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EUROPEAN
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Brussels, 12.9.2018
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2018/0329 (COD)

Proposal for a

DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

**on common standards and procedures in Member States for returning illegally staying
third-country nationals (recast)**

*A contribution from the European Commission to the Leaders' meeting in
Salzburg on 19-20 September 2018*

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE PROPOSAL

- **Reasons for and objectives of the proposal**

This proposal is part of a package of measures proposed by the Commission as a follow up to the European Council of 28 June 2018¹ that underlined the necessity to significantly step up the effective return of irregular migrants, and welcomed the intention of the Commission to make legislative proposals for a more effective and coherent European return policy. The main principles agreed in the conclusions of the European Council, which have also been supported by Member States in different fora,² emphasise the need to reinforce the tools of European solidarity, in particular strengthening the European Border and Coast Guard, to ensure the effective management of the external borders and migration and to establish a more effective and coherent European return policy.

The effective return of third-country nationals who do not have a right to stay in the EU is an essential component of the European Agenda on Migration³. At EU level, the return policy is regulated by Directive 2008/115/EC of the European Parliament and of the Council⁴ (the "Return Directive"), which lays down common standards and procedures to be applied in Member States for returning illegally staying third-country nationals in full respect of the principle of *non-refoulement*. Since the entry into force of the Return Directive in 2010, the migratory pressure on the Member States and the Union as a whole has increased. As a result, the challenges related to the effective return of irregular migrants need to be addressed more than ever.

There are two main challenges that can be identified.

Firstly, Member States encounter difficulties and obstacles in return procedures to successfully enforce return decisions. National practices implementing the EU framework vary between Member States and are not as effective as they should be. Among others, inconsistent definitions and interpretations of the risk of absconding and of the use of detention result in the absconding of irregular migrants and in secondary movements. Lack of cooperation on the part of the third-country nationals leads also to obstructing the return procedures. Member States are not sufficiently well equipped to enable competent authorities to exchange necessary information promptly in view of carrying out returns.

Secondly, the efficiency of the EU's return policy depends also on the cooperation of countries of origin. Over the last three years, the EU sustained efforts in engaging the main countries of origin on cooperation in migration management resulted in good progress and several legally non-binding arrangements for return and readmission have been put in place. Implementation of these arrangements has started and it is now important that all Member States capitalise on these results and make full use of the arrangements to increase returns to

¹ Conclusions of the European Council of 28 June 2018.

² Meseberg declaration of Germany and France "Renewing Europe's promises of security and prosperity", 19 June 2018.

³ COM(2015) 240 final.

⁴ Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, OJ L 348, 24.12.2008, p. 98.

the countries concerned. Additionally, the Commission has also proposed to strengthen the use of EU visa policy as a tool to achieve progress in cooperation on return and readmission with third countries. Once it becomes law, this will significantly improve the EU leverage in its relations to countries of origin.

Making returns more effective has been a priority for the past few years. In 2016, the Commission proposed to revise the mandate of the European Border and Coast Guard which was significantly enhanced in the field of return. Under the new mandate, the Agency has been developing new tools to assist and support Member States' return activities and procedures. In the renewed Action Plan on Return of 2017⁵ the Commission indicated how the shortcomings of Member States' return procedures and practices hamper the effectiveness of the EU return system. The Commission therefore adopted a Recommendation in 2017 recommending a set of measures to be taken up by the Member States to make returns more effective⁶, including by making full use of the flexibility provided by the Return Directive. On that occasion, the Commission also indicated that based on the experience with the implementation of the Recommendation and depending on the need to take further actions to substantially increase return rates, it stood ready to launch a revision of the Return Directive.

Despite these efforts, there has been little progress in increasing the effectiveness of returns. On the contrary, a decrease in the return rate throughout the EU was observed from 45.8% in 2016 to merely 36.6% in 2017. In order to address the key challenges to ensure effective returns, a targeted revision of the Return Directive is necessary, to notably reduce the length of return procedures, secure a better link between asylum and return procedures and ensure a more effective use of measures to prevent absconding. To achieve a more effective and coherent European return policy, in line with fundamental rights as enshrined in the Charter of Fundamental Rights of the European Union, an urgent adoption of a targeted recast of the Return Directive is needed.

Such targeted recast should:

- establish a new border procedure for the rapid return of applicants for international protections whose application was rejected following an asylum border procedure;
- provide clearer and more effective rules on the issuing of return decisions and on the appeals against such decisions;
- provide a clear framework of cooperation between irregular migrants and competent national authorities, streamline the rules on the granting of a period for voluntary departure and establish a framework for the granting of financial, material and in-kind assistance to irregular migrants willing to return voluntarily;
- establish more efficient instruments to manage and facilitate the administrative processing of returns, the exchange of information among competent authorities and the execution of return in order to dissuade illegal migration;
- ensure coherence and synergies with asylum procedures;
- ensure a more effective use of detention to support the enforcement of returns.

⁵ COM(2017) 200 final.

⁶ C(2017) 1600 final.

The proposed targeted changes do not change the scope of the Directive nor do they affect the protection of the rights of the migrants that currently exist, including with regard to the best interests of the child, family life and the state of health. The Directive continues to ensure the full respect of the fundamental rights of the migrants, in particular the principle of *non-refoulement*.

- **Consistency with existing policy provisions in the policy area**

This proposal further develops the existing provisions of the Return Directive on common standards and procedures for the effective return of irregular migrants, respecting their fundamental rights and the principle of *non-refoulement*.

It builds notably on the implementation of the Commission's renewed Action Plan and the Recommendation on Return of March 2017, as well as the revised Return Handbook adopted in November 2017⁷, and complements the proposal to further strengthen the role of the European Border and Coast Guard Agency, with a view to ensure the effective control of the EU's external borders and significantly stepping up the effective return of irregular migrants.

Moreover, in order to better promote voluntary return, Member States should put in place operational programmes providing for enhanced return assistance and counselling, which may include support for reintegration in third countries of return, taking into account common standards on Assisted Voluntary Return and Reintegration Programmes⁸ in view of further harmonisation of such programmes.

- **Consistency with other Union policies**

This proposal is consistent with the European Agenda on Migration, which developed President Juncker's Political Guidelines into a set of coherent and mutually reinforcing initiatives based on four pillars. Those pillars consist of reducing the incentive for irregular migration, securing external borders and saving lives, a strong asylum policy and a new policy on legal migration.

It also responds to the European Council of 28 June 2018 which requested to significantly step up the effective return of irregular migrants and welcomed the intention of the Commission to make legislative proposals for a more effective and coherent European return policy.

This proposal is consistent and reinforces other Union policies, including:

- The Common European Asylum System with the increasing synergies between asylum and return procedures, especially in the context of border procedures;
- The European Border and Coast Guard Regulation, which further strengthen the mandate of the European Border and Coast Guard Agency in the area of return. In addition, this proposal requires to set up national systems for return management that should communicate with a central system established by that Agency, in accordance with the new proposal for a European Border and Coast Regulation that is part of this legislative package.

⁷ C(2017) 6505.

⁸ Non-binding common standards for Assisted Voluntary Return (and Reintegration) Programmes implemented by Member States (8829/16).

2. LEGAL BASIS, SUBSIDIARITY AND PROPORTIONALITY

• Legal basis

This proposal recasts the Return Directive and should therefore be based on Article 79(2)(c) of the Treaty on the Functioning of the European Union, which empowers the Union to adopt measures in the field of illegal immigration and unauthorised residence, including removal and repatriation of persons residing without authorisation.

• Variable geometry

With regard to variable geometry, this proposal follows a comparable regime to the current Return Directive.

According to Article 4 of Protocol 22 on the position of Denmark annexed to the Treaties, Denmark shall decide, within a period of six months after the Council has decided on this Directive, whether it will implement this proposal, which builds upon the Schengen acquis, in its national law.

With regard to the United Kingdom and Ireland, the Return Directive presents a hybrid character, as reflected in its recitals (48) and (49). It follows that both Protocol 19 on the Schengen acquis integrated in the framework of the European Union annexed to the Treaties, and Protocol 21 on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice annexed to the Treaties, apply to this proposal.

Based on the respective agreements associating those countries with the implementation, application and development of the Schengen acquis, Iceland, Norway, Switzerland and Liechtenstein should be bound by the Directive proposed.

• Subsidiarity

The objective of this proposal is to address the key shortcomings and obstacles encountered by Member States when carrying out returns. The prevention and countering of illegal immigration and return of those who have no legal right to stay is a shared interest of all Member States, which the Member States cannot achieve alone. Further EU action is therefore needed towards improving the effectiveness of the Union return policy, in full respect to the principle of subsidiarity as set out in Article 5(3) of the Treaty on European Union.

• Proportionality

Together with the proposal for an extended mandate for the European Border and Coast Guard Agency, this proposal is intended to respond to the challenges faced by the Union as regard migration management and the return of illegally staying third-country nationals. It is part of and reinforces the overall return policy framework already in place, which also consists of operational support tools and programmes, as well as funding mechanisms available to Member States' authorities and organisations involved in return. The changes to the Return Directive are limited and targeted, aimed at effectively addressing the key shortcoming of return procedures and reduce the obstacles that Member States encounter when carrying out returns, while respecting the fundamental rights of the third-country nationals concerned. The proposal does not go beyond what is necessary in order to achieve the stated objectives.

- **Choice of the instrument**

The Return Directive already contains a robust set of norms for the effective and dignified return of illegally staying third-country nationals. This proposal is intended to provide for targeted changes to that Directive which are intended to address certain identified shortcomings and obstacles that Member States encounter when carrying out returns. Since this proposal is to recast the Return Directive, the same legal instrument is the most appropriate.

3. RESULTS OF EX-POST EVALUATIONS, STAKEHOLDER CONSULTATIONS AND IMPACT ASSESSMENTS

- **Ex-post evaluations/fitness checks of existing legislation**

The evaluation and monitoring mechanism to verify the application of the Schengen acquis⁹ and the information collected through the Return Expert Group of the European Migration Network (EMN REG) and the European Border and Coast Guard Agency have allowed for a comprehensive assessment of how Member States implement the Union policy on return.

Since 2015, when the first evaluation in the field of return took place, several cross-cutting elements that are common to those national return situations and systems assessed so far have been identified (in 21 Member States and Schengen associated countries).

- **Stakeholder consultations**

In its conclusions of October 2016, the European Council called for reinforcing national administrative processes for returns. The Malta Declaration of Heads of State or Government of February 2017 highlighted the need for a review of EU return policy based on an objective analysis of the way in which the legal, operational, financial and practical tools available at Union and national level are applied. It welcomed the Commission's intention to rapidly present an updated EU Action Plan on Return and to provide guidance for more operational returns by the EU and Member States and effective readmission based upon the existing acquis. In its 2015 EU Action Plan on Return and subsequently in its 2017 Communication on a more effective return policy and the accompanying Recommendation, the Commission emphasised the need for a stronger enforcement of EU rules on return in order to increase the overall effectiveness of the EU's return policy. In its Conclusions of June 2018 the European Council welcomed the intention of the Commission to make legislative proposals for a more effective and coherent European return policy.

The European Migration Network has contributed over the last two years with specialised studies, ad hoc queries and informs on effectiveness of return in EU Member States, alternatives to detention, assisted voluntary return and reintegration schemes, detention and material detention conditions, legal assistance in detention facilities and other topics.

⁹ Council Regulation (EU) No 1053/2013 of 7 October 2013 establishing an evaluation and monitoring mechanism to verify the application of the Schengen acquis and repealing the Decision of the Executive Committee of 16 September 1998 setting up a Standing Committee on the evaluation and implementation of Schengen, OJ L 295, 6.11.2013, p. 27.

- **Collection and use of expertise**

Technical level exchanges on current implementation challenges has been carried out with the Member States in the context of the Contact Group on Return, the EMN REG and the European Border and Coast Guard Agency resulting, in particular in a revision of the Return Handbook and the European Migration Network study of “the effectiveness of return in EU Member States”. The study aimed at analysing the impact of EU rules on return – including the Return Directive and related case law from the Court of Justice of the European Union – on Member States’ return policies and practices and hence on the effectiveness of the return process across the EU.

- **Impact assessment**

Making returns more effective has been a priority for the Commission over the past years. To this end, the European Border and Coast Guard Regulation and the ensuing new mandate of the Agency made significant improvements in the field of returns. Furthermore, the renewed Action Plan on Return and the Recommendation on making return more effective, published in March 2017, indicated how the shortcomings in Member States' return procedures and practices hampered the effectiveness of the return system. Against this background, the Commission and the Member States embarked in technical consultations to analyse the current challenges in returns and to identify the shortcomings, and acknowledged the need for targeted revisions of the existing legislation. These consultations and the ensuing analysis of the key issues at stake, resulted in the revision of the Return Handbook in November 2017. The civil society was also consulted and, in addition, work carried out under the Schengen Evaluation Mechanism provided a thorough overview of issues to be addressed in the field of return. Through the above processes, stakeholders were able to identify both the legal and practical impediments to the effective implementation of returns in the context of the Return Directive and to ascertain the need for a targeted revision of the Directive.

In its conclusions of June 2018, the European Council welcomed the Commission's intention to make legislative proposals for a more effective and coherent European return policy. Taking into account that an in-depth assessment of the key issues in the field of return has been accomplished, the urgency in which legislative proposals need to be tabled and also acknowledging that the revision of the existing Directive is the most appropriate option both in terms of substance and timing, an Impact Assessment on this proposal is not deemed necessary.

- **Fundamental rights**

This proposal respects the fundamental rights and observes the principles recognised by Articles 2 and 6 of the Treaty on European Union and reflected in the Charter of Fundamental Rights of the European Union.

In particular, this proposal fully respects human dignity, the right to life, the prohibition of torture and of inhuman or degrading treatment or punishment, the right to liberty and security, the right to the protection of personal data, the right to asylum and protection in the event of removal and expulsion, the principles of *non-refoulement* and non-discrimination, the right to effective remedy and the rights of the child.

4. BUDGETARY IMPLICATIONS

This proposal does not impose any financial or administrative burden on the Union. Therefore it has no impact on the Union budget.

5. OTHER ELEMENTS

- **Implementation plans and monitoring, evaluation and reporting arrangements**

The Commission shall report on the application of this Directive to the European Parliament and to the Council within three years from its entry into force and every three years thereafter; in that occasion, the Commission may propose any amendments that are deemed necessary.

- **Detailed explanation of the specific provisions of the proposal**

The aim of the targeted changes of this proposal is to enhance the efficiency of the return procedure, including its articulation with the termination of asylum procedures. The targeted changes do not amend the safeguards and rights of third country nationals and respects their fundamental rights, in particular the principle of *non-refoulement*.

Explanations are provided for changes introduced in relation to:

1) Risk of Absconding (Article 6): a strong need exists for EU-wide objective criteria for the determination of the existence or not of a risk of absconding, including unauthorised secondary movements. To prevent diverging or ineffective interpretations, the proposal sets out a common, non-exhaustive, list of objective criteria to determine the existence of a risk of absconding as part of an overall assessment of the specific circumstances of the individual case.

2) Obligation to cooperate (Article 7): it has increasingly been observed that not all third-country nationals cooperate during the return procedures thus obstructing their return. It is therefore necessary to introduce an explicit obligation for third-country nationals to cooperate with national authorities at all stages of the return procedures, in particular for establishing and verifying their identity in view of obtaining a valid travel document and ensuring the successful enforcement of return decision. This mirrors a similar obligation to cooperate with competent authorities that already exists and applies in the context of asylum procedures.

3) Issuing of a return decision in connection with the termination of legal stay (Article 8): due to the fact that Member States do not systematically issue return decisions in connection with the termination of legal stay, the proposal clarifies the need to issue a return decision immediately after a decision rejecting or terminating the legal stay is taken. When a return decision is issued immediately after or in the same act as a decision rejecting an application for international protection, the enforcement of the return decision is suspended until the rejection becomes final, in accordance with the case-law of the Court of Justice of the European Union.

4) Voluntary departure (Article 9): there is a need to adapt the rules for granting a period for voluntary departure. Such period should not be longer than 30 days, as already foreseen in the Return Directive currently in force. However, this proposal does not make it mandatory anymore, when determining the duration of the period for voluntary departure, to grant a minimum of seven days. This allows Member States to decide on a shorter period. The

proposal also establishes a number of cases in which it becomes mandatory not to grant a period for voluntary departure.

5) Entry bans issued during border checks at exit (Article 13): when an illegally staying third-country national is detected for the first time while leaving the Union, in certain circumstances it may be appropriate to impose an entry ban in order to prevent future re-entry and reduce the risks of illegal immigration. At the same time, this should not delay his or her departure, given that the person is already about to leave the territory of the Member States. This proposal introduces the possibility for Member States to impose an entry ban without issuing a return decision following a case-by-case assessment and taking into account the principle of proportionality.

6) Return Management (Article 14): efficient return procedures require instruments that allow information to be made available promptly to the competent authorities and operational schemes that provide enhanced return assistance and counselling to returnees, with appropriate operational and financial EU support. The proposal establishes the obligation to have national return management systems providing timely information on the identity and legal situation of the third-country nationals that are relevant for monitoring and following upon individual cases. These are to be linked to a central system established by the European Border and Coast Guard Agency in accordance with the new Regulation that is part of this package.

The proposal also sets an obligation for Member States to establish voluntary return programmes that may also include reintegration support.

7) Remedies and appeals (Article 16): the effectiveness and speed of return procedures need to be complemented with adequate safeguards. Deadlines for lodging appeals against return decisions diverge significantly among Member States, ranging from a few days to one month or more. In compliance with fundamental rights, the deadline needs to provide enough time to ensure access to an effective remedy, while not delaying return procedures.

The proposal provides for a specific time-limit (five days) for lodging appeals against return decisions issued in cases where the return decision is the consequence of a decision rejecting an application for international protection that became final.

If the risk of a breach of the principle of *non-refoulement* has not been already assessed by a judicial authority in asylum procedures, an automatic suspensive effect of the appeal against a return decision must be granted. This is the only mandatory case where automatic suspensive effect shall be granted under this proposal, without prejudice to the obligation for Member States' competent national authorities or bodies to have the possibility to temporarily suspend the enforcement of a return decision in individual cases where deemed necessary for other reasons. Such decision on temporary suspension shall be made quickly, within 48 hours as a rule.

The proposal also establishes that only one level of judicial remedy should be available to appeal against a return decision that is the result of a prior negative decision on an application for international protection, which was already subject to judicial remedy.

Finally, it further harmonises the rules to provide, on request, free legal assistance and/or representation, in accordance with the conditions set under the asylum acquis.

8) Detention (Article 18): there is need for targeted changes in the rules on detention. Firstly, new risks have emerged in recent years, which make it necessary that illegally staying third-country nationals who pose a threat to public order or national security can be detained if deemed necessary. While this is a new ground for detention in the context of return procedures, this ground for detention already exists in the asylum acquis.

Secondly, the maximum period of detention currently established by several Member States is significantly shorter than the one allowed by the Return Directive, and is precluding effective removals. While the maximum period for detention of 6 months and the possibility to prolong in specific circumstances are not modified, this proposal requires that national legislation to provide for not less than 3 months as an initial minimum period of detention, in order to more appropriately reflect the period of time needed to successfully carry out return and readmission procedures with third countries. Detention must however be for as short a period as possible and only maintained as long as removal arrangements are in progress and executed with due diligence.

9) Border procedure (Article 22): while keeping the possibility for Member States to derogate from the application of the rules of the Return Directive for border cases covered by Article 2(2)(a), the proposal provides for specific, simplified rules applicable to third-country nationals who were subject to asylum border procedures: issuance of a decision by a simplified form, no period for voluntary return granted as a rule (except if the third-country national holds a valid travel document and cooperates with the national authorities), shorter time-limit for lodging an appeal, dedicated ground for detention. This border procedure for return will follow up the asylum border procedure. In order to facilitate return, it is proposed to ensure that a third-country national who was already detained during the examination of his or her application for international protection as part of the asylum border procedure may be maintained in detention for a maximum period of 4 months under the border procedure for return. If the return decision is not enforced during that period, the third country national may be further detained if one of the conditions set out in the provisions relating to the general rules on detention is fulfilled and for the period of detention set in accordance with Article 18.

Proposal for a

DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

on common standards and procedures in Member States for returning illegally staying third-country nationals (recast)

A contribution from the European Commission to the Leaders' meeting in Salzburg on 19-20 September 2018

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty ~~establishing the European Community~~ ☒ on the Functioning of the European Union ☒, and in particular Article ~~63(3)(b)~~ ☒ 79(2)(c) ☒ thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national parliaments,

Acting in accordance with the ordinary legislative procedure,

Whereas:

↓ new

(1) A number of amendments are to be made to Directive 2008/115/(EC) of the European Parliament and of the Council¹⁰. In the interests of clarity, that Directive should be recast.

(2) An effective and fair return policy is an essential part of the Union's approach to better manage migration in all aspects, as reflected in the European Agenda on Migration of May 2015¹¹.

¹⁰ Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals (OJ L 348, 24.12.2008, p. 98).

¹¹ COM(2015) 285 final.

- (3) On 28 June 2018, in its conclusions, the European Council underlined the necessity to significantly step up the effective return of irregular migrants, and welcomed the intention of the Commission to make legislative proposals for a more effective and coherent European return policy.

↓ 2008/115/EC recital 1 (adapted)

~~The Tampere European Council of 15 and 16 October 1999 established a coherent approach in the field of immigration and asylum, dealing together with the creation of a common asylum system, a legal immigration policy and the fight against illegal immigration.~~

↓ 2008/115/EC recital 2 (adapted)

~~The Brussels European Council of 4 and 5 November 2004 called for the establishment of an effective removal and repatriation policy, based on common standards, for persons to be returned in a humane manner and with full respect for their fundamental rights and dignity.~~

↓ 2008/115/EC recital 3 (adapted)

~~On 4 May 2005 the Committee of Ministers of the Council of Europe adopted ‘Twenty guidelines on forced return’.~~

↓ 2008/115/EC recital 4 (adapted)
⇒ new

- (4) ☒ That European return policy should be based on common standards, for persons to be returned in a humane manner and with full respect for their fundamental rights and dignity ☒ ⇒, as well as international law, including refugee protection and human rights obligations. ⇐ Clear, transparent and fair rules need to be ☒ established ☒ fixed to provide for an effective return policy as a necessary element of a well managed migration policy ⇒ which serves as a deterrent to irregular migration and ensures coherence with and contributes to the integrity of the Common European Asylum System and the legal migration system ⇐ .

↓ 2008/115/EC recital 5

- (5) This Directive should establish a horizontal set of rules, applicable to all third-country nationals who do not or who no longer fulfil the conditions for entry, stay or residence in a Member State.

↓ 2008/115/EC recital 6

- (6) Member States should ensure that the ending of illegal stay of third-country nationals is carried out through a fair and transparent procedure. According to general principles of EU law, decisions taken under this Directive should be adopted on a case-by-case basis and based on objective criteria, implying that consideration should go beyond the mere fact of an illegal stay. When using standard forms for decisions related to return, namely return decisions and, if issued, entry-ban decisions and decisions on removal, Member States should respect that principle and fully comply with all applicable provisions of this Directive.

↓ new

- (7) The link between the decision on ending of the legal stay of a third-country national and the issuing of a return decision should be reinforced in order to reduce the risk of absconding and the likelihood of unauthorised secondary movements. It is necessary to ensure that a return decision is issued immediately after the decision rejecting or terminating the legal stay, or ideally in the same act or decision. That requirement should in particular apply to cases where an application for international protection is rejected, provided that the return procedure is suspended until that rejection becomes final and pending the outcome of an appeal against that rejection.

↓ 2008/115/EC recital 7 (adapted)

- (8) The need for ~~Community~~ ☒ Union ☒ and bilateral readmission agreements with third countries to facilitate the return process is underlined. International cooperation with countries of origin at all stages of the return process is a prerequisite to achieving sustainable return.

↓ 2008/115/EC recital 8

- (9) It is recognised that it is legitimate for Member States to return illegally staying third-country nationals, provided that fair and efficient asylum systems are in place which fully respect the principle of *non-refoulement*.

↓ 2008/115/EC recital 9

- (10) In accordance with Council Directive 2005/85/EC ~~of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status~~¹², a third-country national who has applied for asylum in a Member State should not be regarded as staying illegally on the territory of that Member State until a

¹² Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status (OJ L 326, 13.12.2005, p. 13).

negative decision on the application, or a decision ending his or her right of stay as asylum seeker has entered into force.

↓ new

- (11) To ensure clearer and more effective rules for granting a period for voluntary departure and detaining a third-country national, determining whether there is or there is not a risk of absconding should be based on Union-wide objective criteria. Moreover this Directive should set out specific criteria which establish a ground for a rebuttable presumption that a risk of absconding exists.
- (12) To reinforce the effectiveness of the return procedure, clear responsibilities for third-country nationals should be established, and in particular the obligation to cooperate with the authorities at all stages of the return procedure, including by providing the information and elements that are necessary in order to assess their individual situation. At the same time, it is necessary to ensure that third-country nationals are informed of the consequences of not complying with those obligations, in relation to the determination of the risk of absconding, the granting of a period for voluntary departure and the possibility to impose detention, and to the access to programmes providing logistical, financial and other material or in-kind assistance.

↓ 2008/115/EC recital 10
(adapted)
⇒ new

- (13) Where there are no reasons to believe that ☒ the granting of a period for voluntary departure ☒ ~~this~~ would undermine the purpose of a return procedure, voluntary return should be preferred over forced return and ~~a~~ ⇒ an appropriate ⇐ period for voluntary departure ⇒ of up to thirty days, depending in particular on the prospect of return, ⇐ should be granted. ⇒ A period for voluntary departure should not be granted where it has been assessed that third-country nationals pose a risk of absconding, have had a previous application for legal stay dismissed as fraudulent or manifestly unfounded, or they pose a risk to public policy, public security or national security. ⇐ An extension of the period for voluntary departure should be provided for when considered necessary because of the specific circumstances of an individual case. ~~In order to promote voluntary return, Member States should provide for enhanced return assistance and counselling and make best use of the relevant funding possibilities offered under the European Return Fund.~~

↓ new

- (14) In order to promote voluntary return, Member States should have operational programmes providing for enhanced return assistance and counselling, which may include support for reintegration in third countries of return, taking into account the common standards on Assisted Voluntary Return and Reintegration Programmes

developed by the Commission in cooperation with Member States and endorsed by the Council.

↓ 2008/115/EC recital 11

- (15) A common minimum set of legal safeguards on decisions related to return should be established to guarantee effective protection of the interests of the individuals concerned.
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↓ new

- (16) The deadline for lodging an appeal against decisions related to return should provide enough time to ensure access to an effective remedy, while taking into account that long deadlines can have a detrimental effect on return procedures. To avoid possible misuse of rights and procedures, a maximum period not exceeding five days should be granted to appeal against a return decision. This provision should only apply following a decision rejecting an application for international protection which became final, including after a possible judicial review.
- (17) The appeal against a return decision that is based on a decision rejecting an application for international protection which was already subject to an effective judicial remedy should take place before a single level of jurisdiction only, since the third-country national concerned would have already had his or her individual situation examined and decided upon by a judicial authority in the context of the asylum procedure.
- (18) An appeal against a return decision should have an automatic suspensive effect only in cases where there is a risk of breach of the principle of *non-refoulement*.
- (19) In cases where the principle of *non-refoulement* is not at stake, appeals against a return decision should not have an automatic suspensive effect. The judicial authorities should be able to temporarily suspend the enforcement of a return decision in individual cases for other reasons, either upon request of the third-country national concerned or acting *ex officio*, where deemed necessary. Such decisions should, as a rule, be taken within 48 hours. Where justified by the complexity of the case, judicial authorities should take such decision without undue delay.
- (20) To improve the effectiveness of return procedures and avoid unnecessary delays, without negatively affecting the rights of the third-country nationals concerned, the enforcement of the return decision should not be automatically suspended in cases where the assessment of the risk to breach the principle of *non-refoulement* already took place and judicial remedy was effectively exercised as part of the asylum procedure carried out prior to the issuing of the related return decision against which the appeal is lodged, unless the situation of the third-country national concerned would have significantly changed since.

↓ 2008/115/EC recital 11 (adapted) ⇒ new
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- (21) The necessary legal aid should be made available ⇒ , upon request, ⇐ to those who lack sufficient resources. ~~Member States should provide in their n~~ National legislation ☒ should establish a list of instances where ☒ ~~for which cases~~ legal aid is to be considered necessary.

↓ 2008/115/EC recital 12

- (22) The situation of third-country nationals who are staying illegally but who cannot yet be removed should be addressed. Their basic conditions of subsistence should be defined according to national legislation. In order to be able to demonstrate their specific situation in the event of administrative controls or checks, such persons should be provided with written confirmation of their situation. Member States should enjoy wide discretion concerning the form and format of the written confirmation and should also be able to include it in decisions related to return adopted under this Directive.

↓ 2008/115/EC recital 13

- (23) The use of coercive measures should be expressly subject to the principles of proportionality and effectiveness with regard to the means used and objectives pursued. Minimum safeguards for the conduct of forced return should be established, taking into account Council Decision 2004/573/EC of 29 April 2004 on the ~~organisation of joint flights for removals from the territory of two or more Member States, of third-country nationals who are subjects of individual removal orders~~¹³. Member States should be able to rely on various possibilities to monitor forced return.

↓ 2008/115/EC recital 14

- (24) The effects of national return measures should be given a European dimension by establishing an entry ban prohibiting entry into and stay on the territory of all the Member States. The length of the entry ban should be determined with due regard to all relevant circumstances of an individual case and should not normally exceed five years. In this context, particular account should be taken of the fact that the third-country national concerned has already been the subject of more than one return decision or removal order or has entered the territory of a Member State during an entry ban.

¹³ Council Decision 2004/573/EC of 29 April 2004 on the organisation of joint flights for removals from the territory of two or more Member States, of third-country nationals who are subjects of individual removal orders (OJ L 261, 6.8.2004, p. 28).

↓ new

- (25) When an illegally staying third-country national is detected during exit checks at the external borders, it may be appropriate to impose an entry ban in order to prevent future re-entry and therefore to reduce the risks of illegal immigration. When justified, following an individual assessment and in application of the principle of proportionality, an entry ban may be imposed by the competent authority without issuing a return decision in order to avoid postponing the departure of the third-country national concerned.

↓ 2008/115/EC recital 15

- (26) It should be for the Member States to decide whether or not the review of decisions related to return implies the power for the reviewing authority or body to substitute its own decision related to the return for the earlier decision.

↓ 2008/115/EC recital 16

- (27) The use of detention for the purpose of removal should be ~~limited and~~ subject to the principle of proportionality with regard to the means used and objectives pursued. Detention is justified only to prepare the return or carry out the removal process and if the application of less coercive measures would not be sufficient.

↓ new

- (28) Detention should be imposed, following an individual assessment of each case, where there is a risk of absconding, where the third-country national avoids or hampers the preparation of return or the removal process, or when the third country national concerned poses a risk to public policy, public security or national security.
- (29) Given that maximum detention periods in some Member States are not sufficient to ensure the implementation of return, a maximum period of detention between three and six months, which may be prolonged, should be established in order to provide for sufficient time to complete the return procedures successfully, without prejudice to the established safeguards ensuring that detention is only applied when necessary and proportionate and for as long as removal arrangements are in progress.
- (30) This Directive should not preclude Member States from laying down effective, proportionate and dissuasive penalties and criminal penalties, including imprisonment, in relation to the infringements of migration rules, provided that such penalties are compatible with the objectives of this Directive, do not compromise the application of this Directive and are in full respect of fundamental rights.

- (31) Third-country nationals in detention should be treated in a humane and dignified manner with respect for their fundamental rights and in compliance with international and national law. Without prejudice to the initial apprehension by law-enforcement authorities, regulated by national legislation, detention should, as a rule, take place in specialised detention facilities.

- (32) Without prejudice to the possibility for Member States not to apply this Directive with regard to the cases referred to in Article 2(2)(a), when a border procedure is applied in accordance with Regulation (EU) .../... [*Asylum Procedure Regulation*], a specific border procedure should follow for the return of illegally staying third-country nationals whose application for international protection under that asylum border procedure has been rejected in order to ensure direct complementarity between the asylum and return border procedures and prevent gaps between the procedures. In such cases, it is necessary to establish specific rules that ensure the coherence and synergy between the two procedures and preserve the integrity and effectiveness of the whole process.
- (33) To ensure effective return in the context of the border procedure, a period for voluntary departure should not be granted. However, a period for voluntary departure should be granted to third-country nationals who hold a valid travel document and cooperate with the competent authorities of the Member States at all stages of the return procedures. In such cases, to prevent absconding, third-country nationals should hand over the travel document to the competent authority until their departure.
- (34) For a rapid treatment of the case, a maximum time limit is to be granted to appeal against a return decision following a decision rejecting an application for international protection adopted under the border procedure and which became final.
- (35) An appeal against a return decision taken in the context of the border procedure should have an automatic suspensive effect in cases where there is a risk of breach of the principle of *non-refoulement*, there has been a significant change in the situation of the third-country national concerned since the adoption under the asylum border procedure of the decision rejecting his or her application for international protection, or if no judicial remedy was effectively exercised against the decision rejecting his or her application for international protection adopted under the asylum border procedure.
- (36) It is necessary and proportionate to ensure that a third country national who was already detained during the examination of his or her application for international protection as part of the asylum border procedure may be kept in detention in order to prepare the return and/or carry out the removal process, once his or her application has been rejected. To avoid that a third country national is automatically released from detention and allowed entry into the territory of the Member State despite having been denied a right to stay, a limited period of time is needed in order to try to enforce the

return decision issued at the border. The third-country national concerned may be detained in the context of the border procedure for a maximum period of four months and as long as removal arrangements are in progress and executed with due diligence. That period of detention should be without prejudice to other periods of detention established by this Directive. Where it has not been possible to enforce return by the end of the former period, further detention of the third-country national may be ordered under another provision of this Directive and for the duration provided for therein.

↓ 2008/115/EC recital 18
(adapted)
⇒ new

- (37) Member States should have rapid access to information on ⇒ return decisions and ⇐ entry bans issued by other Member States. ~~This information sharing~~ ☒ Such access ☒ should take place in accordance with ⇒ Regulation (EU) .../...¹⁴ [*Regulation on the use of the Schengen Information System for the return of illegally staying third country nationals*] and ⇐ Regulation (EC) No 1987/2006 of the European Parliament and of the Council ~~of 20 December 2006 on the establishment, operation and use of the second generation Schengen Information System (SIS II)~~¹⁵ ⇒ , including to facilitate mutual recognition of these decisions amongst competent authorities, by virtue of Council Directive 2001/40/EC¹⁶ and Council Decision 2004/191/EC¹⁷ ⇐ .

⇓ new

- (38) Establishing return management systems in Member States contributes to the efficiency of the return process. Each national system should provide timely information on the identity and legal situation of the third country national that are relevant for monitoring and following up on individual cases. To operate efficiently and in order to significantly reduce the administrative burden, such national return systems should be linked to the Schengen Information System to facilitate and speed up the entering of return-related information, as well as to the central system established by the European Border and Coast Guard Agency in accordance with Regulation (EU) .../... [*EBCG Regulation*].

¹⁴ [*Regulation on the use of the Schengen Information System for the return of illegally staying third country nationals*] (OJ L ...).

¹⁵ Regulation (EC) No 1987/2006 of the European Parliament and of the Council of 20 December 2006 on the establishment, operation and use of the second generation Schengen Information System (SIS II) (OJ L 381, 28.12.2006, p. 4).

¹⁶ Council Directive 2001/40/EC of 28 May 2001 on the mutual recognition of decisions on the expulsion of third-country nationals (OJ L 149, 2.6.2001, p. 34).

¹⁷ Council Directive 2001/40/EC of 28 May 2001 on the mutual recognition of decisions on the expulsion of third-country nationals, OJ L 149, 2.6.2001, p. 34; and Council Decision 2004/191/EC of 23 February 2004 setting out the criteria and practical arrangements for the compensation of the financial imbalances resulting from the application of Directive 2001/40/EC on the mutual recognition of decisions on the expulsion of third-country nationals (OJ L 60, 27.2.2004, p. 55).

↓ 2008/115/EC recital 19 ⇒ new

- (39) Cooperation between the institutions involved at all levels in the return process and the exchange and promotion of best practices ⇒ , including by taking into account and regularly updating the Return Handbook to reflect legal and policy developments, ⇄ should accompany the implementation of this Directive and provide European added value.

↓ new

- (40) The Union provides financial and operational support in order to achieve an effective implementation of this Directive. Member States should make best use of the available Union financial instruments, programmes and projects in the field of return, in particular under Regulation (EU) .../... [*Regulation establishing the Asylum and Migration Fund*], as well as of the operational assistance by the European Border and Coast Guard Agency according to Regulation (EU) .../... [*EBCG Regulation*]. Such support should be used in particular for establishing return management systems and programmes for providing logistical, financial and other material or in-kind assistance to support the return – and where relevant the reintegration – of illegally staying third-country nationals.

↓ 2008/115/EC recital 20 (adapted)

- (41) Since the objective of this Directive, namely to establish common rules concerning return, removal, use of coercive measures, detention and entry bans, cannot be sufficiently achieved by the Member States and can therefore, by reason of its scale and effects, be better achieved at ~~Community~~ ☒ Union ☒ level, the ~~Community~~ ☒ Union ☒ may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty ☒ on the European Union ☒ . In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary to achieve that objective.

↓ 2008/115/EC recital 21

- (42) Member States should implement this Directive without discrimination on the basis of sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinions, membership of a national minority, property, birth, disability, age or sexual orientation.

↓ 2008/115/EC recital 22

- (43) In line with the 1989 United Nations Convention on the Rights of the Child, the ‘best interests of the child’ should be a primary consideration of Member States when implementing this Directive. In line with the European Convention for the Protection of Human Rights and Fundamental Freedoms, respect for family life should be a primary consideration of Member States when implementing this Directive.

↓ 2008/115/EC recital 23

- (44) Application of this Directive is without prejudice to the obligations resulting from the Geneva Convention relating to the Status of Refugees of 28 July 1951, as amended by the New York Protocol of 31 January 1967.

↓ 2008/115/EC recital 24

- (45) This Directive respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union.

↓ new

- (46) The purpose of an effective implementation of the return of third-country nationals who do not fulfil or no longer fulfil the conditions for entry, stay or residence in the Member States, in accordance with this Directive, is an essential component of the comprehensive efforts to tackle irregular migration and represents an important reason of substantial public interest.
- (47) Member States' return authorities need to process personal data to ensure the proper implementation of return procedures and the successful enforcement of return decisions. The third countries of return are often not the subject of adequacy decisions adopted by the Commission under Article 45 of Regulation (EU) 2016/679 of the European Parliament and of the Council¹⁸, or under Article 36 of Directive (EU) 2016/680¹⁹, and have often not concluded or do not intend to conclude a readmission agreement with the Union or otherwise provide for appropriate safeguards within the meaning of Article 46 of Regulation (EU) 2016/679 or within the meaning of the national provisions transposing Article 37 of Directive (EU) 2016/680. Despite the extensive efforts of the Union in cooperating with the main countries of origin of

¹⁸ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (OJ L 119 4.5.2016, p. 1).

¹⁹ Directive (EU) 2016/680 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA (OJ L 119 4.5.2016, p. 89).

illegally staying third-country nationals subject to an obligation to return, it is not always possible to ensure such third countries systematically fulfil the obligation established by international law to readmit their own nationals. Readmission agreements, concluded or being negotiated by the Union or the Member States and providing for appropriate safeguards for the transfer of data to third countries pursuant to Article 46 of Regulation (EU) 2016/679 or pursuant to the national provisions transposing Article 36 of Directive (EU) 2016/680, cover a limited number of such third countries. In the situation where such agreements do not exist, personal data should be transferred by Member States' competent authorities for the purposes of implementing the return operations of the Union, in line with the conditions laid down in Article 49(1)(d) of Regulation (EU) 2016/679 or in the national provisions transposing Article 38 of Directive (EU) 2016/680.

↓ 2008/115/EC (adapted)	recital	25
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- (48) In accordance with Articles 1 and 2 of ~~the Protocol~~ ☒ No 22 ☒ on the position of Denmark annexed to the Treaty on European Union and the Treaty ☒ on the functioning of the European Union ~~establishing the European Community~~, Denmark is not taking part in the adoption of this Directive and is not bound by it or subject to its application. Given that this Directive builds — to the extent that it applies to third-country nationals who do not fulfil or who no longer fulfil the conditions of entry in accordance with ~~the Schengen Borders Code~~²⁰ ☒ Regulation (EU) 2016/399 of the European Parliament and of the Council²¹ ☒ — upon the Schengen acquis~~under the provisions of Title IV of Part Three of the Treaty establishing the European Community~~, Denmark shall, in accordance with Article ~~5~~ ☒ 4 ☒ of ~~the said~~ ☒ that ☒ Protocol, decide, within a period of six months after ~~the adoption of~~ ☒ the Council has decided on ☒ this Directive, whether it will implement it in its national law.

↓ 2008/115/EC (adapted)	recital	26
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- (49) To the extent that it applies to third-country nationals who do not fulfil or who no longer fulfil the conditions of entry in accordance with ☒ Regulation (EU) 2016/399 ☒ ~~the Schengen Borders Code~~, this Directive constitutes a development of ☒ the ☒ provisions of the Schengen acquis in which the United Kingdom does not take part, in accordance with Council Decision 2000/365/EC of 29 May 2000 concerning the request of the United Kingdom of Great Britain and Northern Ireland

²⁰ ~~Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code) (OJ L 105, 13.4.2006, p. 1).~~

²¹ Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code), OJ L 77, 23.3.2016, p. 1.

~~to take part in some of the provisions of the Schengen acquis²². Moreover, in accordance with Articles 1 and 2 of the Protocol ☒ No 21 ☒ on the position of the United Kingdom and Ireland ☒ in respect of the area of freedom, security and justice, ☒ annexed to the Treaty on European Union and to the Treaty ☒ on the Functioning of the European Union ~~establishing the European Community~~, and without prejudice to Article 4 of the said ☒ that ☒ Protocol, the United Kingdom is not taking part in the adoption of this Directive and is therefore not bound by it in its entirety or subject to its application.~~

↓ 2008/115/EC recital 27
(adapted)

- (50) To the extent that it applies to third-country nationals who do not fulfil or who no longer fulfil the conditions of entry in accordance with ☒ Regulation (EU) 2016/399 ~~☒ the Schengen Borders Code~~, this Directive constitutes a development of ☒ the ☒ provisions of the Schengen acquis in which Ireland does not take part, in accordance with Council Decision 2002/192/EC ~~of 28 February 2002 concerning Ireland's request to take part in some of the provisions of the Schengen acquis²³. Moreover, in accordance with Articles 1 and 2 of the Protocol ☒ No 21 ☒ on the position of the United Kingdom and Ireland ☒ in respect of the area of freedom, security and justice, ☒ annexed to the Treaty on European Union and to the Treaty ☒ on the Functioning of the European Union ~~establishing the European Community~~, and without prejudice to Article 4 of the said ☒ that ☒ Protocol, Ireland is not taking part in the adoption of this Directive and is therefore not bound by it in its entirety or subject to its application.~~

↓ 2008/115/EC recital 28
(adapted)

- (51) As regards Iceland and Norway, this Directive constitutes — to the extent that it applies to third-country nationals who do not fulfil or who no longer fulfil the conditions of entry in accordance with ☒ Regulation (EU) 2016/399 ~~☒ the Schengen Borders Code~~ — a development of ☒ the ☒ provisions of the Schengen *acquis* within the meaning of the Agreement concluded by the Council of the European Union and the Republic of Iceland and the Kingdom of Norway concerning the ☒ latters' ~~☒ association of those two States~~ with the implementation, application and development of the Schengen *acquis*, which fall within the area referred to in Article 1, point C, of Council Decision 1999/437/EC²⁴ ~~on certain arrangements for the application of that Agreement.~~

²² Council Decision 2000/365/EC of 29 May 2000 concerning the request of the United Kingdom of Great Britain and Northern Ireland to take part in some of the provisions of the Schengen acquis (OJ L 131, 1.6.2000, p. 43).

²³ Council Decision 2002/192/EC of 28 February 2002 concerning Ireland's request to take part in some of the provisions of the Schengen acquis (OJ L 64, 7.3.2002, p. 20).

²⁴ Council Decision 1999/437/EC of 17 May 1999 on certain arrangements for the application of the Agreement concluded by the Council of the European Union and the Republic of Iceland and the Kingdom of Norway concerning the association of those two States with the implementation, application and development of the Schengen *acquis* (OJ L 176, 10.7.1999, p. 31).

↓ 2008/115/EC	recital	29
(adapted)		

- (52) As regards Switzerland, this Directive constitutes — to the extent that it applies to third-country nationals who do not fulfil or who no longer fulfil the conditions of entry in accordance with ~~⊗~~ Regulation (EU) 2016/399 ~~⊗~~ ~~the Schengen Borders Code~~ — a development of ~~⊗~~ the ~~⊗~~ provisions of the Schengen *acquis* within the meaning of the Agreement between the European Union, the European Community and the Swiss Confederation on the Swiss Confederation's association with the implementation, application and development of the Schengen *acquis*²⁵, which fall within the area referred to in Article 1, point C, of Decision 1999/437/EC read in conjunction with Article 3 of Council Decision 2008/146/EC²⁶ ~~on the conclusion, on behalf of the European Community, of that Agreement.~~

↓ 2008/115/EC	recital	30
(adapted)		

- (53) As regards Liechtenstein, this Directive constitutes — to the extent that it applies to third-country nationals who do not fulfil or who no longer fulfil the conditions of entry in accordance with ~~⊗~~ Regulation (EU) 2016/399 ~~⊗~~ ~~the Schengen Borders Code~~ — a development of ~~⊗~~ the ~~⊗~~ provisions of the Schengen *acquis* within the meaning of the Protocol between the European Union, the European Community, the Swiss Confederation and the Principality of Liechtenstein on the accession of the Principality of Liechtenstein to the Agreement between the European Union, the European Community and the Swiss Confederation on the Swiss Confederation's association with the implementation, application and development of the Schengen *acquis*²⁷, which fall within the area referred to in Article 1, point C, of Decision 1999/437/EC read in conjunction with Article 3 of Council Decision 2011/350/EU²⁸ ~~2008/261/EC~~²⁹ ~~on the signature, on behalf of the European Community, and on the provisional application of, certain provisions of that Protocol.~~

↓ new

- (54) The obligation to transpose this Directive into national law should be confined to those provisions which represent a substantive amendment as compared to the earlier

²⁵ OJ L 53, 27.2.2008, p. 52.

²⁶ Council Decision 2008/146/EC of 28 January 2008 on the conclusion, on behalf of the European Community, of the Agreement between the European Union, the European Community and the Swiss Confederation on the Swiss Confederation's association with the implementation, application and development of the Schengen *acquis* (OJ L 53, 27.2.2008, p. 1).

²⁷ OJ L 160, 18.6.2011, p. 21

²⁸ Council Decision 2011/350/EU of 7 March 2011 on the conclusion, on behalf of the European Union, of the Protocol between the European Union, the European Community, the Swiss Confederation and the Principality of Liechtenstein on the accession of the Principality of Liechtenstein to the Agreement between the European Union, the European Community and the Swiss Confederation on the Swiss Confederation's association with the implementation, application and development of the Schengen *acquis*, relating to the abolition of checks at internal borders and movement of persons (OJ L 160, 18.6.2011, p. 19).

²⁹ ~~OJ L 83, 26.3.2008, p. 2.~~

Directive. The obligation to transpose the provisions which are unchanged arises under the earlier Directive.

- (55) This Directive should be without prejudice to the obligations of the Member States relating to the time-limits for the transposition into national law of the Directive set out in Annex I,

↓ 2008/115/EC (adapted)

HAVE ADOPTED THIS DIRECTIVE:

CHAPTER I GENERAL PROVISIONS

Article 1

Subject matter

This Directive sets out common standards and procedures to be applied in Member States for returning illegally staying third-country nationals, in accordance with fundamental rights as general principles of ~~Community~~ ☒ Union ☒ law as well as international law, including refugee protection and human rights obligations.

Article 2

Scope

1. This Directive applies to third-country nationals staying illegally on the territory of a Member State.
2. Member States may decide not to apply this Directive to third-country nationals who:
 - (a) are subject to a refusal of entry in accordance with Article ~~1413~~ of ☒ Regulation (EU) 2016/399 ~~☒ the Schengen Borders Code~~, or who are apprehended or intercepted by the competent authorities in connection with the irregular crossing by land, sea or air of the external border of a Member State and who have not subsequently obtained an authorisation or a right to stay in that Member State;
 - (b) are subject to return as a criminal law sanction or as a consequence of a criminal law sanction, according to national law, or who are the subject of extradition procedures.
3. This Directive shall not apply to persons enjoying the ~~Community~~ right of free movement ☒ under Union law ☒ as defined in Article 2(5) of ☒ Regulation (EU) 2016/399 ~~☒ the Schengen Borders Code~~.

Article 3

Definitions

For the purpose of this Directive the following definitions shall apply:

1. 'third-country national' means any person who is not a citizen of the Union within the meaning of Article 20 ~~47(4)~~ of the Treaty ~~on the Functioning of the European Union~~ and who is not a person enjoying the ~~Community~~ right of free movement ~~under Union law~~, as defined in point 5 of Article 2(5) of ~~Regulation (EU) 2016/399~~ ~~the Schengen Borders Code~~;
2. 'illegal stay' means the presence on the territory of a Member State, of a third-country national who does not fulfil, or no longer fulfils the conditions of entry as set out in Article ~~65~~ of ~~Regulation (EU) 2016/399~~ ~~the Schengen Borders Code~~ or other conditions for entry, stay or residence in that Member State;
3. 'return' means the process of a third-country national going back — whether in voluntary compliance with an obligation to return, or enforced — to:
 - (a) his or her country of origin, or
 - (b) a country of transit in accordance with ~~Community~~ ~~Union~~ or bilateral readmission agreements or other arrangements, or
 - (c) another third country, to which the third-country national concerned voluntarily decides to return and in which he or she will be accepted;
4. 'return decision' means an administrative or judicial decision or act, stating or declaring the stay of a third-country national to be illegal and imposing or stating an obligation to return;
5. 'removal' means the enforcement of the obligation to return, namely the physical transportation out of the Member State;
6. 'entry ban' means an administrative or judicial decision or act prohibiting entry into and stay on the territory of the Member States for a specified period, accompanying a return decision;
7. 'risk of absconding' means the existence of reasons in an individual case which are based on objective criteria defined by law to believe that a third-country national who is the subject of return procedures may abscond;
8. 'voluntary departure' means compliance with the obligation to return within the time-limit fixed for that purpose in the return decision;
9. 'vulnerable persons' means minors, unaccompanied minors, disabled people, elderly people, pregnant women, single parents with minor children and persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence.

Article 4

More favourable provisions

1. This Directive shall be without prejudice to more favourable provisions of:
 - (a) bilateral or multilateral agreements between the ~~Community~~ ☒ Union ☒ or the ~~Community~~ ☒ Union ☒ and its Member States and one or more third countries;
 - (b) bilateral or multilateral agreements between one or more Member States and one or more third countries.
2. This Directive shall be without prejudice to any provision which may be more favourable for the third-country national, laid down in the ~~Community~~ ☒ Union ☒ *acquis* relating to immigration and asylum.
3. This Directive shall be without prejudice to the right of the Member States to adopt or maintain provisions that are more favourable to persons to whom it applies provided that such provisions are compatible with this Directive.
4. With regard to third-country nationals excluded from the scope of this Directive in accordance with Article 2(2)(a), Member States shall:
 - (a) ensure that their treatment and level of protection are no less favourable than as set out in Article ~~108~~(4) and (5) (limitations on use of coercive measures), Article ~~119~~(2)(a) (postponement of removal), Article ~~1714~~(1)(b) and (d) (emergency health care and taking into account needs of vulnerable persons), and Articles ~~1916~~ and ~~2017~~ (detention conditions) and
 - (b) respect the principle of non-refoulement.

Article 5

Non-refoulement, best interests of the child, family life and state of health

When implementing this Directive, Member States shall take due account of:

- (a) the best interests of the child;
- (b) family life;
- (c) the state of health of the third-country national concerned,

and respect the principle of non-refoulement.

Article 6

Risk of absconding

1. The objective criteria referred to in point 7 of Article 3 shall include at least the following criteria:
 - (a) lack of documentation proving the identity;
 - (b) lack of residence, fixed abode or reliable address;
 - (c) lack of financial resources;
 - (d) illegal entry into the territory of the Member States;
 - (e) unauthorised movement to the territory of another Member State;
 - (f) explicit expression of intent of non-compliance with return-related measures applied by virtue of this Directive;
 - (g) being subject of a return decision issued by another Member State;
 - (h) non-compliance with a return decision, including with an obligation to return within the period for voluntary departure;
 - (i) non-compliance with the requirement of Article 8(2) to go immediately to the territory of another Member State that granted a valid residence permit or other authorisation offering a right to stay;
 - (j) not fulfilling the obligation to cooperate with the competent authorities of the Member States at all stages of the return procedures, referred to in Article 7;
 - (k) existence of conviction for a criminal offence, including for a serious criminal offence in another Member State;
 - (l) ongoing criminal investigations and proceedings;
 - (m) using false or forged identity documents, destroying or otherwise disposing of existing documents, or refusing to provide fingerprints as required by Union or national law;
 - (n) opposing violently or fraudulently the return procedures;
 - (o) not complying with a measure aimed at preventing the risk of absconding referred to in Article 9(3);
 - (p) not complying with an existing entry ban.

2. The existence of a risk of absconding shall be determined on the basis of an overall assessment of the specific circumstances of the individual case, taking into account the objective criteria referred to in paragraph 1.

However, Member States shall establish that a risk of absconding is presumed in an individual case, unless proven otherwise, when one of the objective criteria referred to in points (m), (n), (o) and (p) of paragraph 1 is fulfilled.

Article 7

Obligation to cooperate

1. Member States shall impose on third-country nationals the obligation to cooperate with the competent authorities of the Member States at all stages of the return procedures. That obligation shall include the following in particular:
 - (a) the duty to provide all the elements that are necessary for establishing or verifying identity;
 - (b) the duty to provide information on the third countries transited;
 - (c) the duty to remain present and available throughout the procedures;
 - (d) the duty to lodge to the competent authorities of third countries a request for obtaining a valid travel document.
2. The elements referred to in point (a) of paragraph 1 shall include the third-country nationals' statements and documentation in their possession regarding the identity, nationality or nationalities, age, country or countries and place or places of previous residence, travel routes and travel documentation.
3. Member States shall inform the third-country nationals about the consequences of not complying with the obligation referred to in paragraph 1.

↓ 2008/115/EC (adapted) ⇒ new

CHAPTER II

TERMINATION OF ILLEGAL STAY

Article ~~86~~

Return decision

1. Member States shall issue a return decision to any third-country national staying illegally on their territory, without prejudice to the exceptions referred to in paragraphs 2 to 5.

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.
3. Member States may refrain from issuing a return decision to a third-country national staying illegally on their territory if the third-country national concerned is taken back by another Member State under bilateral agreements or arrangements existing on ☒ 13 January 2009 ~~☒ the date of entry into force of this Directive~~. In such a case the Member State which has taken back the third-country national concerned shall apply paragraph 1.
4. Member States may at any moment decide to grant an autonomous residence permit or other authorisation offering a right to stay for compassionate, humanitarian or other reasons to a third-country national staying illegally on their territory. In that event no return decision shall be issued. Where a return decision has already been issued, it shall be withdrawn or suspended for the duration of validity of the residence permit or other authorisation offering a right to stay.
5. If a third-country national staying illegally on the territory of a Member State is the subject of a pending procedure for renewing his or her residence permit or other authorisation offering a right to stay, that Member State shall consider refraining from issuing a return decision, until the pending procedure is finished, ~~without prejudice to paragraph 6~~.
6. ☒ Member States shall issue a return decision immediately after the adoption of a decision ending a legal stay of a third-country national, including a decision not granting a third-country national refugee status or subsidiary protection status in accordance with Regulation (EU) .../... [*Qualification Regulation*]. ☒

This Directive shall not prevent Member States from adopting a ☒ return ~~☒ decision on the ending of a legal stay~~ together with a ~~return decision and/or~~ ☒ a decision ending a legal stay of a third-country national, ~~☒ a decision on a removal and/or entry ban in a single administrative or judicial decision or act as provided for in their national legislation, without prejudice to the procedural safeguards available under Chapter III and under other relevant provisions of Community and national law.~~

The first and second subparagraphs are without prejudice to the safeguards under Chapter III and under other relevant provisions of Union and national law.

↓ 2008/115/EC
⇒ new

Article 97

Voluntary departure

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

The time period provided for in the first subparagraph shall not exclude the possibility for the third-country nationals concerned to leave earlier.

↓ new

The length of the period for voluntary departure shall be determined with due regard to the specific circumstances of the individual case, taking into account in particular the prospect of return.

↓ 2008/115/EC (adapted)
⇒ new

2. Member States shall, where necessary, extend the period for voluntary departure by an appropriate period, taking into account the specific circumstances of the individual case, such as the length of stay, the existence of children attending school and the existence of other family and social links.
3. Certain obligations aimed at avoiding the risk of absconding, such as regular reporting to the authorities, deposit of an adequate financial guarantee, submission of documents or the obligation to stay at a certain place may be imposed for the duration of the period for voluntary departure.

4. ⇒ Member States shall not grant a period for voluntary departure in following cases: ⇐

(a) ~~If~~ ⇐ where ⇐ there is a risk of absconding ⇒ determined in accordance with Article 6 ⇐ ~~;~~

(b) ~~or if~~ ⇐ where ⇐ an application for a legal stay has been dismissed as manifestly unfounded or fraudulent; ~~;~~

(c) ~~or if~~ ⇐ where ⇐ the ~~person~~ ⇐ third-country national ⇐ concerned poses a risk to public policy, public security or national security, ~~Member States may~~

~~refrain from granting a period for voluntary departure, or may grant a period shorter than seven days.~~

Article ~~108~~

Removal

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 ~~97~~(4) or if the obligation to return has not been complied with within the period for voluntary departure granted in accordance with Article ~~97~~. ⇒ Those measures shall include all measures necessary to confirm the identity of illegally staying third-country nationals who do not hold a valid travel document and to obtain such a document. ⇐
2. If a Member State has granted a period for voluntary departure in accordance with Article ~~97~~, the return decision may be enforced only after the period has expired, unless a risk as referred to in Article ~~97~~(4) arises during that period.
3. Member States may adopt a separate administrative or judicial decision or act ordering the removal.
4. Where Member States use — as a last resort — coercive measures to carry out the removal of a third-country national who resists removal, such measures shall be proportionate and shall not exceed reasonable force. They shall be implemented as provided for in national legislation in accordance with fundamental rights and with due respect for the dignity and physical integrity of the third-country national concerned.
5. In carrying out removals by air, Member States shall take into account the Common Guidelines on security provisions for joint removals by air annexed to Decision 2004/573/EC.
6. Member States shall provide for an effective forced-return monitoring system.

Article ~~119~~

Postponement of removal

1. Member States shall postpone removal:
 - (a) when it would violate the principle of non-refoulement, or
 - (b) for as long as a suspensory effect is granted in accordance with Article ~~1613(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 ~~97~~(3) may be imposed on the third-country national concerned.

Article ~~12~~~~10~~

Return and removal of unaccompanied minors

1. Before deciding to issue a return decision in respect of an unaccompanied minor, assistance by appropriate bodies other than the authorities enforcing return shall be granted with due consideration being given to the best interests of the child.
2. Before removing an unaccompanied minor from the territory of a Member State, the authorities of that Member State shall be satisfied that he or she will be returned to a member of his or her family, a nominated guardian or adequate reception facilities in the State of return.

Article ~~13~~~~11~~

Entry ban

1. 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.

↓ new

2. Member States may impose an entry ban, which does not accompany a return decision, to a third-country national who has been illegally staying in the territory of the Member States and whose illegal stay is detected in connection with border checks carried out at exit in accordance with Article 8 of Regulation (EU) 2016/399, where justified on the basis of the specific circumstances of the individual case and taking into account the principle of proportionality.

↓ 2008/115/EC
⇒ new

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

43. 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.

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 authorities³⁰ shall not be subject of an entry ban without prejudice to paragraph 1, first subparagraph, point (b), and provided that the third-country national concerned does not represent a threat to public policy, public security or national security.

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

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

54. Where a Member State is considering issuing a residence permit or other authorisation offering a right to stay to a third-country national who is the subject of an entry ban issued by another Member State, it shall first consult the Member State having issued the entry ban and shall take account of its interests in accordance with Article 25 of the Convention implementing the Schengen Agreement²⁴ ⇨ in accordance with Article 27 of Regulation (EU) 2018/XXX³² ⇨.

65. Paragraphs 1 to 54 shall apply without prejudice to the right to international protection, as defined in point (a) of Article 2(a) of Directive 2011/95/EU Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted²³, in the Member States.

⇩ new

Article 14

Return Management

³⁰ Council Directive 2004/81/EC of 29 April 2004 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities (OJ L 261, 6.8.2004, p. 19).

³¹ OJ L 239, 22.9.2000, p. 19.

³² Regulation (EU) 2018/... of the European Parliament and of the Council of [...] on the establishment, operation and use of the Schengen Information System (SIS) in the field of border checks, and amending the Convention implementing the Schengen Agreement, and amending and repealing Regulation (EC) No 1987/2006 [adoption pending].

³³ Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted (OJ L 304, 30.9.2004, p. 12).

1. Each Member State shall set up, operate, maintain and further develop a national return management system, which shall process all the necessary information for implementing this Directive, in particular as regards the management of individual cases as well as of any return-related procedure.
2. The national system shall be set up in a way which ensures technical compatibility allowing for communication with the central system established in accordance with Article 50 of Regulation (EU) .../... [*EBCG Regulation*].
3. Member States shall establish programmes for providing logistical, financial and other material or in-kind assistance, in accordance with national legislation, for the purpose of supporting the return of illegally staying third-country nationals who are nationals of third countries listed in Annex I to Council Regulation 539/2001³⁴.

Such assistance may include support for reintegration in the third country of return.

The granting of such assistance, including its kind and extent, shall be subject to the cooperation of the third-country national concerned with the competent authorities of the Member States as provided for in Article 7 of this Directive.

↓ 2008/115/EC

CHAPTER III

PROCEDURAL SAFEGUARDS

Article ~~15~~¹²

Form

1. Return decisions and, if issued, entry-ban decisions and decisions on removal shall be issued in writing and give reasons in fact and in law as well as information about available legal remedies.

The information on reasons in fact may be limited where national law allows for the right to information to be restricted, in particular in order to safeguard national security, defence, public security and for the prevention, investigation, detection and prosecution of criminal offences.

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

³⁴ Council Regulation (EC) No 539/2001 of 15 March 2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement (OJ L 81, 21.3.2001, p. 1).

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

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

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

Article ~~16~~¹³

Remedies

1. The third-country national concerned shall be afforded an effective remedy to appeal against or seek review of decisions related to return, as referred to in Article ~~15~~¹²(1), before a competent judicial ~~or administrative authority or a competent body composed of members who are impartial and who enjoy safeguards of independence.~~

↓ new

The third-country national concerned shall be granted the right to appeal before a single level of jurisdiction against the return decision where that decision is based on a decision rejecting an application for international protection taken in accordance with Regulation EU) .../... [*Asylum Procedure Regulation*] that was subject to an effective judicial review in accordance with Article 53 of that Regulation.

↓ 2008/115/EC
⇒ new

2. The ⇒ judicial ⇐ authority ~~or body~~ mentioned in paragraph 1 shall have the power to review decisions related to return, as referred to in Article ~~15~~¹²(1), including the possibility of temporarily suspending their enforcement, ~~unless a temporary suspension is already applicable under national legislation.~~

↓ new

3. The enforcement of the return decision shall be automatically suspended during the period for bringing the appeal at first instance and, where that appeal has been lodged within the set period, during the examination of the appeal, where there is a risk to breach the principle of non-refoulement. Should a further appeal against a first or subsequent appeal decision be lodged, and in all other cases, the enforcement of the return decision shall not be suspended unless a court or tribunal decides otherwise

taking into due account the specific circumstances of the individual case upon the applicant's request or acting ex officio.

Member States shall ensure that a decision on the request for temporary suspension of the enforcement of a return decision is taken within 48 hours from the lodging of such a request by the third-country national concerned. In individual cases involving complex issues of fact or law, the time-limits set out in this paragraph may be extended, as appropriate, by the competent judicial authority.

Where no relevant new elements or findings have arisen or have been presented by the third-country national concerned which significantly modify the specific circumstances of the individual case, the first and the second subparagraphs of this paragraph shall not apply where:

- (a) the reason for temporary suspension referred thereto was assessed in the context of a procedure carried out in application of Regulation (EU) .../... [*Asylum Procedure Regulation*] and was subject to an effective judicial review in accordance with Article 53 of that Regulation;
- (b) the return decision is the consequence of the decision on ending the legal stay that has been taken following such procedures.

4. Member States shall establish reasonable time limits and other necessary rules to ensure the exercise of the right to an effective remedy pursuant to this Article.

Member States shall grant a period not exceeding five days to lodge an appeal against a return decision when such a decision is the consequence of a final decision rejecting an application for international protection taken in accordance with Regulation (EU) .../... [*Asylum Procedure Regulation*].

↓ 2008/115/EC

53. The third-country national concerned shall have the possibility to obtain legal advice, representation and, where necessary, linguistic assistance.
64. Member States shall ensure that the necessary legal assistance and/or representation is granted on request free of charge in accordance with relevant national legislation or rules regarding legal aid, and may provide that such free legal assistance and/or representation is subject to conditions as set out in Article 15(3) to (6) of Directive 2005/85/EC.

Article ~~17~~44

Safeguards pending return

1. Member States shall, with the exception of the situation covered in Articles ~~19~~146 and ~~20~~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 ~~97~~ and during periods for which removal has been postponed in accordance with Article ~~119~~:

- (a) family unity with family members present in their territory is maintained;
 - (b) emergency health care and essential treatment of illness are provided;
 - (c) minors are granted access to the basic education system subject to the length of their stay;
 - (d) special needs of vulnerable persons are taken into account.
2. Member States shall provide the persons referred to in paragraph 1 with a written confirmation in accordance with national legislation that the period for voluntary departure has been extended in accordance with Article ~~97~~(2) or that the return decision will temporarily not be enforced.

CHAPTER IV

DETENTION FOR THE PURPOSE OF REMOVAL

↓ 2008/115/EC (adapted)
⇒ new

Article ~~18~~¹⁵

Detention

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 ⇒ determined in accordance with Article 6; ⇐ ~~or~~
 - (b) the third-country national concerned avoids or hampers the preparation of return or the removal process; ~~or~~ ~~or~~ or ~~or~~

↓ new

- (c) the third-country national concerned poses a risk to public policy, public security or national security.

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

↓ 2008/115/EC

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

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.

3. In every case, detention shall be reviewed at reasonable intervals of time either on application by the third-country national concerned or ex officio. In the case of prolonged detention periods, reviews shall be subject to the supervision of a judicial authority.
4. When it appears that a reasonable prospect of removal no longer exists for legal or other considerations or the conditions laid down in paragraph 1 no longer exist, detention ceases to be justified and the person concerned shall be released immediately.

↓ 2008/115/EC (adapted)
⇒ new

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

↓ 2008/115/EC

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.

Article ~~19~~¹⁶

Conditions of detention

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.

Article ~~20~~¹⁷

Detention of minors and families

1. Unaccompanied minors and families with minors shall only be detained as a measure of last resort and for the shortest appropriate period of time.
2. Families detained pending removal shall be provided with separate accommodation guaranteeing adequate privacy.
3. Minors in detention shall have the possibility to engage in leisure activities, including play and recreational activities appropriate to their age, and shall have, depending on the length of their stay, access to education.
4. Unaccompanied minors shall as far as possible be provided with accommodation in institutions provided with personnel and facilities which take into account the needs of persons of their age.
5. The best interests of the child shall be a primary consideration in the context of the detention of minors pending removal.

Emergency situations

1. In situations where an exceptionally large number of third-country nationals to be returned places an unforeseen heavy burden on the capacity of the detention facilities of a Member State or on its administrative or judicial staff, such a Member State may, as long as the exceptional situation persists, decide to allow for periods for judicial review longer than those provided for under the third subparagraph of Article ~~18~~¹⁵(2) and to take urgent measures in respect of the conditions of detention derogating from those set out in Articles ~~19~~¹⁶(1) and ~~20~~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.

↓ new

CHAPTER V BORDER PROCEDURE

Article 22

Border procedure

1. Member States shall establish return procedures applicable to illegally staying third-country nationals subject to an obligation to return following a decision rejecting an application for international protection taken by virtue of Article 41 of Regulation (EU) .../... [*Asylum Procedure Regulation*].
2. Except where otherwise provided in this Chapter, the provisions of Chapters II, III and IV apply to return procedures carried out in accordance with paragraph 1.
3. Return decisions issued in return procedures carried out in accordance with paragraph 1 of this Article shall be given by means of a standard form as set out under national legislation, in accordance with Article 15(3).
4. A period for voluntary departure shall not be granted. Member States shall however grant an appropriate period for voluntary departure in accordance with Article 9 to third-country nationals holding a valid travel document and fulfilling the obligation to cooperate with the competent authorities of the Member States at all stages of the return procedures established in accordance with Article 7. Member States shall require the third-country nationals concerned to hand over the valid travel document to the competent authority until departure.

5. Member States shall grant a period not exceeding 48 hours to lodge an appeal against the return decisions based on a final decision rejecting an application for international protection taken by virtue of Article 41 of Regulation (EU) .../... [*Asylum Procedure Regulation*] at the border or in transit zones of the Member States.
6. The enforcement of a return decision during the period for bringing the appeal at first instance and, where that appeal has been lodged within the period established, during the examination of the appeal, shall be automatically suspended where there is a risk of breach of the principle of non-refoulement and one of the following two conditions applies :
- (a) new elements or findings have arisen or have been presented by the third-country national concerned after a decision rejecting an application for international protection taken by virtue of Article 41 of Regulation (EU) .../... [*Asylum Procedure Regulation*], which significantly modify the specific circumstances of the individual case; or
 - (b) the decision rejecting an application for international protection taken by virtue of Article 41 of Regulation (EU) .../... [*Asylum Procedure Regulation*] was not subject to an effective judicial review in accordance with Article 53 of that Regulation.

Where a further appeal against a first or subsequent appeal decision is lodged, and in all other cases, the enforcement of the return decision shall not be suspended unless a court or tribunal decides otherwise taking into account the specific circumstances of the individual case upon the applicant's request or acting ex officio.

Member States shall provide that a decision on the request by the person concerned for a temporary suspension of the enforcement of a return decision shall be taken within 48 hours from the lodging of such a request by the third-country national concerned. In individual cases involving complex issues of fact or law, the time-limits set out in this paragraph may be extended as appropriate by the competent judicial authority.

7. In order to prepare the return or carry out the removal process, or both, Member States may keep in detention a third-country national who has been detained in accordance with point (d) of Article 8(3) of Directive (EU) .../... [*recast Reception Condition Directive*] in the context of a procedure carried out by virtue of Article 41 of Regulation (EU) .../... [*Asylum Procedure Regulation*], and who is subject to return procedures pursuant to the provisions of this Chapter.

Detention shall be for as short a period as possible, which shall in no case exceed four months. It may be maintained only as long as removal arrangements are in progress and executed with due diligence.

When the return decision cannot be enforced within the maximum period referred to in this paragraph, the third-country national may be further detained in accordance with Article 18.

CHAPTER ~~VII~~ FINAL PROVISIONS

Article ~~23~~¹⁹

Reporting

The Commission shall report every three years to the European Parliament and the Council on the application of this Directive in the Member States and, if appropriate, propose amendments.

~~The Commission shall report for the first time by 24 December 2013 and focus on that occasion in particular on the application of Article 11, Article 13(4) and Article 15 in Member States. In relation to Article 13(4) the Commission shall assess in particular the additional financial and administrative impact in Member States.~~

Article ~~20~~

Transposition

~~1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive. In relation to Article 13(4), Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 24 December 2011. They shall forthwith communicate to the Commission the text of those measures.~~

~~When Member States adopt those measures, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. Member States shall determine how such reference is to be made.~~

~~2. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.~~

Article ~~24~~²¹

Relationship with the Schengen Convention

This Directive replaces the provisions of Articles 23 and 24 of the Convention implementing the Schengen Agreement.



Article 25

Transposition

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with Articles 6 to 10, Articles 13 and 14(3), Article 16, Article 18 and Article 22 by [*six months after the day of entry into force*] and with Article 14(1) and (2) by [*one year after the day of entry into force*]. They shall immediately communicate the text of those measures to the Commission.

When Member States adopt those measures, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. They shall also include a statement that references in existing laws, regulations and administrative provisions to the Directive repealed by this Directive shall be construed as references to this Directive. Member States shall determine how such reference is to be made and how that statement is to be formulated.

2. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.

Article 26

Repeal

Directive 2008/115/EC is repealed with effect from [...] [*the day after the second date referred to in the first subparagraph of Article 25(1)*], without prejudice to the obligations of the Member States relating to the time-limits for the transposition into national law of the Directive set out in Annex I.

References to the repealed Directive shall be construed as references to this Directive and shall be read in accordance with the correlation table in Annex II.

 2008/115/EC

Article ~~22~~ 27

Entry into force

This Directive shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.



Articles [...] [*articles which are unchanged by comparison with the repealed Directive*] shall apply from [...] [*the day after the second date referred to in the first subparagraph of Article 25(1)*].

↓ 2008/115/EC (adapted)

Article ~~28~~²³

Addressees

This Directive is addressed to the Member States in accordance with the ~~Treaty establishing the European Community~~ ☒ ~~Treaties~~ ☒ .

Done at Brussels,

*For the European Parliament
The President*

*For the Council
The President*