Council of the
European Union

Brussels, 17 March 2023
(OR. en)

7571/23

JAI 333
MIGR 102
ASILE 29
FRONT 90
RELEX 368
COMIX 134

COVER NOTE

From:	Secretary-General of the European Commission, signed by Ms Martine DEPREZ, Director
date of receipt:	17 March 2023
To:	Ms Thérèse BLANCHET, Secretary-General of the Council of the European Union
No. Cion doc.:	C(2023) 1763 final
Subject:	COMMISSION RECOMMENDATION of 16.3.2023 on mutual recognition of return decisions and expediting returns when implementing Directive 2008/115/EC of the European Parliament and of the Council

Delegations will find attached document C(2023) 1763 final.

Encl.: C(2023) 1763 final

EUROPEAN
COMMISSION

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COMMISSION RECOMMENDATION

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THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 292 thereof,

Whereas:

(1) Article 4(3) of the Treaty on European Union requires the Union and the Member States to assist each other, in full mutual respect, in carrying out tasks that flow from the Treaties.

(2) Directive 2008/115/EC of the European Parliament and of the Council ([1]) lays down common standards and procedures to be applied in Member States for returning illegally staying third-country nationals.

(3) On 12 September 2018 the Commission tabled a proposal to recast Directive 2008/115/EC reducing the length of return procedures, securing a better link between asylum and return procedures and ensuring a more effective use of measures to prevent absconding, while ensuring respect for fundamental rights as enshrined in the Charter of Fundamental Rights of the European Union (the Charter).

(4) The New Pact on Migration and Asylum ([2]) aims at establishing a common EU system for returns that combines stronger structures inside the Union with more effective cooperation with third countries on return and readmission, as part of a comprehensive approach on managing migration. That approach brings together all policies in the areas of migration, asylum, integration, border management, recognising that the overall effectiveness depends on progress on all fronts. A faster, seamless migration process and stronger governance of migration and borders policies, cooperation with third countries including on the implementation of EU readmission agreements and arrangements, underpinned by modern IT systems and support from relevant EU agencies will foster a more effective and sustainable return process.

(5) The European Council has consistently underlined the importance of a unified, comprehensive and effective Union policy on return and readmission calling for swift action to ensure effective returns from the Union by speeding up return procedures. The European Council also invited Member States to recognise each other's return decisions ([3]).

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1 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).

2 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on a New Pact on migration and Asylum (COM(2020) 609 final).

3 European Council conclusions of 9 February 2023, 1/23.

(6) The Commission Communication of 10 February 2021 on 'Enhancing cooperation on return and readmission as part of a fair, effective and comprehensive EU migration policy' ([4]) identified the obstacles that hamper effective return and indicated that, to overcome them, there is a need for improved procedures that reduce the fragmentation of national approaches, as well as closer cooperation and reinforced solidarity between all Member States. The Schengen Evaluation and Monitoring Mechanism established by Council Regulation (EU) 2022/922 ([5]) and the information collected through the European Migration Network ([6]) established by Council Decision 2008/381/EC have allowed for a comprehensive assessment of how Member States implement the Union policy on return and to identify the existing gaps and obstacles.

(7) In view of the continued challenges in the area of return, and pending the conclusion of the legislative negotiations, notably on the proposal for a recast of Directive 2008/115/EC, additional actions are recommended to further improve the effective and efficient application of the existing legal framework.

(8) Commission Recommendation (EU) 2017/432 ([7]) which recommends a series of measures and actions to make returns more effective when implementing Directive 2008/115/EC, remains relevant and should continue to guide Member States for a more expeditious return process. Recommendation (EU) 2017/432 has been incorporated into Commission Recommendation (EU) 2017/2338 ([8]) allowing for a continuous assessment of its implementation as part of the Schengen Evaluation and Monitoring Mechanism.

(9) As a steppingstone towards a common EU system for returns, mutual recognition of return decisions can facilitate and accelerate the return processes for the Member State responsible for return and enhance cooperation and mutual trust between Member States for further increasing convergence between Member States on managing migration. Mutual recognition of return decisions previously issued in another Member State can also contribute to deterring irregular migration and discourage unauthorised secondary movements within the Union. Council Directive 2001/40/EC ([9]) sets out a framework for mutual recognition. This framework was complemented by Council Decision 2004/191/EC ([10]) setting out the criteria and practical arrangements for the compensation of the financial imbalances resulting from the application of Directive 2001/40/EC, predating much of the support that has since been developed at Union level. Progress on mutual recognition of return decisions

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4 COM(2021) 56 final.

5 Council Regulation (EU) 2022/922 of 9 June 2022 on the establishment and operation of an evaluation and monitoring mechanism to verify the application of the Schengen acquis, and repealing Regulation (EU) No 1053/2013 (OJ L 160, 15.6.2022, p. 1).

6 Council Decision 2008/381/EC of 14 May 2008 establishing a European Migration Network (OJ L 131, 21.5.2008, p. 7).

7 Commission Recommendation (EU) 2017/432 of 7 March 2017 on making returns more effective when implementing the Directive 2008/115/EC of the European Parliament and of the Council (OJ L 66, 11.3.2017, p. 15).

8 Commission Recommendation (EU) 2017/2338 of 16 November 2017 establishing a common 'Return Handbook' to be used by Member States' competent authorities when carrying out return-related tasks (OJ L 339, 19.12.2017, p. 83).

9 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).

10 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 Council 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).

should also feed into the ongoing discussions on the Commission proposal to recast Directive 2008/115/EC.

(10) The lack of a Union-wide system indicating whether an apprehended third country national is already subject to a return decision issued by another Member State has previously hampered the recourse to mutual recognition.

(11) Since 7 March 2023 when Regulation (EU) 2018/1860 of the European Parliament and of the Council ([11]) started to apply, Member States are required to enter an alert on return in the Schengen Information System without delay following the issuance of a return decision. Through the Schengen Information System Member States are now able to see immediately whether a third-country national apprehended by the competent authority is already subject to a return decision issued by another Member State.

(12) The added value of this new feature in the Schengen Information System depends on the active use of and adequate follow up on alerts on return including by means of mutual recognition of return decision issued previously by other Member States. This can significantly speed up and render the return process more efficient notably when the return can be immediately enforced, including where the period for voluntary departure granted in the return decision by issuing Member State has expired and where remedies against such return decision have been exhausted.

(13) Dedicated funding under the Asylum, Migration and Integration Fund ([12]) will support the implementation of this Recommendation and in particular, the mutual recognition of return decisions between Member States. Moreover, practical and operational support by competent EU Agencies should be provided in the implementation of this recommendation.

(14) Obstacles to cooperation and communication among national authorities responsible for the asylum and the return procedures represent a key structural challenge for a more efficient return process. All competent authorities of the Member States involved in the different phases of the return process should work and coordinate closely.

(15) Closer links between the asylum and return procedures and swift procedures at the external borders of the Member States can considerably increase the efficiency of return. When the derogation from the application of Directive 2008/115/EC on the basis of Article 2(2)(a) is not applicable, there is a need to accelerate, within the current legislative framework, notably the effective return of those third-country nationals whose application for international protection has been rejected and for cases in the vicinity of the external border of Member States, through a faster return process providing that the respect of their fundamental rights is ensured during the whole return process.

(16) Article 3(3) of Regulation (EU) 2018/1860 provides for a possibility to refrain from entering alerts on return in the Schengen Information System when the return decision is issued at the external border of a Member State and is executed immediately. Nevertheless, Article 3(1) of Regulation (EU) 2018/1860 requires Member States to

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[11] Regulation (EU) 2018/1860 of the European Parliament and of the Council of 28 November 2018 on the use of the Schengen Information System for the return of illegally staying third-country nationals (OJ L 312, 7.12.2018, p. 1).

[12] Regulation (EU) 2021/1147 of the European Parliament and of the Council of 7 July 2021 establishing the Asylum, Migration and Integration Fund (OJ L 251, 15.7.2021, p. 1–47).

ensure that alerts are entered in the Schengen Information System without delay when the return was not executed immediately from the external borders.

(17) In order to incentivise and encourage voluntary returns, the possibilities provided by Directive 2008/115/EC could be used to consider refraining from issuing an entry ban in respect of third-country nationals who cooperate with the authorities and who participate in an assisted voluntary return and reintegration programme, without prejudice to the obligations set by Article 11(1) of Directive 2008/115/EC. In such cases, Member States are to prolong the period for voluntary departure as appropriate, in accordance with Article 7(2) of Directive 2008/115/EC.

(18) Preventing absconding and unauthorised movements within the Union is essential to ensure the effectiveness of the common EU system for returns. A comprehensive approach, including the key tools for assessing and preventing the risk of absconding, is needed to facilitate and streamline the assessment of this risk in individual cases, to strengthen the use of efficient alternatives to detention, and to ensure sufficient detention capacity – when detention is used as a measure of last resort and for an as short as possible period in accordance with Article 15 of Directive 2008/115/EC.

(19) Support at Union level is available for the implementation of this Recommendation including by the EU Return Coordinator and the High-Level Network for Returns guided by an operational strategy on returns. Operational support is also available through competent Agencies of the Union, notably Frontex, the European Union Asylum Agency and the Fundamental Rights Agency.

(20) National return authorities are part of the European Border and Coast Guard which is responsible for ensuring the effective implementation of the European Integrated Border Management. Frontex plays a central role as the operational arm of the common EU system for returns and provides assistance to Member States in all phases of the return process under its mandate pursuant to Regulation (EU) 2019/1896 of the European Parliament and of the Council ([13]).

(21) This Recommendation should be addressed to all Member States bound by Directive 2008/115/EC.

(22) Member States are encouraged to instruct their national authorities competent for carrying out return-related tasks to apply this Recommendation when performing their duties.

(23) This Recommendation complies with the fundamental rights and the principles recognised by the Charter. In particular, this Recommendation ensures full respect for human dignity and the application of Articles 1, 4, 14, 18, 19, 21, 24 and 47 of the Charter and has to be implemented accordingly.

HAS ADOPTED THIS RECOMMENDATION:

Mutual recognition of return decisions

(1) With a view to facilitating and speeding up the return process, the Member State responsible for the return of an illegally staying third-country national should mutually recognise any return decision previously issued to the same person by

[13] Regulation (EU) 2019/1896 of the European Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard and repealing Regulations (EU) No 1052/2013 and (EU) 2016/1624 (OJ L 295, 14.11.2019).

another Member State unless the effect of such return decision has been suspended. To this effect Member States should:

(a) make full use of information shared through alerts on return in the Schengen Information System set out in Regulation (EU) 2018/1860;

(b) ensure that fingerprints are available for inclusion in an alert in accordance with Article 4 of Regulation (EU) 2018/1860;

(c) systematically verify in the automated fingerprint identification system of the Schengen Information System whether an illegally staying third-country national is the subject of an alert on return in the Schengen Information System;

(d) ensure that the national authorities responsible for return closely cooperate with the national SIRENE Bureau considering its role established by Regulation EU 2018/1861 of the European Parliament and of the Council ([14]) and its role in the exchange of information pursuant to Regulation (EU) 2018/1860;

(e) cooperate and where necessary exchange supplementary information to facilitate the recognition and the enforcement of the return decision;

(f) examine the situation of the third-country national concerned after having heard that person to ensure compliance with national law and with Article 5 of Directive 2008/115/EC, before recognising a return decision issued by another Member State and before removal. For children in particular, the enforcing Member State should ensure that due consideration shall be given to the best interest of the child;

(g) notify the third-country national concerned in writing that the return decision issued by another Member State to which that person is subject has been recognised. The notification should restate the reasons in fact and in law provided in the return decision and should provide information of the available legal remedies;

(h) immediately inform the issuing Member State about the removal of the third-country national concerned, so that the issuing Member State can update the Schengen Information System in accordance with Article 24(1) point (b) of Regulation (EU) 2018/1861.

Expediting returns

(2) For the purpose of speeding up return procedures, Member States should establish strong cooperation between authorities responsible for the decisions ending legal stay and those responsible for the issuance of return decisions, including the regular exchange of information and operational cooperation, based on the integrated and coordinated approach recommended in Recommendation (EU) 2017/432.

(3) To ensure the timely availability of information on the identity and legal situation of third-country nationals subject to a return decision necessary to monitor and follow up on individual cases, and to establish and maintain a national situational picture on return, Member States are invited to establish, without delay, a comprehensive IT

[14] Regulation (EU) 2018/1861 of the European Parliament and of the Council of 28 November 2018 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. OJ L 312, 7.12.2018, p. 14.

return case management system, based on the model developed by Frontex pursuant to Article 48(1) point (c) of Regulation (EU) 2019/1896. Member States should also make full use of the Readmission Case Management Systems which have been put in place to foster the implementation of readmission agreements or arrangements with third countries.

(4) To ensure that a decision rejecting an application for international protection is swiftly followed up with return procedures, Member States should:

(a) establish a direct and standard communication channel between asylum and return authorities for seamless coordination between the two procedures;

(b) issue in the same act, or in separate acts at the same time or directly thereafter, a return decision and a decision rejecting an application for international protection, making the best use of the possibility referred to in Article 6(6) of Directive 2008/115/EC;

(c) provide for the possibility of lodging appeals against the decision rejecting the application for international protection and the return decision at the same time before the same court or tribunal, or for the possibility to appeal both decisions within the same timeframe;

(d) provide for the automatic suspension of the execution of return decisions during an appeal procedure only to the extent that it is necessary to comply with Article 19(2) and Article 47 of the Charter;

(e) take steps to ensure that a remedy can be exercised from a third country, notably through appropriate legal representation and by making use of innovative tools such as videoconferencing, provided that the right to an effective remedy and Article 5 of Directive 2008/115/EC are complied with.

(5) To ensure faster returns in the vicinity of the external borders, Member States should:

(a) put in place mobile support teams bringing together all competent authorities for voluntary and forced return and relevant support services, including interpreters, health services, legal advice and social workers;

(b) establish adequate facilities (in particular for children and families) in the vicinity of the external border area to host third-country nationals pending return that respect human dignity and fundamental rights enshrined in the Charter, including the rights to private and family life, and non-discrimination;

(c) where applicable, make full use of the accelerated procedures provided for in the readmission agreements concluded between the Union or Member States and third countries, while respecting the procedural guarantees in compliance, notably, with article 47 of the Charter;

(d) in accordance with Article 3 (1) and (2) of Regulation (EU) 2018/1860, enter an alert on return in the Schengen Information System when it is not possible to execute the return immediately.

(6) Member States should rely on and use to the full extent possible all the support provided by Frontex, including its operational support to the national authorities, assistance with the identification of returnees and the acquisition of travel documents, organisation of return operations and support to voluntary departure and reintegration.

Incentives for voluntary return

(7) To encourage illegally staying third-country nationals to return voluntarily, Member States should establish return and reintegration counselling structures to provide them with information and guidance as early in the process as possible and channel them into an assisted voluntary return and reintegration programme. Member States should ensure that information about return is also provided during the asylum process, as return is a possible outcome in case the application for international protection is rejected.

(8) Furthermore, Member States should:

(a) consider refraining from issuing an entry ban to third-country nationals who cooperate with the competent authorities and who enrol into an assisted voluntary return and reintegration programme, without prejudice to Article 11(1) of Directive 2008/115/EC; in such cases Member States should prolong the period for voluntary departure as appropriate, in accordance with Article 7(2) of Directive 2008/115/EC;

(b) provide for an easily accessible and practically operational procedure for the third country national to request the withdrawal, suspension or shortening of an entry ban in those cases in which a third country national who is subject to an entry ban has left the territory of a Member State in full compliance with a return decision within the period granted for voluntary departure, in accordance with Article 11(3) of Directive 2008/115/EC.

A comprehensive approach to absconding

(9) For the purpose of establishing a streamlined and coordinated process, Member States should put in place a comprehensive approach comprising the following key tools for assessing and preventing the risk of absconding:

(a) objective criteria for assessing the existence of the risk of absconding in each individual case;

(b) effective alternatives to detention to match the different levels of risk of absconding and individual circumstances;

(c) detention as a measure of last resort and for an as short as possible period in accordance with Article 15 of Directive 2008/115/EC and Article 6 of the Charter.

(10) To assess the existence of reasons in an individual case to believe that a third-country national who is the subject of return procedures may abscond within the meaning of Article 3, point 7 of Directive 2008/115/EC, Member States should introduce in the national legislation the objective circumstances and criteria referred to respectively in points 15 and 16 of Recommendation (EU) 2017/432. Member States should provide for a wide range of alternatives to detention that are effective to prevent the absconding of the illegally staying third-country nationals and that are targeted to the individual circumstances of the individuals concerned. Member States should put adequate procedures in place to ensure that third-country nationals comply with such measures. Efficient but less coercive measures than detention should be provided for and may include:

(a) the obligation to regularly report to the competent authorities, ranging from every 24 hours to once a week, depending on the level of the risk of absconding;

(b) the obligation to surrender the passport, travel document or identity document to the competent authorities;

(c) the obligation to reside in a place designated by the authorities, such as a private residence, a shelter or a dedicated centre;

(d) the obligation to report a home address to the competent authorities, including any changes to such an address;

(e) deposit of an adequate financial guarantee;

(f) the use of innovative technology.

(11) Member States should ensure that detention capacity is in line with actual needs, taking into account the number of illegally staying third-country nationals subject to a return decision and the estimated number of those that are expected to be returned in the medium term.

Implementation, Monitoring and Reporting

(12) When implementing this Recommendation Member States should rely on and use to the full extent all the support provided at Union level, including:

(a) the EU Return Coordinator and the High-Level Network for Returns;

(b) support from the competent Union Agencies, notably Frontex, the European Union Agency for Asylum, eu-LISA, and the Fundamental Rights Agency;

(c) the expertise and information collected and exchanged in Union networks and groups dealing with return matters.

(13) For the purpose of monitoring the implementation of this Recommendation, Member States are invited to report annually to the Commission, including on the number of return decisions of other Member States that have been mutually recognised.

Done at Brussels, 16.3.2023

For the Commission
Ylva JOHANSSON
Member of the Commission

CERTIFIED COPY
For the Secretary-General

Martine DEPREZ
Director
Decision-making & Collegiality
EUROPEAN COMMISSION