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The effectiveness of return in EU Member States

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

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EXPLANATORY NOTE

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

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

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

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

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Executive Summary

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

KEY POINTS TO NOTE

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

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

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

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

MAIN FINDINGS

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

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

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

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

The majority of Member States issue return decisions when:

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

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

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

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

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

How is the risk of absconding assessed by Member States?

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

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

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

How do Member States effectively enforce return decisions?

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

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

Several Member States reported that they could make use of EU travel documents for return in application of Regulation 2016/1953[2] (AT, BE, DE, EE, FI, FR, LT, LU, LV, NL, UK). On the other hand, eight Member States stated that they did not use EU travel documents at all (CY, CZ, EL, ES, HR, HU, IE, MT, SK). In practice, some Member States reported that the acceptance of EU travel documents by third-countries varied, with only a small number of third countries accepting them.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

How do Member States regulate the period for voluntary departure?

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

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

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

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

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

An entry ban can be imposed in cases where:

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

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

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

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

01

INTRODUCTION

Introduction

1.1 STUDY RATIONALE

The return of irregular migrants is one of the main pillars of the EU's policy on migration and asylum. However, in 2014, it was estimated that less than 40% of the irregular migrants who were ordered to leave the EU departed effectively.[3] In addition, recent data made available to Eurostat show that the number of returns of third-country nationals within the EU have not improved despite the important increase in the number of rejected asylum applications and in the number of return decisions issued between 2014 and 2015.[4] As a result, the European Commission has emphasised in its EU Action Plan on Return published on 9th September 2015,[5] and, subsequently, in its Communication on a more effective return policy in the EU published on 2nd March 2017 and the attached Recommendation,[6] the need for a stronger enforcement of EU rules on return in order to increase the overall effectiveness of the EU's return policy.

1.2 STUDY CONTEXT

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

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

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

Following the dramatic increase in arrivals of migrants to the EU in 2014 and 2015, a European Agenda on Migration was adopted on 17th May 2015.[11] The Agenda set out actions in the areas of humanitarian response, international protection, border management, return and legal migration and encouraged Member States to step up their efforts to effectively return irregular migrants. Similarly, the European Council Conclusions of 25th-26th June 2015 called for all tools to be mobilised to increase the rate of

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

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

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

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

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

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

9 *Directive 2008/115/EC, op. cit.*

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

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

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

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

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

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

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

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

1.3 STUDY AIMS

This study aims at analysing the impact of EU rules on return – including the Return Directive[18] and related case law from the Court of Justice of the European Union (CJEU) – on Member States' return policies and practices and hence on the effectiveness of return decisions issued across the EU. The study will present an estimation of the scale of the population of irregular migrants who have been issued a return decision but whose return to a third country has, as yet, not been carried out. The study will also seek to provide an overview of the challenges encountered by Member States in effectively implementing returns, as well as identify any good practices developed to ensure the enforcement of return obligations

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

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

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

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

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

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

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

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

1.4 SCOPE OF THE STUDY

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

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

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

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

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

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

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

[22] Available at: https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/networks/european_migration_network/reports/docs/emn-studies/emn_study_reentry_bans_and_readmission_agreements_final_december_2014.pdf, last accessed on 30th March 2017.

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

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

1.5 STRUCTURE OF THE REPORT

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

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

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

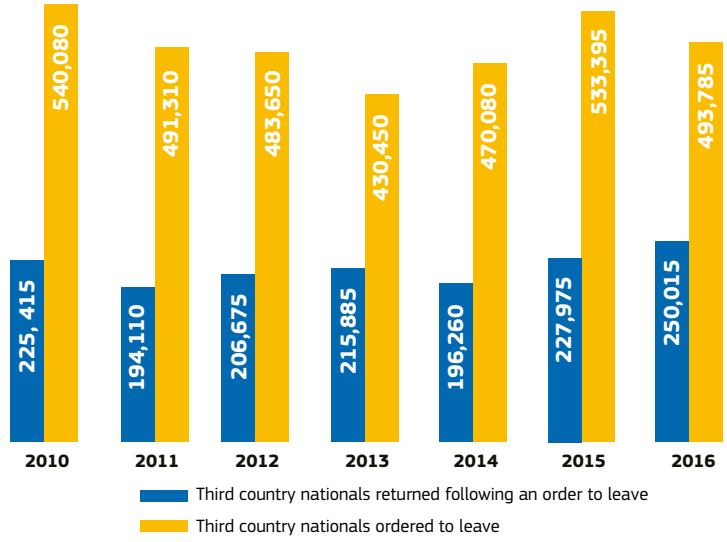
02

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

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

As outlined in Figure 1, data made available to Eurostat show that the number of returns has not increased in proportion to the number of those who were ordered to leave, despite the significant increase in the number of rejected asylum applications and in the number of return decisions issued between 2014 and 2015.[24] Eurostat figures from 2016 show a slight increase in the number of return decisions issued and of returns of third-country nationals in comparison with previous years, although the proportion of effective returns remains at about half of the total of orders to leave the territory issued by Member States.

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



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

This section provides a mapping of the recent changes in the national legal and policy framework and an overview of the main focus of debates on return in all EU Member States. It also reviews the national measures implementing the Return Directive[25] as well as different interpretations and equivalent standards applied by Member States.

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

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

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

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

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

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

Member State	Focus of debate	Key players involved
Austria	› Removals to Afghanistan › Voluntary return › Harder sanctions for illegal residence › More efficient enforcement of return obligations	› Federal Ministry of the Interior › NGOs
Belgium	› Possibility to detain families with minor children › Identification and forced return of irregularly staying Sudanese migrants in transit › Attempt to remove a minor from Kosovo who grew up in Belgium › Draft law on interception of irregularly staying persons at home	› Government › Belgian State Secretary for Asylum Policy and Migration › NGOs › International Organisations (e.g. UNICEF) › Media
Cyprus	› Return of irregular migrants › Detention › Alternative measures to detention	› N/A
Czech Republic	› Irregular migration › Readmission policy	› N/A
France	› Irregular migration › Unaccompanied minors	› Government › Municipalities › NGOs
Germany	› Forced return › Treatment of persons who might endanger public security › Removals to Afghanistan › Young people who are obliged to leave the country even though they are attending school or vocational training measures	› Federal Ministry of Interior › Ministries and governments of the *Länder* › Civil-society organisations and welfare associations › Chambers of industry and commerce › Private sector
Greece	› Effectiveness of the return policy › Prioritisation of voluntary returns	› Ministry of Interior (Police Headquarters) › Ministry for Migration Policy
Estonia	› Return of irregularly staying third-country nationals › Voluntary return	› Ministry of the Interior
Finland	› Efficient enforcement of removal decisions › Return of rejected asylum seekers	› Government › Other political parties › Civil Society
Hungary	› Implementation of humane, effective and sustainable return	› N/A
Ireland	› Procedural issues › Detention › Individual Cases	› NGOs › United Nations › Media
Italy	› Return of irregularly staying third-country nationals › Assisted voluntary return (AVR) › Expulsions for reasons of national security	› Government › Ministry of Interior › Other political parties › International Organisations › Media › Civil-society organisations
Lithuania	› Return of third-country nationals to countries which do not cooperate	› Government

Member State	Focus of debate	Key players involved
Luxembourg	› Voluntary return › Forced returns › Extension of the period of detention for families with children	› Government › NGOs
Latvia	› Effective return of third-country nationals	› Government › International Organisations
Malta	› Return of irregularly staying third-country nationals › Readmission	› Government
The Netherlands	› Shelter for third-country nationals who have exhausted all legal remedies › Individual cases › Effective return of rejected asylum seekers causing nuisance/involved in petty crime	› Media › NGOs
Slovak Republic	› Return of irregularly staying third-country nationals	› Media › Government
Spain	› Banning detention of returnees › Closing of detention centres	› Civil society
Sweden	› Return of unaccompanied minors and young adults (in particular to Afghanistan) › Voluntary returns › Efficient enforcement of return decisions	› Government › Lobbying networks › NGOs › Political organisations
United Kingdom	› Numbers of irregularly staying third country nationals returned › Procedures used in the return process › UK's voluntary returns scheme › Individual cases	› Government › Parliamentary groups › NGOs › Media

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

2.2 NATIONAL MEASURES IMPLEMENTING THE RETURN DIRECTIVE OR EQUIVALENT STANDARDS

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

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

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

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

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

Member States making use of the derogation:

16

Sixteen Member States (AT, BE, CY, CZ, DE, EL, ES, FR, HU, LT, LU, LV, MT, NL, SI, SE) make use of the derogations defined in Article 2(2), and therefore may decide not to apply the Directive to certain groups of third-country nationals as detailed in Table 2 below. Four Member States (EE[28], FI[29], HR[30], SK) reported not making use of the derogations.

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

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

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

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

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

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

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

[31] Not applicable to Ireland.

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

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

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

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

03

SYSTEMATIC ISSUANCE OF RETURN DECISIONS

3. Systematic issuance of return decisions

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

3.1 AUTHORITIES INVOLVED IN THE ISSUANCE OF A RETURN DECISION

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

- Ministry of Interior or equivalent (CY, HR, IT, MT, UK), Ministry of Justice (IE) or Ministry of Foreign Affairs (SI);
- Immigration and Asylum Authority (AT, BE, DE, EL, FI, HU, IE, LT, LV, NL, SE);
- Police forces, including border authorities (CZ, EE, EL, FI, HR, LT, LV, NL, SE, SK). In some Member States, border authorities are also responsible for the implementation of the return decisions (IE, LT[34], LU);
- Other authorities include: municipalities (BE, DE), judicial authority (HU, IT, SK[35]), government delegate in the province (ES) and prefect (FR).

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

[34] Including police.

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

3.2 ISSUANCE OF RETURN DECISIONS

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

For this reason, Recommendation 5[36] encourages Member States to (a) set up measures to effectively locate and apprehend third-country nationals staying illegally; and to (b) issue return decisions regardless of whether the individual holds an identity or travel document. In addition, Recommendation 24(d) calls for Member States to issue return decisions where illegal stay is detected during an exit check.

Member States issuing return decisions when whereabouts are unknown:

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

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

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

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

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

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

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

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

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

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

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

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

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

44 Although Austria reported that no cases are known.

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

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

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

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

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

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

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

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

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

Measures to locate third-country nationals whose whereabouts are unknown

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

- Regular identity checks, including via travel identity documents (AT, DE, FI, FR, IT, LV, NL, SE, SK);
- Property/residence checks (AT, BE, CY, CZ, DE[51], EE, EL, FI, IT, NL, SK, UK);
- Physical checks at the last known residence or employment address (MT);
- Cooperation and exchange of information among authorities and stakeholders, such as local authorities, schools and employers (BE, DE[52], EE, FI, IT, SK, UK);
- Through other random controls/checks, such as traffic violations, emergency calls, inspections for illegal labour, criminal investigations (BE, DE, EE, EL, ES, FI, FR, IT, LV, NL, SE, SK, UK);
- Issuance of a (detention) warrant, if considered necessary, for example if there is a risk of absconding (HU, IE, IT).

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

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

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

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

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

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

Luxembourg[53] reported that it did not have specific measures to locate third-country nationals.

3.3 TIMING, VALIDITY AND SCOPE OF RETURN DECISIONS

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

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

Member States issuing return decisions of unlimited validity:

In seventeen Member States (AT, CY, DE, EE[54], EL, FI, FR, HR, HU, IT, LT, LU, MT, NL, SE, SI, and UK[55]), the return decision is issued together with the decision to end the legal stay of a third-country national. Whether these are issued in the same document and/or issued simultaneously varies from one Member State to another and, at times, also depends on the procedure at hand.

For example, in Germany, a return decision is issued in the same document as the rejection of an asylum application; for third-country nationals overstaying their residence permit, this depends on the practice of local foreigners' authorities. While Finland, France,[56] Greece, Lithuania,[57] Luxembourg,[58] the Netherlands[59] and Slovenia indicated that national authorities issue a return decision together with the decision to end the legal stay in the same document, Austria and Italy issue them at the same time but not in the same document

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

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53 Luxembourg reported that as it is a small country (2.586 km^2) with no visible external borders (except for the Luxembourg International Airport), it is difficult to implement measures to effectively locate and apprehend those irregularly staying third-country nationals whose whereabouts are unknown.

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

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

56 With the exception of asylum cases.

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

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

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

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

Return decisions have unlimited validity in twelve Member States (BE, DE, EE, ES, FI, FR[60], IE, LT, LU, NL, SI, SK). On the other hand, in at least ten Member States (AT, CY, CZ, EL, HU, IT, LV, SE and UK), this is not the case. As an example, in Austria, Cyprus, Czech Republic and the United Kingdom[61] a return decision is valid until the time for the third-country national to be returned has expired (CY, CZ, UK) or until he/she actually left the territory (AT). In Hungary, return decisions have a validity of minimum one year up to maximum ten years, while in Latvia and Italy, the maximum duration is set to five years, and in Sweden to four years.

In twenty-two Member States, the return decision included the information that the third-country national concerned must leave the territory of the Member State to reach a third country (AT, BE[62], CY, CZ[63], DE, EE, ES, FI, FR[64], HR, HU, IE[65], IT, LT, LU, LV[66], MT, NL, SE, SI, SK[67], UK). Belgium, Cyprus, Greece, the Netherlands and Slovenia did not specify the country to which the third-country national had to return. Estonia, Germany, Finland, France,[68] Latvia, Lithuania, Sweden, Slovakia and United Kingdom[69] did specify in the return decision to which third-country the person had to return.

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

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

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

The legislation in twenty-one Member States (AT, BE, CY, CZ, DE, EE, EL, ES, FR[70], HR, HU, IE, IT, LT[71], LU, MT, NL, SE, SI[72], SK[73] and UK) foresees the possibility to grant a residence permit or other authorisation offering a right to stay for compassionate, humanitarian or other reasons to third-country nationals irregularly staying on their territory under certain circumstances.

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

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

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

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

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

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

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

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

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

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

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

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

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

73 The Slovak Republic grants tolerated status in these cases.

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

- Protection of private or family life, including medical reasons (AT, BE, DE[74], EL, ES, FI, FR, HU, IE, IT, LT[75], NL[76], SI, SE, SK);
- Residence for at least a number (3 or 5) of years (AT, ES) or special bonds with the country (EL, ES);
- Having had tolerated status for at least one year (AT[77], DE[78], HU[79]);
- Victims of trafficking in human beings or of violence (AT, BE, DE, EE, EL, ES, FI, HR, IE[80], IT, LT, NL, SK, UK) or other vulnerabilities (EL, FI, HU[81], IT, SK);
- Unaccompanied minors (BE, CY, EL, FI, HR, IT, LT);
- Humanitarian grounds of exceptional seriousness (FI, LU);
- Spouses or parents of minors or dependent family members of a Greek citizen (EL);
- Previous refugees status for at least ten years (HR);
- Cooperation in criminal proceedings (ES, HR);
- Paid employment (ES, FR);
- Other impediments to enforcement, including lack of travel documents (DE[82], LT, SE, SI), minor attending primary school (SI), refusal of his/her nation of citizenship or last residence (SI), and reasons of national security and public interest (DE, ES);
- Victims of work accidents and other accidents for as long as the treatment lasts (EL).

In Finland and in the United Kingdom[83] a residence permit can be granted on humanitarian reasons, but this is seen as an autonomous permit on the basis of specific reasons and does not constitute a 'regularisation' of irregularly staying third country nationals.[84]

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

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

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

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

75 Only for medical reasons

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

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

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

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

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

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

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

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

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

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

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

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

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

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

04

RISK OF ABSCONDING

4. Risk of absconding

Article 3(7) of the Return Directive defines the risk of absconding as "the existence of reasons in an individual case which are based on objective criteria defined by law to believe that a third-country national who is the subject of return procedures may abscond". In the Return Directive, this notion is used both to refusing or limiting the period for voluntary departure (Article 7) and as a possible ground for pre-removal detention (Article 15).

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

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

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

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

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

Opposing violently or fraudulently the return operation;

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

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

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

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

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

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

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

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

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

Table 5: Objective criteria constituting a rebuttable presumption of a risk of absconding[92]

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

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

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

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

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

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

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

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

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

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

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

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

4.2 MEASURES AIMING TO AVOID THE RISK OF ABSCONDING

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

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

Table 6: Measures to prevent the risk of absconding[96]

Preventive measures	(Member) States
Regular reporting to the authorities	AT, BE[97], CZ, DE, EE[98], EL, ES, FR, HR, HU, IT, LV, MT, NL, SE, SI, SK, UK
Deposit of an adequate financial guarantee	AT, BE[99], CZ, DE100, EL[101], HR, MT, NL, SK, UK
Submission of documents	AT, BE, CY, DE, EE, ES, FR, HR, HU, IT, LV, MT, NL, SE, UK
Obligation to stay at a certain place	AT, BE[102], CY, CZ, DE, EE, EL, ES, FR, HR, IT, MT, NL, SI, UK

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

- The possibility to oblige persons to attend a return counselling session (DE);
- No notification of the removal date[103] (DE);
- Electronic surveillance of third-country nationals posing a specific danger to public order or security (DE[104], UK);
- Departure facilities which aim to promote the willingness to return voluntarily by offering support and advice (DE);
- Requirement to submit additional documents to authorities such as a travel ticket (NL, SE);
- Requirement to submit additional documents proving an adequate financial guarantee in the form of a statement by a third-party guarantor for the costs of the return (NL);
- Retention of identity documents presented to national authorities in the course of an asylum application if the application was unsuccessful; these documents would then be used to support the return process of the third-country national concerned (UK);
- Detention of a third-country national (UK), with alternatives to detention.

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

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

97 This is rarely used in practice.

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

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

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

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

102 This is rarely used in practice.

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

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

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

4.3 CHALLENGES IN DETERMINING THE EXISTENCE OF A RISK OF ABSCONDING

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

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

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

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

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EFFECTIVE ENFORCEMENT OF RETURN DECISIONS

5. Effective enforcement of return decisions

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

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

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

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

Member States imposing sanctions:

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

- Fine (AT, BE, EE, DE, FI, FR, IE, IT, LU, SK);
- Imprisonment (AT, BE, DE, FR, IE, LU, SK);
- Residence restriction in case of obstruction of the return process (DE, SE);
- Benefits cut (DE[107], SE[108]).

In some Member States and, under certain circumstances, a fine and an imprisonment sentence can be cumulated. The level of the sanction imposed also varies significantly depending on the facts of the case and across Member States, with fines ranging from a minimum of EUR 251 in Luxembourg to a maximum of EUR 18,000 in Italy, and sentences for imprisonment ranging from a minimum of eight days in Belgium and Luxembourg[109] to a maximum of three years in France in cases where the

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

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

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

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

While it does not constitute a sanction as such, the possibility to adopt administrative decisions for the purpose of the return process was also reported by some Member States. In particular, some of them could resort to detention as a way to encourage cooperation with the return process (BE, CY, CZ, EL, HR, FI, HU, IE[110], UK). Member States' practices regarding detention are described under Section 5.4.1. A number of Member States (FI, FR, NL, SE, SK) also evoked the imposition of entry bans as a way to sanction non-compliance with a return decision. The issue of entry bans is described in detail in Section 9 of the present report.

5.2 MUTUAL RECOGNITION OF RETURN DECISIONS

One of the obstacles to return highlighted by the 2015 Action Plan on Return[111] was the fact that it was possible for third-country nationals under the obligation to leave the EU to avoid return by moving to another Member State, due to the insufficient exchange of information about return and entry bans across Member States. The Action Plan stated that in such situations, Member States should either pass back the person to the Member State from which the third-country national arrived (if a bilateral readmission agreement is applicable), issue its own return decision, enforce the decision themselves in application of Council Directive 2001/40/EC[112] and Council Decision 2004/191/EC,[113] or grant an authorisation or right to stay (according to Article 6(4) of the Return Directive).

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

17

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

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

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

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

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

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

[113] Council Decision 2004/191/EC of 23 February 2004 setting out the criteria and practical arrangements for the compensation of the financial imbalances resulting from the application of Directive 2001/40/EC on the mutual recognition of decisions on the expulsion of third-country nationals

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

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

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

5.3 TRAVEL DOCUMENTS

Recommendation 9(c) encourages Member States to ensure that return decisions are followed without delay by a request to the third-country of readmission to deliver valid travel documents, or to make use of the European travel document for return in application of Regulation 2016/1953.[115]

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

Additionally, Member States reported that they could make use of EU travel documents (AT, BE, DE, EE, FI, FR, LT, LU[116], LV, NL, SI[117], and UK). As an example, Latvia issues a EU travel document once a positive reply on the readmission request from a country of return is received. In practice, Slovenia mostly issues EU travel documents in return procedures concerning Kosovar nationals. On the other hand, nine Member States stated that they did not use EU travel documents at all (CY, CZ, EL, ES, HR, HU, IE, MT and SK[118]).

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

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

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

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

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

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

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

In practice, several Member States reported that the acceptance of EU travel documents by third-countries was variable (AT, BE[119], DE, EE, FI, FR and UK), with sometimes only a small number only of third-countries accepting them (DE, EE). The Netherlands have not encountered issues with the acceptance of the documents as it uses an EU travel document only when it is established, through preparatory research, that the document will be accepted by the authorities of the third country. Finland indicated that the document in itself was generally not enough to enable the third-country national to enter the territory of the country of readmission. The EU travel documents are used with airlines but further steps needed to be taken once the third-country national arrives in the country of readmission. In September 2015, the German Federal government launched a diplomatic initiative with the goal of ensuring that an EU travel document is accepted for returns to the following countries of destination: Serbia, Bosnia and Herzegovina, Macedonia, Albania, Kosovo, Montenegro, Egypt, Algeria, Lebanon, Morocco, Ethiopia, Eritrea, Bangladesh, India, Pakistan, Benin, Burkina Faso, Ghana, Guinea, Guinea-Bissau, Mali, Nigeria and Niger. In the end, only the Western Balkan countries agreed to this procedure (in the case of Bosnia and Herzegovina only with the provision of a time limitation). The other countries still refuse to accept removals for which an EU travel document was used.

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

- Local or regional authorities (DE[120], FR);
- Central authority such as the Border Police (DE[121], EL, FR[122], LV, MT), services of the Ministry in charge of immigration matters (AT, BE, FR[123], HR, HU[124], IE, IT, LT[125], LV, NL, SE, and UK), the Ministry of Foreign Affairs (EE, EL, HR, MT), and police services (CY, CZ, EE, ES, FI, HU[126], SE, SK);
- Assistance by IOM (EL, FI[127], IE, LU, SK[128]).

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

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

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

121 For certain third-countries.

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

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

124 If there is no readmission agreement in place

125 Usually the Foreigners' Registration Center

126 If there is a readmission agreement in place

127 Only in case of Assisted Voluntary Return.

128 Only in case of Assisted Voluntary Return.

5.4 USE OF DETENTION IN THE RETURN PROCEDURE

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

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

5.4.1 USE OF DETENTION IN THE RETURN PROCEDURE IN MEMBER STATES

Member States making use of detention under certain conditions:

23

All the responding Member States could make use of detention under certain conditions during the return procedure (AT, BE, CY, CZ, DE, EE, EL, ES, FI, FR, HR, HU, IE[129], IT, LT, LU, LV, MT, NL, SE, SI, SK, UK). In Austria, in complement to detention in the sense of the Return Directive, the authorities can also issue an "apprehension order" *(Festnahmeauftrag)*. An apprehension order can be issued even where no risk of absconding exists and allows the detention of an individual for a maximum of 72 hours. It is issued in particular when the person concerned fails to comply with conditions applying to a period for voluntary departure or does not comply with the obligation to leave, or in preparation for a removal order. Since 2014, apprehension orders have been used more frequently than detention pending removal, particularly with asylum seekers whose application was rejected. Similarly, in Germany, third-country nationals may be placed in custody to facilitate their departure for a maximum of 10 days if the person's behaviour suggests that s/he will try to make the removal procedure more difficult or impossible. In the Netherlands, a Return and Detention Act is currently being drafted, providing for a special regime for detainees under migration law.

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

- UAM (AT[131], BE, CY, DE[132], EE[133], EL, ES, FI[134], HU, IE, IT, LT[135], LU[136], LV[137], MT, SK, UK[138]);
- Minors (IE, IT, UK)

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

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

[131] Under the age of 14

[132] In practice rather than in law.

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

[134] Below the age of 15.

[135] UAMs may be detained only in exceptional cases.

[136] UAMs may be detained only in exceptional cases.

[137] Under the age of 14.

[138] Only in exceptional cases.

- Family with minors (AT[139], BE[140], FR[141], IT, LT[142]) or single parents with minors (AT[143], CY, IT, LT[144], UK[145]);
- Parents who are the sole provider for their family (CY);
- Victims of trafficking (EE, IT, LT[146], UK[147]);
- Third-country national with health/mental issues that do not enable him/her to be detained (BE, IT, NL, UK);
- Advanced pregnancy with complications (BE, IT, UK);
- Contagious disease requiring the placement in a close hospital ward (UK).

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

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

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

139 Under the age of 14.

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

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

142 May be detained only in exceptional cases.

143 Under the age of 14.

144 May be detained only in exceptional cases.

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

146 May be detained only in exceptional cases.

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

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

149 Only if additional conditions exist.

150 Only if additional conditions exist.

151 Only if additional conditions exist.

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

153 For a maximum of 72 hours.

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

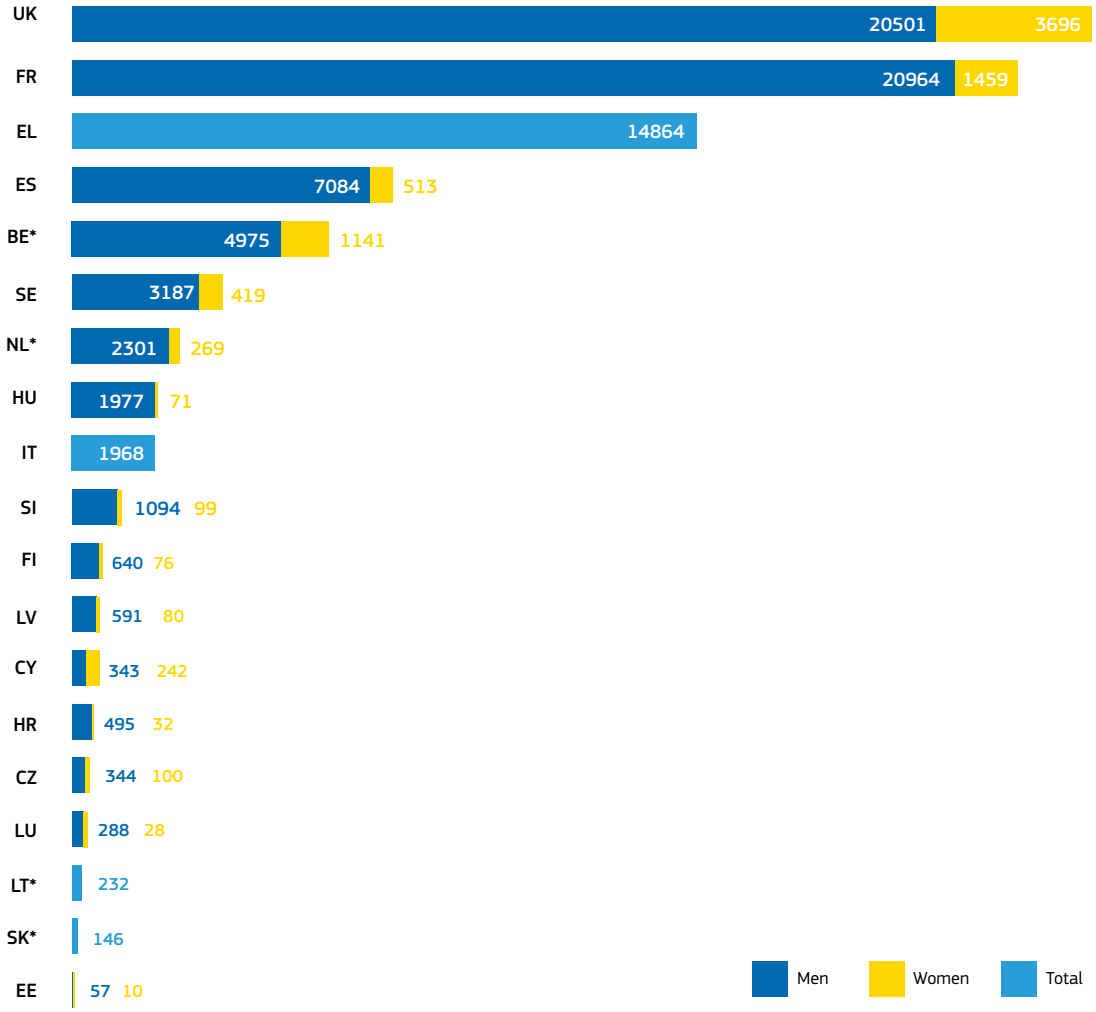
155 This ground is considered as a risk of absconding and therefore a third-country national may be detained.

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

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

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

Figure 2: Total number of third-country nationals ordered to leave and subsequently placed in detention in 2016[158]



Source: EMN NCP National Reports

[157] Only if additional conditions exist.

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

The figure presented for the Netherlands include Dublin cases.

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

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

5.4.2 LENGTH OF DETENTION

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

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

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

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

5.4.3 PROCEDURE

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

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

Authorities in charge of ordering the detention

The placement of a third-country national in detention is ordered by an administrative authority in eleven responding Member States (AT, BE, CY, CZ, IE, IT, LU, NL, SI, SK, UK), and by a judicial authority in three Member States (DE[160], EE[161], ES).

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

In nine other Member States (EE[162], EL, FI, FR[163], HR, HU, LT[164], LV, MT, SE), both administrative and judicial authorities are in charge of ordering the detention, which in general means that the decision on detention taken by an administrative authority has to be validated by a court.

Review of the lawfulness of detention ordered by an administrative authority

Reviews of the lawfulness of the detention decision take place in all the responding Member States, especially in cases where the decision was taken by an administrative authority. Such a review can be performed *ex officio* (BE[165], DE, EE, EL, FI, FR, HR, HU, IE, MT, NL, SI). The review ex officio is initiated within 24 hours in Finland,[166] after 48 hours in France, Estonia and Italy, one month or on an ad-hoc basis if circumstances relevant to the decision to detain change in the United Kingdom, eight weeks in Ireland, three months in Greece and Slovenia, and four months in Belgium.

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

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

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

- Within four days from the placement in detention (FI[167]);
- Within five working days from the notification to the court (BE, HR);
- Within a week from the notification to the court (AT, CZ, SK) or after the hearing of the third-country national (NL) which takes place 14 days after the notification to the court;
- Within a month from the placement in detention (CY).

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160 Upon application of an administrative authority.

161 Upon application of an administrative authority.

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

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

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

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

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

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

Review of the stay in detention

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

In all Member States, the length and/or relevance of detention is reviewed on a regular basis by an administrative authority (CY, CZ, DE, EL, LU, UK), by a judicial authority (AT, EL, FI, FR, HR, IT[168], LT, LV, SK), or both (BE, EE, ES, IE, NL, SE, SI). The frequency of the reviews varies across Member States, from every two weeks (FI[169]), every month (AT, LU, NL, UK), every two months (BE CY, LV), three months (SI), or two weeks to two months depending on the merits of the case (SE). In the United Kingdom, the detention can also be reviewed if there is a change of circumstances which would affect the decision to detain.

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

5.4.4 DETENTION CAPACITY

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

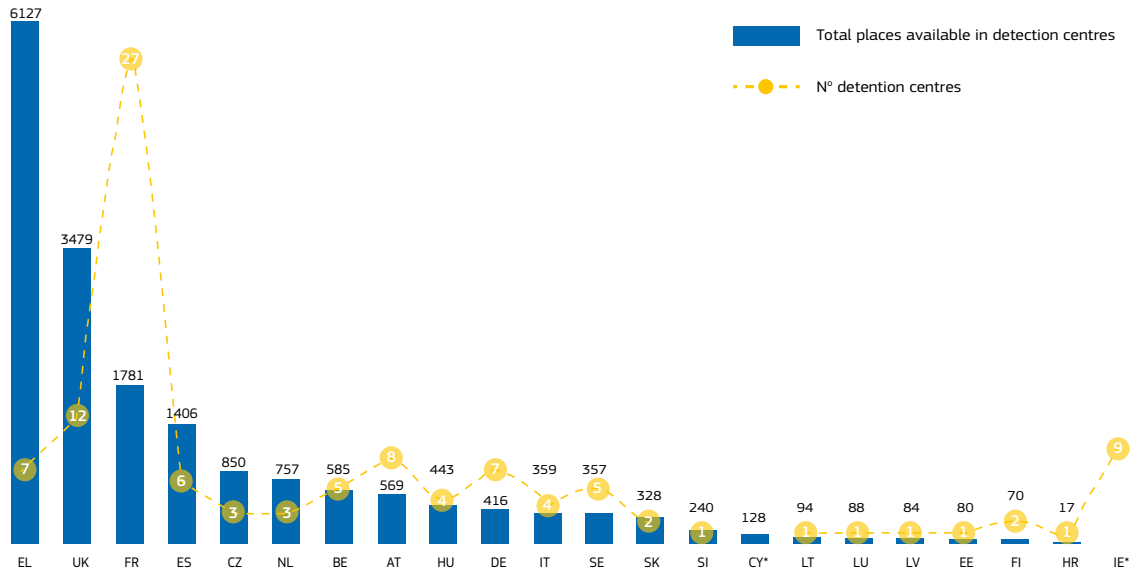
The fluctuations in Member States' capacity in the last few years can be explained by various factors, such as the fact that detention centres were closed for renovation (one centre in DE), the influence of EU case law (see Subsection on specialised detention facilities below) or that a stronger focus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

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

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

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

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



Source: EMN NCP National Reports

Assessment of detention capacity

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

Availability of specialised detention facilities

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

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

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

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

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

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

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

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

- Some irregularly staying third-country nationals imprisoned for criminal activities (BE, FR, SE, UK) or who pose a threat to public security (DE[173], LV, UK);
- Risk for public order in the detention facility (SE, UK);
- People with mental illness who could stay in a care facility (BE);
- Unforeseen increase in the number of places needed (EE, FI, HU). In Estonia and Finland, third-country nationals can be detained in police detention facilities in such cases, though minors cannot be placed in such facilities in Finland.

In addition, several Member States indicated that CJEU rulings had impacted their national practices on detention. For instance, Luxembourg amended its national legislation in line with the CJEU *Achughbabian* ruling[174] on the criminalisation of illegal stay. The Court concluded that the Return Directive did not preclude a Member State from classifying illegal stay as an offence and from laying down criminal sanctions to deter and prevent such an infringement of the national rules on residence. On the other hand, the Court ruled that a national regulation allowing the imprisonment of a third-country national who, though staying irregularly and not willing to leave the territory, had not been subject to any of the coercive measures foreseen by the Directive and had not been placed in detention in order to enforce a return decision, was contrary to EU law.

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

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

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

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

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

Challenges related to detention capacity

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

Only two of the responding Member States reported having faced challenges regarding their detention capacity in recent years that required them to trigger the application of this provision (CZ, HU[176]).

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

5.5 USE OF ALTERNATIVES TO DETENTION IN THE RETURN PROCEDURE

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

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

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

[176] Until the first half of 2016.

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

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

Source: EMN NCPs' National Reports

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

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

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

177 Rarely used in practice.

178 Not used in practice.

179 Not used in practice.

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

181 Only in relation with home custody.

182 For individuals presenting a high risk of absconding.

183 For UAMs.

184 For UAMs.

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

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

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

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

5.6.1 CHALLENGES

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

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

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

5.6.2 GOOD PRACTICES

The following good practices were identified by Member States:

- Some Member States launched initiatives to study the issue of detention and look for solutions to improve detention conditions. Austria set up a working group on detention conditions in 2014. The group is composed of representatives of the Austrian Ombudsman Board and delegated committees, together with the Federal Ministry of the Interior and discusses how to improve detention conditions and standards. In Sweden, the publication of a study on the health of detainees by the Faculty of Medicine in Uppsala revealed the negative consequences of detention on health, which contributed to ongoing efforts at national level to improve the medical care provided to detainees.
- Several Member States praised the involvement of NGOs in taking care of detainees, to de-escalate conflicts and avoid incidents (AT, BE, HU, NL).
- Good management of specialised detention centres and open centres (AT, BE, FR, HR, NL). In Austria, the Vordernberg detention centre was cited as example providing high standards of care. The European Committee for the Prevention of Torture (CPT) reportedly welcomed the high standards observed at that centre. Also, the Zinnergasse centre in Vienna for families functions well because it employs staff who are not in uniform and have some psychological training. In Belgium, from the perspective of both family and children rights, and costs compared to detention centres, FITT-units[187] were regarded by the authorities and NGOs as a good practice. For this reason, the Belgian Secretary of State announced that closed family units would be built within detention centres.[188] Similarly, in the Netherlands, the Closed Family Centre (GGV) was noted as a good practice to accommodate families prior to their return. In Hungary, support provided includes individual consultation opportunities, community programmes, internet access, psychological and psychiatric assistance, which was widely acknowledged as good practice by NGOs and international organisations.
- Since mid-2015, France has deployed return preparation measures (DPAR) which are destined as a priority to people subject to an order to leave French territory. This scheme's main aim is to facilitate the removal of rejected asylum seekers by placing them under house arrest in its centres. These centres offer assistance for preparing the return (presentation of voluntary return aid measures, administrative support, etc.) and provide accommodation to the people concerned. The first results recorded by these measures are encouraging, with 60% of the exits based on a voluntary return to the person's country. This scheme is being progressively extended.
- In Belgium, a detained third-country national has the possibility to file an appeal with suspensive effect within 5 or 10 days. Within this period, he can't be removed against his will. However, if the detained third-country national wants to return immediately, s/he can sign a form by which s/he declares to renounce his right to appeal against the return decision. In this case, his/her return to their country of origin can be organised immediately.
- In Belgium still, where it is possible to arrange the early release of third-country nationals in prison serving a sentence for a criminal offence in order to swiftly return them. Under the Belgian legislation, prisoners serving a sentence of more than three years could be released after 1/3 or 2/3 of their sentence, provided that they cooperated with their identification and return. If so the removal could be organised up to 6 months before the foreigner is in the conditions for early release. A similar practice exists in the Netherlands, where the sentence can be suspended for

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

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

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

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