).

Introduction of a derogation from the scope at a later stage (after 2010): Member States may decide to make use of the derogation foreseen in Article 2 (Border cases and criminal law cases) at a later stage. This change to national legislation must not have disadvantageous consequences with regard to those persons who were already able to avail themselves of the effects of the Return Directive ⇒ See section 2 (scope) above.

19. Sources and reference documents

This Handbook is based on the following sources:

1. Compiled minutes of Contact Group Return Directive (document MIGRAPOL CC Return 51).

2. Extracts from relevant ECJ cases (with keywords and name of Member State concerned in brackets):

- Judgment of 30 November 2009, *Kadzoev* (C-357/09 PPU) ECLI:EU:C:2009:741 (detention – reasons for prolongation; link to asylum related detention - BG)
- Judgment of 28 April 2011, *El Dridi* (C-61/11 PPU) ECLI:EU:C:2011:268 (criminalisation - penalisation of illegal stay by imprisonment - IT)
- Judgment of 6 December 2011, *Achughbabian* (C-329/11) ECLI:EU:C:2011:807 (criminalisation – penalisation of illegal stay by imprisonment - FR)
- Judgment of 6 December 2012, *Sagor* (C-430/11) ECLI:EU:C:2012:777 (criminalisation – penalisation of illegal stay by fine; expulsion order; house arrest - IT)
- Order of 21 March 2013, *Mbaye* (C-522/11) ECLI:EU:C:2013:190 (criminalisation of illegal stay - IT)
- Judgment of 30 May 2013, *Arslan* (C-534/11) ECLI:EU:C:2013:343 (return vs asylum related detention - CZ)
- Judgment of 10 September 2013, *G. and R.* (C-383/13 PPU) ECLI:EU:C:2013:533 (right to be heard before prolonging detention - NL)

– Judgment of 19 September 2013, *Filev and Osmani* (C-297/12) ECLI:EU:C:2013:569 (entry bans – need to determine ex-officio length; historic entry bans - DE)

– Judgment of 5 June 2014, *Mahdi* (C-146/14 PPU) ECLI:EU:C:2014:1320 (detention – reasons for prolongation and judicial supervision - BG)

– Judgment of 3 July 2014, *Da Silva* (C-189/13) ECLI:EU:C:2014:2043 (criminalisation – illegal entry – FR)

– Judgment of 17 July 2014, *Bero* (C-473/13) and Bouzalmate (C-514/13)ECLI:EU:C:2014:2095 (detention conditions – obligation to provide for specialised facilities - DE)

– Judgment of 17 July 2014, *Pham* (C-474/13) ECLI:EU:C:2014:2096 (detention conditions – not at disposal of detainee - DE)

– Judgment of 6 November 2014, *Mukarubega* (C-166/13) ECLI:EU:C:2014:2336 (right to be heard before issuing a return decision - FR)

– Judgment of 11 December 2014 *Boudjlida* (C-249/13) ECLI:EU:C:2014:2431 (right to be heard before issuing a return decision - FR)

- Judgment of 18 December 2014, *Abdida* (C-562/13) ECLI:EU:C:2014:2453 (rights pending postponed return - BE)

– Judgment of 23 April 2015, *Zaizoune* (C-38/14) ECLI:EU:C:2015:260 (obligation to issue return decision - ES)

– Case *Zh. and O.* (C-554/13) pending (criteria for determining voluntary departure period - NL)

– Case *Skerdjan Celaj* (C-290/14) pending (criminalisation of non-compliance with an entry ban - IT)

– Case *Mehrabipari* (C-390/14) pending (criminalisation – imprisonment after 18 months of detention - CY)

- Case *Arias* (C-456/14) pending (interpretation of Directive 2001/40/EC - ES)

– Case *Affum* (C-47/15) pending (definition of illegal stay; criminalisation – illegal entry – FR)

3. The EU return acquis:

– Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals

– Council Directive 2003/110/EC of 25 November 2003 on assistance in cases of transit for the purposes of removal by air

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

– Council Decision 2004/191/EC setting out the criteria and practical arrangements for the compensation of the financial imbalances resulting from the application of Directive 2001/40/EC

– Council Decision 2004/573/EC of 29 April 2004 on the organisation of joint flights for removals from the territory of two or more Member States, of third-country nationals who are subjects of individual removal orders

4. Relevant CoE documents:

– "20 Guidelines on forced return" adopted by the Council of Europe Committee of Ministers on 4.5.2005 and commentaries (see: CoE Publishing, September 2005, ISBN 92-871-5809-6)
– CPT standards (document CPT/Inf/E (2002) 1 — Rev. 2013)
– Recommendation Rec(2006)2 of the Committee of Ministers to Member States on the European Prison Rules (Adopted by the Committee of Ministers on 11 January 2006 at the 952nd meeting of the Ministers' Deputies)

5. Relevant Frontex documents:

– 7 October 2013 Code of Conduct for joint return operations coordinated by FRONTEX

6. Relevant Fundamental Rights Agency (FRA) documents:

– October 2012 guidance document on the fundamental rights considerations of apprehending migrants in an irregular situation
– Handbook on European law relating to asylum, borders and immigration (co-edited by FRA and ECtHR) (edition 2014)

20. Abbreviations used:

Member States - Member States bound by the Return Directive, i.e.: All EU Member States, except UK and Ireland as well as Switzerland, Norway, Iceland and Liechtenstein.

ECJ – European Court of Justice

FRONTEX – European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union

FRA – Fundamental Rights Agency

CoE – Council of Europe

ECHR – European Convention on Human Rights

ECtHR – European Court of Human Rights

EEA- European Economic Area

UAM – unaccompanied minor

TFEU – Treaty on the Functioning of the European Union

TEU – Treaty on European Union

CFR – Charter of Fundamental Rights of the European Union

SIC – Schengen Implementing Convention

SIS – Schengen Information System

SBC – Schengen Borders Code