

RECOMMENDATIONS

COMMISSION RECOMMENDATION (EU) 2017/432

of 7 March 2017

on making returns more effective when implementing the Directive 2008/115/EC of the European Parliament and of the Council

THE EUROPEAN COMMISSION,

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

Whereas:

- (1) Directive 2008/115/EC of the European Parliament and of the Council ⁽¹⁾ lays down common standards and procedures to be applied in Member States for returning illegally staying third-country nationals.
- (2) The Schengen Evaluation Mechanism ⁽²⁾ and the information collected through the European Migration Network ⁽³⁾ have allowed for a comprehensive assessment of how Member States implement the Union policy on return.
- (3) The evaluations indicate that the margins of discretion left to the Member States by Directive 2008/115/EC led to an inconsistent transposition in national legislations, with a negative impact on the effectiveness of the Union return policy.
- (4) Since the entry into force of Directive 2008/115/EC, and in the light of the increasing migratory pressure on the Member States, the challenges that the Union return policy needs to respond to have increased and brought this aspect of the European comprehensive migration policy to the forefront. In its Conclusions of 20-21 October 2016 ⁽⁴⁾, the European Council called for reinforcing national administrative processes for returns.
- (5) The Malta Declaration of Heads of State or Government ⁽⁵⁾ of 3 February 2017 highlighted the need for a review of EU return policy based on an objective analysis of the way in which the legal, operational, financial and practical tools available at Union and national level are applied. It welcomed the Commission's intention to rapidly present an updated EU Action Plan on Return and to provide guidance for more operational returns by the EU and Member States and effective readmission based upon the existing *acquis*.
- (6) In view of the current increase in the number of third-country nationals illegally entering and staying in the Member States, and in order to ensure appropriate capacity to protect those in need, it is necessary to use to the full extent the flexibility provided for in Directive 2008/115/EC. A more effective implementation of that Directive would reduce possibilities of misuse of procedures and remove inefficiencies, while ensuring the protection of fundamental rights as enshrined in the Charter of Fundamental Rights of the European Union.
- (7) This Recommendation provides guidance on how the provisions of Directive 2008/115/EC should be used for achieving more effective return procedures, and call on the Member States to take the necessary measures to remove legal and practical obstacles to return.

⁽¹⁾ Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals (OJ L 348, 24.12.2008, p. 98).

⁽²⁾ Council Regulation (EU) No 1053/2013 of 7 October 2013 establishing an evaluation and monitoring mechanism to verify the application of the Schengen *acquis* and repealing the Decision of the Executive Committee of 16 September 1998 setting up a Standing Committee on the evaluation and implementation of Schengen (OJ L 295, 6.11.2013, p. 27).

⁽³⁾ Council Decision 2008/381/EC of 14 May 2008 establishing a European Migration Network (OJ L 131, 21.5.2008, p. 7).

⁽⁴⁾ European Council conclusions of 20-21 October 2016, EUCO 31/16.

⁽⁵⁾ European Council press release 43/17 of 3 February 2017.

- (8) An effective Union return policy requires efficient and proportionate measures for the apprehension and identification of illegally staying third-country nationals, swift processing of their cases, and adequate capacity to ensure their presence in view of return.
- (9) Organising return requires a streamlined and well integrated organisation of multi-disciplinary competences at national level. In addition, it demands procedures and instruments that allow information to be made promptly available to the competent authorities, as well as cooperation between all actors that are involved in the different procedures.
- (10) Multi-disciplinary trained and competent staff gathering all relevant competences is needed to ensure that national authorities are able to respond to the needs, particularly in circumstances where Member States are confronted with a significant burden in implementing the obligation to return illegally staying third-country nationals. In organising this integrated and coordinated approach, Member States should make full use of the available Union financial instruments, programmes and projects in the field of return, in particular of the Asylum, Migration and Integration Fund. In this context, the Member States should also take into account the migratory pressure that the competent authorities are dealing with.
- (11) In accordance with Article 6(1) of Directive 2008/115/EC, the Member States should systematically issue a return decision to third-country nationals who are staying illegally on their territory. The legislation and the practice in the Member States does not give full effect to this obligation in all circumstances, thereby undermining the effectiveness of the Union return system. For instance, certain Member States do not issue return decisions following a negative decision on an asylum claim or a residence permit, or do not issue such decisions to illegally staying third-country nationals who do not hold a valid identity or travel document.
- (12) Depending on the institutional set-up of the Member States, in particular when different authorities deal with the process, a return decision is not necessarily or immediately followed by a request to the authorities of third-countries to verify the identity of the illegally staying third-country national and to deliver a valid travel document.
- (13) In accordance with Article 13 of the Schengen Borders Code ⁽¹⁾, a person who has crossed a border illegally and who has no right to stay on the territory of the Member State concerned shall be apprehended and made subject to procedures respecting Directive 2008/115/EC.
- (14) Directive 2008/115/EC establishes that the state of health of the third-country nationals concerned shall be taken into account when implementing that Directive, and that emergency health care and essential treatment of illness must be provided pending return. It is however essential to ensure that removals of illegally staying third-country nationals are enforced and measures are taken to prevent behaviour aimed at hampering or preventing return, such as false new medical claims. Moreover, it is also necessary to put in place measures tackling in an efficient manner asylum applications made merely to delay or frustrate the enforcement of return decisions.
- (15) Directive 2008/115/EC, while obliging the third-country national illegally staying to leave the Union, requires return decisions to be enforced only by the issuing Member States. A return process can be launched in every Member State that apprehends the same illegally staying third-country national. Mutual recognition of return decision, as provided for by Council Directive 2001/40/EC ⁽²⁾ and Council Decision 2004/191/EC ⁽³⁾, would accelerate return process and deter unauthorised secondary movements within the Union.
- (16) Detention can be an essential element for enhancing the effectiveness of the Union's return system, which should only be used if no other sufficient but less coercive measures can be applied effectively in accordance with Article 15(1) of Directive 2008/115/EC. In particular, where necessary, to ensure that illegally staying third-country nationals do not abscond, detention can allow for a successful preparation and organisation of return operations.

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

⁽²⁾ Council Directive 2001/40/EC of 28 May 2001 on the mutual recognition of decisions on the expulsion of third country nationals (OJ L 149, 2.6.2001, p. 34).

⁽³⁾ Council Decision 2004/191/EC of 23 February 2004 setting out the criteria and practical arrangements for the compensation of the financial imbalances resulting from the application of Directive 2001/40/EC on the mutual recognition of decisions on the expulsion of third-country nationals (OJ L 60, 27.2.2004, p. 55).

- (17) The maximum duration period of detention currently used by several Member States is significantly shorter than the one allowed by Directive 2008/115/EC and which is needed to complete the return procedure successfully. These short periods of detention are precluding effective removals.
- (18) Deadlines for lodging appeals against decisions related to return diverge significantly among Member States, ranging from few days to one month or more. In compliance with fundamental rights, the deadline should provide enough time to ensure access to an effective remedy, while taking into account that long deadlines can have a detrimental effect on return procedures.
- (19) Irregularly staying third-country nationals should be granted the right to be heard by the competent authorities before any individual measure which would affect him or her is taken.
- (20) Under Directive 2008/115/EC, an automatic suspensive effect of appeals against return decisions should be granted when there is a risk that the third-country national concerned would be exposed to a real risk of ill-treatment in case of return, in violation of Articles 19(2) and 47 of the Charter of Fundamental Rights of the European Union, as interpreted by the Court of Justice of the European Union ⁽¹⁾.
- (21) A large number of Member States conduct repetitive assessments of the risk of *refoulement* all along the different phases of the asylum and return procedures, which can cause the unnecessary delays in the return of illegally staying third-country nationals.
- (22) Return of an unaccompanied minor to the third country of origin and reunification with the family may be in the best interests of the child. The prohibition to issue return decisions to unaccompanied minors, which exists in the national legislation of several Member States, does not give full effect to the Member States' obligation to take due account of the child's best interests, and to pay attention to the circumstances of each individual case. Such prohibitions can create unintended consequences for illegal immigration, inciting unaccompanied minors to embark on perilous journeys in order to reach the Union.
- (23) Decisions on the legal status and on the return of unaccompanied minors should always be based on individual, multi-disciplinary and robust assessments of their best interests, including family tracing and home assessment. Such assessment should be adequately documented.
- (24) In line with Article 17 of Directive 2008/115/EC which defines the conditions under which Member States can use detention in relation to unaccompanied minors and of families with minors as a measure of last resort and for the shortest appropriate period of time, Member States should ensure the availability of alternatives to detention for children. Where however, no such alternatives exist, an absolute prohibition of detention in such cases, may not give full effect to the obligation to take all necessary measures to ensure return, leading to annulment of return operations due to absconding.
- (25) Pending the adoption of proposal for a Regulation of the European Parliament and of the Council on the use of the Schengen Information System for the return of illegally staying third-country nationals ⁽²⁾, Member States should make full use of the possibility to enter an alert on entry ban in accordance with Article 24(3) of Regulation (EC) No 1987/2006 of the European Parliament and of the Council ⁽³⁾.
- (26) This Recommendation should be addressed to all Member States bound by Directive 2008/115/EC.
- (27) Member States should instruct their national authorities competent for carrying out return-related tasks to apply this Recommendation when performing their duties.
- (28) This Recommendation complies with the fundamental rights and the principles recognised by the Charter of Fundamental Rights of the European Union. In particular, this Recommendation ensures the full respect for human dignity and the application of Articles 1, 4, 14, 18, 19, 24 and 47 of the Charter and has to be implemented accordingly,

⁽¹⁾ Judgment of the Court of Justice of the European Union, case C-562/13 of 18 December 2014.

⁽²⁾ COM(2016) 881 final.

⁽³⁾ Regulation (EC) No 1987/2006 of the European Parliament and of the Council of 20 December 2006 on the establishment, operation and use of the second generation Schengen Information System (SIS II) (OJ L 381, 28.12.2006, p. 4).

HAS ADOPTED THIS RECOMMENDATION:

REINFORCED AND BETTER RETURN CAPACITIES

- (1) To address the procedural, technical, and operational obstacles to more effective returns, Member States should by 1 June 2017 reinforce their capacity to carry out the return of illegally staying third-country nationals by ensuring an integrated and coordinated approach.
- (2) The objectives of such an integrated and coordinated approach in the area of return should be to:
 - (a) ensure swift return procedures and substantially increase the rate of return;
 - (b) mobilise, as needed, law enforcement and immigration authorities, and coordinate actions with judicial authorities, detention authorities, guardianship systems, medical and social services, to ensure availability of swift and adequate multi-disciplinary responses from all authorities involved in the return procedures;
 - (c) ensure that a sufficient number of trained and competent staff, from all authorities with competences in the return procedures, are available to respond swiftly, and if necessary on a 24/7 basis, particularly when facing an increasing burden in implementing the obligation to return illegally staying third-country nationals;
 - (d) depending on the specific situation of the Member State, deploy additional staff at the external borders of the Union with the mandate and capacity to take immediate measures to determine and verify the identity and the legal status of the third-country nationals and immediately refuse entry or issue return decisions to those who have no right to enter or to stay in the Union.
- (3) The integrated and coordinated approach in the area of return should fulfil, in particular, the following tasks:
 - (a) carry out swift medical examinations to avoid potential abuses in the situations referred to in point 9(b);
 - (b) liaise and exchange relevant operational information with other Member States and the European Border and Coast Guard Agency for the fulfilment of their objectives and tasks;
 - (c) make full use of the relevant IT systems, such as Eurodac, the Schengen Information System (SIS) and the Visa Information System (VIS), to obtain timely information on the identity and legal situation of the third-country nationals concerned.
- (4) Member States should ensure that units or bodies tasked to ensure the integrated and coordinated approach are allocated all the necessary human, financial and material resources.

SYSTEMATIC ISSUANCE OF RETURN DECISIONS

- (5) For the purpose of ensuring that return decisions are systematically issued to third-country nationals who either do not have or no longer have a right to stay in the European Union, Member States should:
 - (a) put in place measures to effectively locate and apprehend third-country nationals staying illegally;
 - (b) issue return decisions regardless of whether the illegally staying third-country national holds an identity or travel document;
 - (c) make the best use of the possibility provided for in Article 6(6) of Directive 2008/115/EC to combine in one act or to adopt simultaneously the decision on the ending of a legal stay and the return decision, provided that the relevant safeguards and provisions for each individual decision are respected.
- (6) Member States should ensure that return decisions have unlimited duration, so that they can be enforced at any moment without the need to re-launch return procedures after a certain period of time. This should be without prejudice to the obligation to take into account any change in the individual situation of the third-country nationals concerned, including the risk of *refoulement*.

- (7) Member States should systematically introduce in return decisions the information that third-country nationals must leave the territory of the Member State to reach a third country, to deter and prevent unauthorised secondary movements.
- (8) Member States should make use of the derogation provided for under Article 2(2)(a) of Directive 2008/115/EC when this can provide for more effective procedures, in particular when facing significant migratory pressure.

EFFECTIVE ENFORCEMENT OF RETURN DECISIONS

- (9) For the purpose of ensuring swift returns of illegally staying third-country nationals, Member States should:
- (a) in accordance with Directive 2013/32/EU of the European Parliament and of the Council ⁽¹⁾, organise proceedings for the swift examination of applications for international protection in an accelerated or, where considered appropriate, border procedure, including where an asylum application is made merely to delay or frustrate the enforcement of a return decision;
 - (b) take steps to prevent potential abuses related to false new medical claims aimed at preventing removal, for instance by ensuring that medical personnel appointed by the relevant national authority is available to provide an objective and independent opinion;
 - (c) ensure that return decisions are followed without delay by a request to the third country of readmission to deliver a valid travel documents or to accept the use of the European travel document for return issued in accordance with Regulation (EU) No 2016/1953 of the European Parliament and of the Council ⁽²⁾;
 - (d) make use of the instrument of mutual recognition of return decisions provided for by Directive 2001/40/EC and Decision 2004/191/EC.
- (10) For the purpose of effectively ensuring removals of illegally staying third-country nationals, Member States should:
- (a) use detention as needed and appropriate in the cases provided for in Article 15(1) of Directive 2008/115/EC, and in particular where there is a risk of absconding as provided for in points 15 and 16 of this Recommendation;
 - (b) provide in national legislation for a maximum initial period of detention of six months that can be adapted by the judicial authorities in the light of the circumstances of the case, and for the possibility to further prolong the detention until 18 months in the cases provided for in Article 15(6) of Directive 2008/115/EC;
 - (c) bring detention capacity in line with actual needs, including by using where necessary the derogation for emergency situations as provided for in Article 18 of Directive 2008/115/EC.
- (11) In relation to illegally staying third-country nationals who intentionally obstruct the return processes, Member States should consider using sanctions in accordance with national law. These sanctions should be effective, proportionate and dissuasive and should not impair the achievement of the objective of Directive 2008/115/EC.

PROCEDURAL SAFEGUARDS AND REMEDIES

- (12) Member States should:
- (a) merge in one procedural step, to the extent possible, administrative hearings conducted by the competent authorities for different purposes, such as for the granting of a residence permit, for return or for detention. New ways of holding such hearings of third-country nationals, such as the use of video-conferencing, should also be developed;
 - (b) provide for the shortest possible deadline for lodging appeals against return decisions established by national law in comparable situations, to avoid misuse of rights and procedures, in particular appeals lodged shortly before the scheduled date of removal;

⁽¹⁾ Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (OJ L 180, 29.6.2013, p. 60).

⁽²⁾ Regulation (EU) 2016/1953 of the European Parliament and of the Council of 26 October 2016 on the establishment of a European travel document for the return of illegally staying third-country nationals, and repealing the Council Recommendation of 30 November 1994 (OJ L 311, 17.11.2016, p. 13).

- (c) ensure that the automatic suspensive effect of appeals against return decisions is granted only when this is necessary to comply with Articles 19(2) and 47 of the Charter;
- (d) avoid repetitive assessments of the risk of breach of the principle of *non-refoulement*, if the respect of that principle has already been assessed in other procedures, the assessment is final and there is no change in the individual situation of the third-country nationals concerned.

FAMILY AND CHILDREN

- (13) To ensure respect of the rights of the child, and taking fully into account the best interests of the child and family life under Article 5 of Directive 2008/115/EC, Member States should:
 - (a) establish clear rules on the legal status of unaccompanied minors allowing either to issue return decisions and carry out returns or to grant them a right to stay;
 - (b) ensure that decisions on the legal status of unaccompanied minors are always based on an individual assessment of their best interests. This assessment should systematically take into consideration whether return of an unaccompanied minor to the country of origin and reunification with the family is in their best interests;
 - (c) put in place targeted reintegration policies for unaccompanied minors;
 - (d) ensure that the assessment of the best interests of the child is systematically carried out by the competent authorities on the basis of a multi-disciplinary approach, that the unaccompanied minor is heard and that a guardian is duly involved.
- (14) In respect of the fundamental rights and of the conditions set by Directive 2008/115/EC, Member States should not preclude in their national legislation the possibility to place minors in detention, where this is strictly necessary to ensure the execution of a final return decision insofar as Member States are not able to ensure less coercive measures than detention that can be applied effectively in view of ensuring effective return.

RISK OF ABSCONDING

- (15) Each of the following objective circumstances should constitute a rebuttable presumption that there is a risk of absconding:
 - (a) refusing to cooperate in the identification process, using false or forged identity documents, destroying or otherwise disposing of existing documents, refusing to provide fingerprints;
 - (b) opposing violently or fraudulently the operation of return;
 - (c) 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;
 - (d) not complying with an existing entry ban;
 - (e) unauthorised secondary movements to another Member State.
- (16) Member States should provide that the following criteria are taken into due account as an indication that an illegally staying third-country nationals poses a risk of absconding:
 - (a) explicit expression of the intention of non-compliance with a return decision;
 - (b) non-compliance with a period for voluntary departure;
 - (c) an existing conviction for a serious criminal offence in the Member States.

VOLUNTARY DEPARTURE

- (17) Member States should only grant voluntary departure following a request by the third-country national concerned, while ensuring that the third-country national is well informed of the possibility of submitting such an application.

- (18) Member States should provide in the return decision for the shortest possible period for voluntary departure needed to organise and proceed with the return, taking into account the individual circumstances of the case.
- (19) In determining the duration of the period for voluntary departure, Member States should assess the individual circumstances of the case, in particular the prospects of return and the willingness of the illegally staying third-country national to cooperate with competent authorities in view of return.
- (20) A period longer than seven days should only be granted when the illegally staying third-country national actively cooperate in view of return.
- (21) No period for voluntary departure should be granted in the cases provided for in Article 7(4) of Directive 2008/115/EC, notably when the illegally staying third-country poses a risk of absconding as provided for in points 15 and 16 of this Recommendation and in cases of previous convictions for serious criminal offences in other Member States.

ASSISTED VOLUNTARY RETURN PROGRAMMES

- (22) Member States should have operational assisted voluntary return programmes by 1 June 2017, which should be in line with the common standards on Assisted Voluntary Return and Reintegration Programmes developed by the Commission in cooperation with Member States and endorsed by the Council ⁽¹⁾.
- (23) Member States should take action to improve their process of disseminating information on voluntary return and assisted voluntary return programmes to illegally staying third-country nationals, in cooperation with national education, social and health services.

ENTRY BANS

- (24) For the purpose of making full use of the entry bans, Member States should:
- ensure that entry bans start being valid on the day in which the third-country nationals leave the EU so that their effective duration is not unduly shortened; this should be ensured in cases where the date of departure is known to the national authorities, notably in cases of removal and of departure in conjunction with an assisted voluntary return programme;
 - put in place means to verify if a third country national illegally staying in the European Union has left within the period for voluntary departure, and to ensure an effective follow-up in the case this person has not left, including by issuing an entry ban;
 - systematically enter an alert on entry ban in the second generation Schengen Information System, in application of Article 24(3) of Regulation (EC) No 1987/2006; and
 - put in place a system for issuing a return decision in cases where illegal stay is discovered during an exit check. Where justified, following an individual assessment and in application of the principle of proportionality, an entry ban should be issued in order to prevent future risks of illegal stay.

Done at Brussels, 7 March 2017.

For the Commission
Dimitris AVRAMOPOULOS
Member of the Commission

⁽¹⁾ Council Conclusions of 9-10 June 2016.