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## Voluntary return and the limits of individual responsibility in the EU Returns Directive

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*“The case manager puts his hand on a thick file: ‘I have read that you have already made an effort to return. You have been to the embassy multiple times to get temporary travel documents. Without success. Do you actually want to return?’*

*The man answers: ‘What do you think? The embassy does not want to help me. That is not my fault. I have no choice but to stay in the Netherlands. I have a child here, did you know? And I play in a band.’*

*Then the case manager says: ‘I fully understand that, in your situation, you do not want to go back to your own country. But the Netherlands does not want illegal migrants. You have the duty to leave this country.’”<sup>1</sup>*

*“In return policy, foreign nationals’ own responsibility for return is paramount. They have come to the Netherlands of their own accord, and they will, in principle, have to return of their own accord if their stay is not (or no longer) an option.”<sup>2</sup>*

## 1.1 VOLUNTARY RETURN AND INDIVIDUAL RESPONSIBILITY IN THE RETURNS DIRECTIVE

Within European Union (EU) asylum and migration policy, one of the biggest challenges is to ensure the effective return of those who are not, or no longer, authorised to stay in a member state. At the time of writing, the legal framework for meeting this challenge is still Directive 2008/115/EC on common standards and procedures in Member States for returning illegally staying third-country nationals, commonly known as the Returns Directive;<sup>3</sup> a recast proposal, introduced in September 2018, is under consideration by the Council and the Parliament.<sup>4</sup> The Directive sets out a return procedure in two stages. Under normal circumstances, persons who are required to return are first given an opportunity to do so of their own accord, or, in the parlance of the Directive, to return voluntarily. Only if they do not take advantage of this opportunity does the procedure move to the second stage.

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1 Zuidervaat 2010 (my translation).

2 Letter from the Dutch Minister for Immigration and Asylum to the Lower House of the Parliament, parliamentary year 2010-2011, document 19637 no. 1436, 12 July 2011 (my translation).

3 OJ L 394, 24 December 2008, pp. 98-107 (hereinafter: RD). The use of ‘Returns Directive’ or ‘Return Directive’ varies in the literature. In this dissertation, I will often just use ‘the Directive,’ unless a clear distinction needs to be made with other EU directives that may be relevant to the analysis.

4 COM(2018) 634 final, 12 September 2018.

This involves enforcement by the member state by removing such persons from its territory. Since the adoption of the Directive in 2008, and even in the years leading up to this, the issue of removal and related topics such as detention have received considerable attention, both in the case law of the Court of Justice of the European Union (CJEU) and in academic literature.<sup>5</sup> This same level of scrutiny has not been given to the voluntary return stage, even though the Directive prioritises voluntary return over enforced return and, if all goes well, the return procedure can end after the voluntary return stage because the person concerned will have left.

This dissertation seeks to redress this imbalance by discussing in detail the notion of voluntary return. Not only is this necessary because it is a key component of the return procedure set out in EU law, which nevertheless is only captured by a few – sometimes very brief – articles in the Directive. Also, while it first appears to be a simple concept, the term ‘voluntary return’ in the Directive in fact represents a major idea of considerable complexity.<sup>6</sup> Importantly, voluntary return changes the traditional paradigm of return, which has often been studied from the perspective of the state using physical coercion to implement what has been variously called ‘forced return,’ ‘deportation’ or – in the context of the Directive – ‘removal.’ Voluntary return, by contrast, shifts the focus from the actions of the authorities, and the state responsibilities that come with it, to those of the individual. Rather than being the object of state action, it casts the individual as the key actor who is made responsible for ensuring return takes place in a timely manner. The quotes at the start of this chapter, while relating to one specific member state, nonetheless illustrate this principle embedded in the Directive quite well: the problem of ensuring return, and overcoming any obstacles in this respect, is – first and foremost – one for the individual. Although this shift in responsibility may have benefits for both the individual and the member state,<sup>7</sup> it also raises new questions which are generally not applicable to, or much less prominent in, situations in which individuals are removed.<sup>8</sup> In particular, this includes questions about the boundaries of the responsibility allocated to the individual, both in terms of content and in terms of the time frame. In other words, it raises the question what exactly can be expected of individuals who are made responsible for their own return, and how much time they are actually given to meet this responsibility effectively. As will be discussed below, this hinges on two key concepts in the Directive, namely the obligation to return and the voluntary departure period.<sup>9</sup>

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5 See, among others, Baldaccini 2009; Peers et al 2012, chapter 17; Basilien-Gainche 2015; Mitsilegas 2016; Mancano 2019, chapter 11; Majcher 2020, parts 4 and 5.

6 See 1.3 and 2.10.1.

7 See 2.2.1.

8 See 1.2.2.4 for the specific meaning of removal in the context of the Directive.

9 See 1.2.2.

This dissertation seeks to identify the boundaries of individual responsibility<sup>10</sup> by unpacking the meaning of these two concepts in the Directive, and by examining their interconnection. In particular, it tries to identify what actions individuals can and cannot be expected to take as part of the fulfilment of their obligation to return. And it seeks to clarify individuals' entitlement to, and the appropriate length of, the voluntary departure period. This, I will argue, requires looking at the relationships between the various actors involved, since responsibility only make sense from the perspective that it is owed by someone to someone else. However, given the inherently international nature of return from one country to another, these relevant actors do not only include the individual and the EU member state. It also encompasses the prospective country of return. The latter's decisions on, for example, readmission or the granting of travel documents have a clear impact not only on the question of whether return can take place as a practical matter, but helps set the normative framework in which individual responsibility should be understood. As a result, this dissertation looks at voluntary return as a process involving a triangle of actors: the third-country national, the EU member state and the country of return. It assesses how their respective rights and obligations, including those external to EU law, eventually impact on the individual's position within the context of the Directive.

This chapter will further explain the key issues at stake and sets out the framework for tackling these. Section 1.2 will first provide a broad outline of the return procedure in the Directive, with a specific focus on the role that voluntary return plays within it. Section 1.3 then proceeds to examine the notion of voluntary return in more detail, and sets out why, if it is not further clarified, it risks being a vague and open-ended concept. Section 1.4 sets out the research questions and approach of analysis in this dissertation. An overview of the subsequent chapters and their relation to the research questions is provided in section 1.5.

## 1.2 THE DIRECTIVE IN A NUTSHELL

This section provides, first, some background to the Directive, covering its adoption, objectives, personal scope, and applicability to member states (1.2.1). Second, it outlines the key elements of the return procedure that the Directive establishes, being the return decision, the obligation to return, the voluntary departure period, enforcement of the return decision, and several other elements of interest (1.2.2). Third, it will highlight the changes that the recast process of the Directive may bring (1.2.3).

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10 As explained in 1.3, when using the term 'individual responsibility,' this is not to introduce a new and distinct legal concept, but rather to provide a useful shorthand for the legal obligations incumbent on individuals and the legal consequences that would arise if such obligations are not met.

### 1.2.1 Background to the Directive

Before discussing the concept of voluntary return, a brief explanation of the overall purpose and contents of the Directive, and thus the context in which the specific provisions relevant to voluntary return should be understood, is in order.

#### 1.2.1.1 *Adoption of the original Directive*

The Directive has its legal basis in Article 79 of the Treaty on the Functioning of the EU (TFEU),<sup>11</sup> which provides for the development of a common immigration policy, which includes the adoption of legislative measures in the area of “illegal migration and unauthorised residence, including removal and repatriation of persons residing without authorisation.”<sup>12</sup> After a long period in which forms of closer alignment of return standards and procedures in member states were sought through non-legislative measures,<sup>13</sup> the Commission presented an initial proposal for a Directive in 2005.<sup>14</sup> The Directive was to be the first important piece of legislation related to migration policy to be decided under the co-decision procedure,<sup>15</sup> and it took several years, with fits and starts, to be adopted.<sup>16</sup> On various points, it was a highly contested piece of legislation, especially as regards its implications for the fundamental rights of third-country nationals.<sup>17</sup> Nevertheless, in December 2008, it was finally adopted, with member states required to fully transpose it into national law within two years.<sup>18</sup>

#### 1.2.1.2 *Objectives of the Directive*

The Directive, as its lengthy title indicates, establishes common standards and procedures to be applied by EU member states when dealing with the return of irregular migrants, rejected asylum seekers or any other non-EU citizens who do not (or no longer) have the right to enter or stay in the EU. The Directive incorporates a set of horizontal rules applicable to all relevant

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11 OJ C 326, 26 October 2012, pp. 47-390.

12 TFEU, Article 79(2)(c).

13 Some of which are discussed in 2.2.1.

14 COM(2005) 391 final, 1 September 2005. A first legislative step towards closer cooperation and harmonisation had already come in the form of the Council Directive 2001/40/EC of 28 May 2001 on the mutual recognition of decisions on the expulsion of third-country nationals (the Mutual Recognition Directive), OJ L 146, 2 June 2001, pp. 34-36.

15 Acosta 2009a. Since the Lisbon Treaty, co-decision is now the ordinary procedure used to adopt all measures in this policy area. Also see Ripoll Servant 2011.

16 Lutz 2010, pp. 12-25.

17 EPRS 2019a, p. 31; Lutz 2010, pp. 73-80; Euractiv 2008.

18 RD Article 20(1). An exception was made for laws, regulations and administrative provisions in relation to legal aid under Article 13(4), which were subject to a three-year deadline.

member states, which should be clear, transparent and fair to provide for an effective return policy as a necessary element of a well-managed migration policy.<sup>19</sup> In this respect, the Directive sets out a number of obligations on member states on how they should ensure that the return procedure is implemented promptly and results in eventual return.<sup>20</sup> The rules in the Directive also aim to provide a “common minimum set of legal safeguards on decisions related to return ... to guarantee effective protection of the interests of the individuals concerned.”<sup>21</sup> Returns of individuals should take place “in a humane manner and with full respect for their fundamental rights and dignity.”<sup>22</sup> The Directive thus requires that the common standards and procedures are applied in line with fundamental rights.<sup>23</sup> Some of the more general protections, such as taking into account the best interests of the child, family life, and the health of the third-country national, as well as respecting the principle of non-*refoulement*, are listed explicitly.<sup>24</sup> Similarly, the Directive sets out a number of specific obligations regarding the treatment of third-country nationals during the voluntary departure period.<sup>25</sup> As such, the Directive purports to balance the need for effective return across the EU and protection of those subject to return procedures, which is an important feature that will come back at various points in the analysis.

#### 1.2.1.3 *Scope of the Directive and applicability to member states*

The Directive is applicable to ‘illegally staying third-country nationals.’<sup>26</sup> It defines a third-country national as “any person who is not a citizen of the Union within the meaning of Article 17(1) of the Treaty [on European Union] and who is not enjoying the Community right of free movement, as defined in Article 2(5) of the Schengen Borders Code.”<sup>27</sup> A third-country national is considered illegally staying in a member state if he or she “does not fulfil, or no longer fulfils the conditions of entry as set out in Article 5 of the Schengen Borders Code or other conditions for entry, stay or residence in that Member State.”<sup>28</sup>

In general, persons fitting these definitions are subject to the standards and procedures set out in the Directive. However, in some cases member states have the option of not applying the Directive to such persons,

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19 RD Recitals 5 and 6.

20 See 1.2.2.

21 RD Recital 11.

22 RD Recital 2. On the protective function of the Directive, also see CJEU C-61/11 *El Dridi* [2011], paragraph 42.

23 RD Recital 24; Article 1.

24 RD Article 5.

25 RD Article 14(1).

26 See 2.10.2.1 on the use of the term ‘illegal’ in this context.

27 RD Article 3(1).

28 RD Article 3(2).

including when they are subject to a refusal of entry, or if they are apprehended or intercepted in connection with the irregular crossing of an external border and they have not subsequently obtained authorisation to stay.<sup>29</sup> Similarly, third-country nationals subject to return as a criminal law sanction or as a consequence of a criminal law sanction, or who are the subject of extradition procedures, can be excluded from the scope of the Directive.<sup>30</sup> This also means that the rules on voluntary return do not apply to them. This group is therefore not further discussed in this dissertation.<sup>31</sup> Any third-country national who is not covered by the provisions above, or who is covered but stays in a member state that has decided not to apply the exclusion possibilities, is subject to the procedure as discussed below.<sup>32</sup>

The Directive is applicable to all EU member states, except for Ireland.<sup>33</sup> Although “a development of the Schengen acquis,”<sup>34</sup> it applies also to the EU member states which are not (yet) part of Schengen.<sup>35</sup> It is also applicable to four non-EU member states, which are part of the Schengen area: Iceland, Liechtenstein, Norway and Switzerland.<sup>36</sup> As a result, the Directive covers an area that is both more limited and more expansive than the EU. Despite this, throughout this dissertation, the term ‘EU member state’ will be used as shorthand for those countries to which the Directive applies, unless there is a specific need to differentiate between them.

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29 RD Article 2(2)(a). A 2013 evaluation of the Directive, carried out on behalf of the European Commission, found that 17 member states applied this exception, whilst only eight (Bulgaria, Estonia, Finland, Hungary, Poland, Portugal, Slovakia and Liechtenstein) did not. For the remaining four, the result was indeterminate. See DG HOME 2013, section 2.8. It should be noted that such persons, even whilst excluded from the Directive’s procedures, are entitled to a set of minimum protections elaborated in the Directive, see Article 4(4). The application of this exception is limited to those situations in which there is a “direct temporal and spatial link with that crossing of the border” (CJEU C-47/15 *Affum* [2016], paragraph 72), and to the irregular crossing of external, not internal, borders (*ibid.*, paragraph 69), even if border checks are temporarily reintroduced at those internal borders (CJEU C-444/17 *Arib* [2019], paragraph 67).

30 RD Article 2(2)(b). RD Article 2(3) also states that persons enjoying free movement as defined in Article 2(5) of the SBC are excluded. However, this merely reiterates such persons are already not considered third-country nationals for the purpose of the Directive.

31 However, Pollet notes that the number of third-country nationals excluded from the Directive on this basis could be “potentially large.” See Pollet 2011, p. 31.

32 And remains so as long as their stay has not been regularised, see CJEU C-47/15 *Affum* [2016], paragraph 61.

33 RD Recital 27. Even before its withdrawal from the EU, the Directive was not applicable to the United Kingdom. Denmark is implementing the Directive in accordance with the Protocol on the position of Denmark annexed to the TFEU, see, for example, Gammeltoft-Hansen & Scott Ford 2021, p. 31.

34 RD Recitals 26-30.

35 At the time of writing, Bulgaria, Croatia, Cyprus and Romania have not yet become part of the Schengen area.

36 RD Recitals 28-30.

## 1.2.2 Key elements of the return procedure

Below, key elements of the return procedure, including the return decision, the definition of return, the voluntary departure period, enforcement, and several other provisions are outlined.

### 1.2.2.1 *The return decision: the start of the return procedure*

Once a person is identified as an illegally staying third-country national within the scope of the Directive, the member state should issue a return decision.<sup>37</sup> Such a return decision is “an administrative or judicial decision or act, stating or declaring the stay of a third-country national to be illegal and imposing or stating an obligation to return.”<sup>38</sup> The return decision marks the starting point of the return procedure. The issuing of a return decision by member states is obligatory, unless one of the exceptions can be applied.<sup>39</sup> In this way, the Directive has set a framework in which member states are compelled to take action when faced with an illegally staying third-country national, and cannot choose to ignore their presence, as they might have been able to in the past. This is different in a limited number of situations. Firstly, when persons hold a valid residence permit or other authorisation of stay in another member state and they go there immediately.<sup>40</sup> Secondly, member states may refrain from issuing a return decision if third-country nationals are taken back by another member state under bilateral agreements or other arrangements.<sup>41</sup> They should also consider refraining from issuing a return decision if third-country nationals are the subject of a pending procedure for renewing their residence permit or other authorisation of stay.<sup>42</sup> Finally, member states can negate the need to issue a return decision by providing them a residence permit or authorisation, thus effectively ending their status as ‘illegally staying.’<sup>43</sup>

In relation to voluntary return, the return decision is important for two reasons. First, as noted, it includes a reference to the person’s obligation to return. The return decision thus serves as a mechanism to make the third-country national, rather than the member state, primarily responsible for the successful completion of the return procedure. This is a key feature of voluntary return. And second, the return decision should indicate how long third-country nationals will have to meet this obligation of their own

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37 RD Article 6(1).

38 RD Article 3(4).

39 CJEU C-38/14 *Zaizoune* [2015], according to which a return decision or removal cannot be substituted by another consequence for irregular stay, such as a fine. Also see C(2017) 6505 final, 16 November 2017, Annex (Return Handbook), paragraph 5.

40 RD Article 6(2).

41 RD Article 6(3). In such cases, the member state that has taken him or her back should issue a return decision.

42 RD Article 6(5).

43 RD Article 6(4).



accord. In other words, the return decision indicates whether a voluntary departure period is granted, and if so, for how long. Both elements are discussed in more detail below.

### 1.2.2.2 *The obligation to return: setting the parameters of individual responsibility*

Although a key concept in the Directive, the phrase ‘obligation to return’ is not defined as such. However, the term ‘return’ by itself is. Article 3(3) of the Directive says that ‘return’ means:

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

- his or her country of origin, or*
- a country of transit in accordance with Community or bilateral readmission agreements or other arrangements, or*
- another third country, to which the third-country national concerned voluntarily decides to return and in which he or she will be accepted”*

In this way, the obligation on the third-country national does not merely relate to the departure from the member state where he or she is staying without authorisation (despite the use of the term ‘voluntary departure’ elsewhere in the Directive), but to their return to one of three categories of destinations set out above.<sup>44</sup> The definition above acknowledges that such return does not just happen in a vacuum, but that this is a *process*. As such, the obligation on third-country nationals appears to be both to engage in this process, and to bring it to a successful conclusion by moving to one of the three destinations. It thus comprises both an obligation of effort and of result.

The importance of the definition in Article 3(3) in the Directive in general, and the responsibility allocated to individuals in relation to voluntary return specifically, cannot be overestimated. It is central to understanding what can be expected of third-country nationals faced with voluntary return. It sets the parameters of the actions that they should take during the voluntary departure period and provides the benchmark for assessing compliance with the obligation, which in turn is key to the question of enforcement.

### 1.2.2.3 *The voluntary departure period: how much time to act responsibly is given?*

The Directive defines voluntary departure as “compliance with the obligation to return within the time-limit fixed for that purpose in the return decision.”<sup>45</sup> During this period, the member state must refrain from

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<sup>44</sup> However, see the discussion about the (sometimes confusing) use of the obligation to leave or to return in 9.4.

<sup>45</sup> RD Article 3(8).

enforcing the return decision using coercive measures,<sup>46</sup> thus creating the space for third-country nationals to make arrangements for their own departure.<sup>47</sup> As a general principle, voluntary return should be preferred over forced return “[w]here there are no reasons to believe that this would undermine the purpose of a return procedure.”<sup>48</sup> This priority of voluntary return as an EU legal principle is perhaps one of the biggest innovations of the Directive.<sup>49</sup> This priority is operationalised in Article 7 of the Directive. Article 7(1) requires that return decisions provide for an ‘appropriate period’ for voluntary departure. This period must be between seven and thirty days, to be decided by the member state.<sup>50</sup> Such a period can be granted automatically, or member states may adopt national legislation to require third-country nationals to apply for such a period.<sup>51</sup>

Article 7(2) says that this voluntary departure period should be extended by another appropriate period ‘where necessary.’ In assessing whether this is the case, member states should take into account the specific circumstances of the individual case, such as the length of stay, the existence of children attending school and the existence of other family and social links.<sup>52</sup> A written confirmation of the extension should be provided to the third-country national.<sup>53</sup>

Despite the general priority of voluntary return, the Directive also sets out, in Article 7(4), several grounds for member states to decide to refrain from granting a period for voluntary departure, or to grant one shorter than seven days. This can be done in three cases: (1) if there is a risk of absconding; (2) if the individual’s application for a legal stay has been dismissed as manifestly unfounded or fraudulent; or (3) if the third-country national concerned poses a risk to public policy, public security or national security.<sup>54</sup>

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46 See 1.2.2.4.

47 RD Article 8(2).

48 RD Recital 10.

49 Although numerous member states already had variations of this provision incorporated in their national laws, the Directive required harmonisation of these provisions. Furthermore, some states had to introduce, for the first time, legal provisions on voluntary return. See, for example, Acosta 2009b, p. 5; COM(2014) 199, 28 March 2014, p. 21: “In some Member States, a period for voluntary departure was not previously provided for in national law, or the length was not specified. All Member States have now introduced such a limit.”

50 But see 11.2 on the limitations on member states’ discretion in choosing the length of the voluntary departure period.

51 RD Article 7(1). Member states must then provide information about the possibility of making such an application. In 2017, the European Commission recommended to member states to grant a voluntary departure period only following an application, COM(2017) 1600 final, 7 March 2017, recommendation 17. However, the Commission’s 2018 recast proposal does not include changes to the possibility to grant a voluntary departure period *ex officio*, COM(2018) 634 final, 19 September 2018, Article 8(1).

52 RD Article 7(2).

53 RD Article 14(2).

54 RD Article 7(4).

If no period for voluntary departure is granted, the member state may proceed with the enforcement of the return decision immediately.

If a period for voluntary departure is granted, Article 7(3) provides that member states may impose on third-country nationals certain obligations aimed at avoiding the risk of absconding.<sup>55</sup> It sets out a non-exhaustive list of these measures, such as regular reporting to the authorities, deposit of an adequate financial guarantee, submission of documents, or the obligation to stay at a certain place.<sup>56</sup>

The provisions on the voluntary departure period are important to the analysis here, since they determine how much time third-country nationals get to meet their obligation to return. This then determines, to an important extent, whether third-country nationals can in fact complete the ‘process of going back’ themselves, or whether the member state eventually steps in and takes back full control over their return. The obligation to return, setting the content of the responsibility allocated to the individual, and the voluntary departure period, setting the temporal scope of that responsibility, are therefore interconnected. These two elements form the focal points of this dissertation. However, before discussing these in more detail, some other elements of the return procedure still need to be discussed first, to complete the picture of the return procedure.

#### 1.2.2.4 *Enforcement of the return decision*

Voluntary return represents the first stage of the Directive’s procedure. Ideally, third-country nationals meet their obligation to return within the voluntary departure period, thus concluding the return procedure altogether. But if they fail to do so, or if no voluntary departure period is granted, the second stage of the procedure kicks in: enforcement. I will only deal with this stage very briefly, since the focus of this dissertation is on voluntary return. As noted, the various aspects of enforcement – in contrast to voluntary return – have received considerable attention in both the case law of the CJEU of the EU and academic writing.<sup>57</sup> However, it is useful to outline in general what happens when third-country nationals fail to comply voluntarily with the return decision.

Under Article 8(1) of the Directive the obligation on member states to take “all necessary measures to enforce the return decision” comes into play “if no period for voluntary departure has been granted ... or if the obligation to return has not been complied with within the period for voluntary

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55 RD Article 7(3).

56 RD Article 7(3).

57 The majority of judgments rendered by the CJEU in relation to the Returns Directive have touched upon aspects of enforcement, including detention. For an overview, see, inter alia, Basilien-Gainche 2015; Majcher 2020, parts 4 and 5, and further references in note 5 above.

departure.”<sup>58</sup> This results in removal – that is, the physical transportation of third-country nationals out of the member state.<sup>59</sup> As a last resort, member states may use coercive measures to carry out the removal of third-country nationals who resist, provided these are proportionate and do not exceed reasonable force.<sup>60</sup> Such measures must be provided for in national legislation and should be in accordance with fundamental rights and due respect for the dignity and the physical integrity of the third-country national.<sup>61</sup> In order to prepare the return and/or carry out the removal process, member states may keep third-country nationals in detention, but only if no other sufficient but less coercive measures can be applied effectively.<sup>62</sup> Detention may be used particularly when there is a risk of absconding, or if the third-country national avoids or hampers the preparation of return or the removal process.<sup>63</sup> The Directive sets out a number of safeguards in relation, for example, to the review of a decision to detain, and the length of detention.<sup>64</sup> These are not further discussed as this falls outside the scope of the question of voluntary return.

#### 1.2.2.5 *Other elements*

Some other notable features of the Directive include the introduction of an entry ban, which is an administrative or judicial decision or act prohibiting entry into and stay on the territory of a member state for a specified period.<sup>65</sup> Such an entry ban should normally not exceed five years, although it can be longer if the third-country national represents a serious threat to public policy, public security or national security.<sup>66</sup> If third-country nationals fail to meet their obligation to return within the voluntary departure period, or if such a period is denied, member states must impose an entry ban.<sup>67</sup> This should incentivise third-country nationals to take up voluntary return, as this would help them avoid an entry ban, which would prevent them from applying for authorisation to come back to the member state and the Schengen area more broadly in the future. However, member states may choose to impose entry bans even when third-country nationals leave voluntarily,<sup>68</sup> which would arguably undermine its role as an incentive for voluntary departure.

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58 RD Article 8(1).

59 RD Article 3(5).

60 RD Article 8(4).

61 RD Article 8(3).

62 RD Article 15(1).

63 RD Article 15(2).

64 RD Chapter V.

65 RD Article 3(6).

66 RD Article 11(2).

67 RD Article 11(1).

68 *Ibid.*

Throughout all stages of the Directive, member states are required to take due account of the best interests of the child, family life, and the state of health of the third-country national concerned. They must also respect the principle of non-*refoulement*.<sup>69</sup> Pending return, several other principles must be taken into account “as far as possible,” including during the voluntary departure period. These are the maintenance of family unity with family members present in the member state; the provision of emergency health care and essential treatment of illness; granting access to the basic education system for minors, subject to the length of their stay; and taking account of the special needs of vulnerable persons.<sup>70</sup> With regard to the latter, some further provisions specifically apply to children. For example, beyond the general principle of the best interests of the child, member states should grant unaccompanied minors assistance by “appropriate bodies” before issuing a return decision.<sup>71</sup> They should also ensure that unaccompanied minors will be returned to a family member, nominated guardian or adequate reception facilities in the state of return.<sup>72</sup> The position of victims of trafficking is briefly addressed, but only in relation to their exclusion from being subject to entry bans.<sup>73</sup>

Finally, third-country nationals must be accorded an effective remedy to appeal against, or seek review of, the return decision, decisions related to entry bans and decisions on removal, before an impartial and independent judicial or administrative body, which has the competence to review such decisions and to temporarily suspend the enforcement of these decisions.<sup>74</sup> Third-country nationals must also have the possibility to obtain legal advice and representation – which in some cases must be granted free of charge on request – as well as linguistic assistance (such as an interpreter) where necessary.<sup>75</sup>

### 1.2.3 The recast proposal

The completion of this dissertation comes at a time when the legislation analysed here may soon be replaced. In September 2018, almost ten years after the adoption of the Directive, the Commission published a proposal to recast the Directive.<sup>76</sup> At the time of writing, this proposal is still under

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<sup>69</sup> RD Article 5.

<sup>70</sup> RD Article 14(1). Article 3(9) defines vulnerable persons as “minors, unaccompanied minors, disabled people, elderly people, pregnant women, single parents with minor children and persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence.”

<sup>71</sup> RD Article 10(1).

<sup>72</sup> RD Article 10(2).

<sup>73</sup> RD Article 11(3).

<sup>74</sup> RD Article 13(1) and (2).

<sup>75</sup> RD Article 13(3) and (4).

<sup>76</sup> COM(2018) 634 final, 12 September 2018.

consideration by the European Parliament and the Council.<sup>77</sup> As regards voluntary return, most of the basic principles and approach remain in place in the proposal. The priority of voluntary return over forced return, at least as a general principle, is maintained in the Commission's proposal in the same words. However, it proposes to add to the relevant recital the qualification that this would be "depending in particular on the prospect of return," and making a clearer reference to the grounds for denying a voluntary departure period.<sup>78</sup> The obligation to return, as the hinge on which the entire return procedure turns, is defined in the same way in the proposal as in the current Directive,<sup>79</sup> and so far there have not been any moves by the other institutions to change this. The provisions on the granting or denying of a voluntary departure period, however, may be subject to smaller as well as more fundamental changes. In the Commission's proposal, for example, the time provided for voluntary return would be defined as a period of "up to thirty days."<sup>80</sup> This would scrap the lower limit of seven days in the current Directive, and therefore also the requirement that a shorter period is only provided when one of the grounds for exceptions apply. By contrast, the Rapporteur of the European Parliament's Committee on Civil Liberties, Justice and Home Affairs (LIBE) has instead suggested that all voluntary departure periods should be thirty days as standard.<sup>81</sup>

Additionally, the Commission's proposal seeks to make denial of a voluntary departure period mandatory when any of the three grounds (a risk of absconding, a risk to public policy, public security or national security, or dismissal of an application as fraudulent or manifestly unfounded) exists.<sup>82</sup> This contrasts the current situation, in which such denial is merely formulated as an option for member states. Mandatory denial may have a significant impact on the extent to which voluntary return is truly prioritised.<sup>83</sup>

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77 At the time of completion of this dissertation (May 2021), the Rapporteur for the LIBE Committee had presented her draft report (EP doc. PE648.370v01-00, 21 February 2020) and amendments were being considered at Committee level (EP doc. PE658.738v01-00, 28 September 2020). On the side of the Council, a partial general approach was agreed in May 2019 (Council doc. 12099/18, 23 May 2019). The swift conclusion of negotiations on the recast of the Directive was identified as one of the priorities under the New Pact on Migration and Asylum, presented by the European Commission in September (COM(2020) 609 final, 23 September 2020, paragraph 2.6).

78 COM(2018) 634 final, Recital 13. For a discussion of the general priority of voluntary return, and its links to the specific grounds for denial of a voluntary departure period, see 10.2.

79 COM(2018) 634 final, Article 3(3). A small modification is proposed in relation to transit countries, changing the reference to "Community agreements" to "Union agreements," but this simply reflects the changed situation since the Lisbon Treaty.

80 COM(2018) 634 final, Article 9(1).

81 EP doc. PE648.370v01-00, amendment 62.

82 COM(2018) 634 final, Article 9(4).

83 See 10.7.

It is a step that is resisted by the LIBE Rapporteur,<sup>84</sup> and the Council proposes to keep denial optional in the case of the dismissal of an application as manifestly unfounded or fraudulent, or in the case third-country nationals concerned are minors or families with children.<sup>85</sup> A connected change proposed by the Commission is to introduce a set of indicators for the risk of absconding, which member states should, at a minimum, incorporate into their national laws.<sup>86</sup> The list proposed by the Commission is quite extensive, leaving some to fear that it would give member states a large measure of discretion in finding that a risk of absconding exists, and thus leading to the denial of a voluntary departure period.<sup>87</sup> Notwithstanding these changes, the Commission's proposals maintain that, when a voluntary departure period is granted, this should be for an appropriate period, and its possible extension is governed by rules set out in the same way as currently.

In addition to these specific changes to the provisions on voluntary departure, the recast proposal introduces a new article providing that member states shall impose on third-country nationals the obligation to cooperate with the competent authorities at all stages of the return procedures.<sup>88</sup> This was apparently motivated by a concern about frequent non-cooperation by third-country nationals with the return procedure. This obligation would include the duty to provide all elements necessary for establishing or verifying identity; the duty to provide information on third countries transited; the duty to remain present and available throughout the procedures; and the duty to lodge to the competent authorities of third countries a request for obtaining a valid travel document.<sup>89</sup> It also includes new provisions on 'return management,' which, in addition to referring to the setting up and maintenance of return management systems by member states, also explicitly requires them to "establish programmes for providing logistical, financial and other material or in-kind assistance, in accordance with national legislation" to support the return of nationals of certain third countries.<sup>90</sup> The proposal foresees further changes to the return procedure,

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84 EP doc. PE648.370v01-00, amendment 64, which furthermore seeks to limit possibilities for denial of a voluntary departure period to only those situations in which third-country nationals pose "a genuine and present risk to public security or national security."

85 Council doc. 9620/19, p. 59. It further proposes to add to these grounds the possibility of denying a voluntary departure period in case an application has been dismissed as inadmissible.

86 COM(2018) 634 final, Article 6.

87 EP doc. PE648.370v01-00, amendment 46, which seeks to delete this entire provision. Also see FRA 2019, pp. 45-51; ECRE 2018, pp. 7-8; Amnesty International EIO 2018, pp. 1-3.

88 COM(2018) 634 final, Article 7(1).

89 COM(2018) 634 final, Article 7(1)(a)-(d).

90 COM(2018) 634 final, Article 14, and particularly paragraph 3 on return assistance. The issue of return assistance and its linkage to the obligation to return is discussed in 9.3.



including with regard to remedies,<sup>91</sup> the expansion of grounds for detention and its duration,<sup>92</sup> and the introduction of a border procedure.<sup>93</sup>

On the basis of the Commission's recast proposal, as well as the first positions taken by the other institutions, it is likely that a number of key elements and principles of the Directive will remain in place. However, some proposals may result in differences with the current Directive. Nevertheless, many of the issues discussed in relation to the current Directive will continue to be of importance, both in terms of its proper transposition to national law and judicial interpretation, especially as they draw heavily on international frameworks that will remain relevant to any recast version of the Directive. While the analysis is firmly focused on the current Directive, comments about differences that – at least as can be foreseen in the Commission's recast proposal – a new Directive may bring are included in the following chapters where relevant.

### 1.3 VOLUNTARY RETURN: A POTENTIALLY VAGUE AND OPEN-ENDED CONCEPT?

So far, the issue of voluntary return has been discussed in terms of responsibility allocated to the individual to ensure their own return. When using the term 'individual responsibility' this is not meant to introduce a new legal concept into the analysis. Rather, it is used as a convenient shorthand to characterise the position of third-country nationals in the context of voluntary return. It follows McCorquodale's definition of responsibility, who simply uses it to refer to legal obligations, which, if breached, give rise to consequences.<sup>94</sup> Under the Directive, the rules applied to return procedures must be "clear, transparent and fair."<sup>95</sup> The consequences are relatively well set out in the Directive: non-compliance will be followed by removal, possibly in combination with detention and coercive measures, and by the imposition of an entry ban. However, it is questionable whether the circumstances under which third-country nationals can be found to have breached their legal obligations is equally unambiguous. In this respect, questions may be raised about both key elements of voluntary return: the obligation to return (1.3.1.), and the voluntary departure period (1.3.2). The implications of these questions are discussed in 1.3.3.

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91 COM(2018) 634 final, Article 16.

92 COM(2018) 634 final, Article 18(1)(c) and (5).

93 COM(2018) 635 final, Article 22.

94 McCorquodale 2006, p. 314.

95 RD Recital 4.



### 1.3.1 The obligation to return

In examining the extent of individual responsibility, a proper understanding of the obligation to return is crucial, as it sets the specific scope of what can be expected of third-country nationals, and thus which actions, if not taken, lead to a non-compliance. Without clarity about this obligation, any finding of non-compliance may be arbitrary. One easy way to deal with this would simply to consider that any third-country national still in the member state after the expiry of the voluntary departure period has failed to comply with this obligation. However, it is questionable whether this is appropriate. The Directive does not establish continued presence in the member state as the trigger for enforcement. Rather, enforcement follows if a third-country national has not complied with the obligation to return within the time limit set for this.<sup>96</sup> The two could indeed overlap, but to say this is necessarily always the case would rest on a few assumptions. First, it would mean that it must be assumed that, if return does not materialise, it is always the third-country national who is at fault. This, in turn, would assume that the outcome of the return process is fully within the control of the individual. Only a cursory glance at the return process shows that this may not always be the case. Specifically, it would ignore the role of the country of return, which should take the third-country national back. Without this, no successful return is possible. There may be cases in which the country of return is unwilling to do so, which would make the obligation to return (at least towards that country) impossible to fulfil.<sup>97</sup>

However, this problem could also be turned back into an issue of individual responsibility. It might be argued, first of all, that Article 3(3) sets out a wide range of possible destinations, to which third-country nationals can be expected to return. This should normally always leave a country available for them to turn to, and indeed, at least one country – the country of origin – that can be assumed to be under a legal obligation to readmit them. Secondly, it is up to third-country nationals to ensure that they meet the necessary requirements to be allowed to return, so if a country of return does not take them back, this must be due to the individual having failed to take the appropriate steps. Both issues require further examination.

As regards the countries to which individuals can be expected to return, the Directive indeed sets a seemingly wide range of options. Third-country nationals can either return to their country of origin, which presumably would be required to readmit them, a transit country, or another third country. This could be read as ensuring there is always an obligatory destination for third-country nationals. However, this strongly depends on

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<sup>96</sup> Or if no such time limit was provided, see RD Article 8(1).

<sup>97</sup> In such cases, it may be wondered whether such an obligation can even be legitimate. See, for example, Fuller 1969, who identifies as one of the principles providing for the legitimacy of legal obligations that they are indeed possible to fulfil.

the interpretation of each of these categories, as well as the qualifications attached to them in the Directive. Even the first of these, the country of origin, although the least problematic, raises some initial questions. This relates, in particular, to notion of 'origin.' This would likely encompass persons with the nationality of that country. But what about people who were born there, or lived there for a long time, but holding the nationality of another country? And importantly, how does this relate to stateless persons? If the notion of country of origin is broader than persons who are nationals, this may also have implications for the extent to which that country, as a matter of international law, is indeed required to take them back; and thus, for their possibilities to meet the obligation to return.

The second category, transit countries, also raises questions. These relate, for example, to the conditions to be fulfilled to consider it a transit. Does a situation in which an individual has spent a prolonged period in a country still count as transit? And does this cover all countries that third-country nationals may have passed through on their way to the EU, or only the last one? Furthermore, return to a transit country must be "in accordance with Community or bilateral readmission agreements or arrangements."<sup>98</sup> But are all agreements in place sufficient to trigger an obligation to return to a transit country? And what might such 'arrangements' be? Perhaps most confusing is the return to the third category of 'another third country', which is qualified in two ways. First, that the individual should "voluntarily decide" to go there, and secondly that he or she will be accepted there. Especially given the fact that the word 'voluntary' has a specific meaning in the Directive, which is disconnected from the individual's willingness to return,<sup>99</sup> this raises questions about the extent that such a destination can actually be considered obligatory.

That the elements of return that are explicitly mentioned in the Directive raise questions is one thing. Quite another, and potentially even bigger, issue is that the Directive does not clarify in any way what must be done to return. Article 3(3) only mentions "the process of going back," but not what this process might entail. Again, a wide reading would be possible here. It might be assumed that third-country nationals simply have to do whatever it takes to return, including meeting any requirements set by the country of return.<sup>100</sup> This would be in line with the notion that it is their responsibility to return, and failure to take any possible action that would lead to such return would thus be a breach of that responsibility.

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98 Since the Lisbon Treaty, "Community agreements" should be read as "Union agreements," also see footnote 71 above.

99 Also see 2.10.1.4.

100 In this context, the questions of defining the destinations and the particular steps to be taken by the third-country national are interconnected: what is necessary to ensure return may vary according to whether the intended destination is the country of origin, a transit country, or another third country.

While such a ‘whatever it takes’ approach may make sense at first glance, it can also lead to perverse results. As a thought experiment, let us think about the situation of the third-country national obligated to leave the Netherlands, quoted at the beginning of this chapter. He was unable to leave the country because he had not obtained travel documents from the embassy of his country of origin. The Netherlands, however, has an external border formed by the North Sea. If the overriding obligation, without any limitations, of the third-country national would truly be to remove himself from the territory of the Netherlands, he could – theoretically – be required to simply go to the coast, hire a rowing boat, and row out to sea. This, in a practical sense, would mean that the third-country national’s irregular stay in the Netherlands had ended, and his obligation fulfilled.<sup>101</sup> Clearly, such an example is absurd, and no EU member state would ask this of any third-country national.<sup>102</sup> However, it illustrates that, at least at some level, there must be limits to what are acceptable expectations of third-country nationals in complying with their obligation to return. As will be discussed in later chapters, the obligation to return voluntarily has been interpreted in such a broad way that this might encompass making apologies to the authorities of the country of origin in order to ensure return,<sup>103</sup> paying bribes,<sup>104</sup> obtaining and using false or fraudulent documents,<sup>105</sup> or navigating return routes that are clearly unsafe.<sup>106</sup> All these, as I will show, were considered by the authorities of EU member states, and sometimes even endorsed by national courts, as part of the third-country national’s own responsibility to return. These examples show the need for defining clearer contours of the obligation to return, and setting out more clearly what third-country nationals can be expected to do as part of that obligation, but also what they cannot be expected to do.

### 1.3.2 The voluntary departure period

Although the obligation to return is central to the allocation of responsibility to third-country nationals, the notion of voluntary return only works in combination with the granting of a voluntary departure period. Only if such a period has been granted do individuals have a chance to meet their

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101 Whether he would ever reach a destination state in this way is, of course, another matter entirely.

102 Although Greece, for example, has been accused of putting irregular migrants intercepted while crossing the Aegean sea or found on the Greek islands on life rafts and pushing them back to sea. See, for example, Kingsley & Shoumali 2020; Commissioner for Human Rights 2021. However, such practices have been condemned as unlawful and clearly fall outside the scope of procedures provided for by the Directive.

103 See 4.2.5.

104 See 8.4.2.

105 See 8.4.3.

106 See 7.3.3.

obligation of their own accord. Lacking such a period, they will be subjected to enforcement measures by the state to ensure return. Regarding the voluntary departure period, two main issues come into focus. Firstly, whether such a period is granted at all. As discussed above, the Directive contains three grounds which allow a member state to make exceptions to the general rule that a voluntary departure period should be granted. Beyond setting out these grounds, the Directive provides very little guidance on how these should be interpreted and applied.<sup>107</sup> There is a significant risk that member states would veer towards an (overly) broad interpretation of these exceptions. This may particularly be the case when they see granting the possibility of voluntary return as a hindrance to the quick removal of third-country nationals. The question of the scope of member states' discretion in denying a voluntary departure period, or conversely, of third-country nationals' entitlement to such a period, is thus central to the identification of clearer boundaries of the concept of voluntary return in the Directive.

The second element concerns the length of a voluntary departure period. Even when such a period is granted, its length can have a significant impact on the extent to which third-country nationals can meet their obligation to return. If the period is too short to do this effectively, it would leave the priority of voluntary return as a paper tiger, rather than a key principle of the Directive to be given practical effect.<sup>108</sup> At the same time, member states will be wary of providing a period that is overly long, as it may unnecessarily delay effective return. By setting a seven to thirty-day range for voluntary departure periods, the Directive appears to leave significant discretion to member states. However, it also requires such a period to be 'appropriate' without giving more direction as to what this means. Furthermore, even though the Directive provides some examples of situations which member states should take into account in deciding whether a voluntary departure period should be extended beyond this initial period, it leaves considerable space to decide whether such an extension is indeed necessary. Finally, the above-mentioned grounds for denying a period for voluntary departure may also be used to grant a period shorter than seven days. Although the provisions related to the voluntary departure period are more elaborate than those covering the obligation to return, they still require a closer examination, in particular regarding their implications for third-country nationals' possibility to truly act on the responsibility allocated to them.

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107 The recast proposal seeks to address this somewhat by setting out specific criteria for finding a risk of absconding. However, as discussed, some of these proposed criteria may worsen, rather than solve, the problem of interpretation. See 10.4.

108 Pollet 2011, p. 33.

### 1.3.3 Voluntary return as limitless responsibility?

As I suggest above, voluntary return cannot be framed as responsibility without limits. When it comes to the specific content of the responsibility, not only must it be acknowledged that third-country nationals themselves cannot fully control the outcome of the process. Even those elements that are within their control are necessarily subject to limits, especially where these may otherwise clash with their fundamental rights. Pollet has warned that “in many ways the directive only provides a very incomplete framework for return procedures in Member States, leaving much discretion to Member States.”<sup>109</sup> This appears particularly relevant to the obligation to return, which, despite its importance, is not clarified at all in terms of what can (and cannot) be legitimately expected of third-country nationals. This is all left implicit, encompassed in a very broad reference to “the process of going back.” Whilst it is often impossible, in either EU or domestic legislation, to set out rules for all eventualities, leaving individual obligations implicit to a large degree may also be problematic, not least from the perspective of legal certainty for the person faced with such an obligation.<sup>110</sup>

Beyond immediate questions in relation to the individual, the matter of the boundaries of the obligation to return also has more conceptual significance. Essentially, the notion of voluntary return presents member states with a difficult exercise in balancing autonomy and control. On the one hand, voluntary return puts the individual in the driver’s seat. In effect, he or she becomes the main implementer of the objective of effective return. The role of the member state at this stage of the procedure will be more hands-off. Giving third-country nationals responsibility for return also implies giving them a degree of autonomy.<sup>111</sup> Indeed, Ten Berge has suggested that autonomy is a precondition to be governed and to allow individuals to fulfil obligations that states impose on them.<sup>112</sup> Whilst voluntary return does not mean a choice between staying or going, to be viable it will need to give the individual certain freedoms to make choices about how to achieve return, where to go and, to some extent, even when this will happen. If a member state would micro-manage all these aspects, this would also undermine some of the perceived benefits of voluntary return, especially that it would reduce administrative burdens.<sup>113</sup> On the other hand, member states retain ultimate responsibility, under EU law, to ensure effective return. And from this perspective, they will want, and are required to, keep control over the overall process, to ensure, for example, that third-country nationals are doing what they must do, and to prevent absconding.

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109 Pollet 2011, p. 32.

110 Ten Berge 2007.

111 See, for example, Triandafyllidou 2017.

112 Ten Berge 2007, p. 28.

113 See 2.2.1.

Absconding would not only undermine the person's effective return, but member states have also frequently cited the security concerns relation to this.<sup>114</sup> This delicate balance between autonomy and control inherent in the concept of voluntary return can only be struck, in my view, when it is sufficiently clear what the obligation to return means.

The question of discretion in granting or denying voluntary departure periods, or in determining the length of such periods, may further impact on such issues. An overly broad notion of responsibility, without much clarification of the benchmark against which third-country nationals' behaviour is assessed, in and of itself, may already be problematic from the perspective of setting clear, transparent, and fair rules. But if this is combined with possibilities of member states to deny a voluntary departure period on broad grounds, or to grant only the shortest of periods, this problem will only be compounded. Allocating responsibility, after all, must also be accompanied by a fair chance for the individual to take the necessary action, especially if the consequences for non-compliance are so far-reaching for that individual, affecting his or her liberty and other fundamental rights. As such, setting out more clearly the limits of the entitlement of the individual to a voluntary departure period should be an integral part of providing more defined contours of the notion of responsibility that is inherent in voluntary return.

The importance of setting out these contours, ensuring that voluntary return is not an open-ended concept, is, first and foremost, a question of clarifying legal norms. However, the language of responsibility often has wider connotations, and may veer into the arena of morality. A person not being 'responsible' is easily understood not only as someone breaching certain rules, but as a reflection on their character. 'Irresponsible' persons cannot be trusted to do the right thing. What is more, because they are 'irresponsible' they may not be deserving of the same entitlements as responsible people are. While this may be true in certain cases, this wider connotation may strengthen tendencies to resort to repressive or coercive measures, impacting on fundamental rights or otherwise incompatible with (international) legal standards, as justifiable nonetheless. From this perspective too, it is even more important to provide clarity about the limits of legally acceptable responsibility for return.

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114 Although there appear to be few clearly recorded instances of persons being granted an opportunity for voluntary return leading to serious security risks, the possibility of this is far from imaginary. This is shown, for example, by the fact that the suspected perpetrator of the terror attack in Nice on 29 October 2020, in which three people were killed, had reportedly arrived in Italy irregularly not long before, and had made his way to France after being subjected to an order to leave Italy of his own accord within one week. See, for example, France24 2020.

## 1.4 RESEARCH QUESTIONS AND APPROACH

Having considered the implications of a potentially open-ended, but at the very least relatively vague, conception of voluntary return in the Directive, this section will set out more specific questions (1.4.1) and the approach taken in this analysis (1.4.2), which should help in filling this gap. It subsequently discusses the scope and limits of the analysis (1.4.3).

### 1.4.1 Overall research question and sub-questions

Considering the central role played by voluntary return in the Directive, and the need for more clarity about its exact scope and meaning, this dissertation will focus on the following overarching question:

*What are the boundaries of the responsibility allocated to third-country nationals, as encompassed by the concept of voluntary return in the Returns Directive?*

Answering this question requires engaging with two sets of sub-questions, namely:

1. Questions related to the appropriate *scope of the obligation to return*:
  - a. Which actions can third-country nationals be expected to take to ensure they meet their obligation to return?
  - b. Are there any actions that third-country nationals cannot legitimately be expected to take, even if they would theoretically contribute to effective return, and if so, which?
2. Questions related to the *application of the voluntary departure period*:
  - a. What is the nature and the extent of third-country nationals' entitlement to a voluntary departure period, in the light of the priority for voluntary return but also the grounds for exceptions as set out in the Directive?
  - b. How should provisions regarding the initial length, extension and shortening of a voluntary departure period be interpreted so that the opportunity of third-country nationals to meet their obligation to return of their own accord is effective?

### 1.4.2 Methodology and approach

The key aim in answering these questions is to fill a crucial normative gap in relation to the formal application of the rules related to voluntary return. It will focus on how the notion of voluntary return, and the specific elements above, should be interpreted as a matter of EU law, in such a way that it meets the objectives of the Directive, but also – as discussed below – consistently with the international frameworks in which return inevitably



needs to take shape.<sup>115</sup> Authoritative interpretations of this, notably by the Court of Justice of the EU (CJEU), are so far lacking, with some small exceptions.<sup>116</sup> This contributes to the risk that EU member states' authorities and judiciaries treat voluntary return as an open-ended concept and thus to them according virtually unlimited responsibility to individuals. As such, the analysis will be distinctly positivist in its focus. Based on the approach set out below, it will engage in a textual analysis of the Directive itself, case law of the Court of Justice of the EU (CJEU), related EU legislation, and relevant norms contained in sources and instruments of international law, as elaborated by the judgments or communications by (quasi)judicial bodies tasked with supervising them, or – where relevant – authoritative texts on those norms, such as codifications, interpretative notes or explanatory memoranda. Which norms are particularly relevant in this respect will be the subject of further discussion in Chapter 2.

Before such an analysis can take place, however, some conceptual groundwork must be laid. In particular, two key foundations of the analysis are set out below. First, this deals with the identification of specific elements of the obligation to return, which can provide a focal point for closer analysis. And second, this explains the use of the multiple legal relationships between the three actors involved in the return process (the third-country national, the EU member state, and the country of return), as a tool to clarify the relevant provisions of the Directive.

#### 1.4.2.1 *Breaking down the obligation to return into specific categories of action*

As noted earlier, the content of the obligation to return is mostly implied, and the only explicit provision of the Directive clarifying it is Article 3(3), which sets out three destinations, and otherwise refers very generally to “the process of going back.” This leaves a very nebulous target for analysis, including in relation to the norms that should be applied to clarify the obligation to return.<sup>117</sup> To provide a framework for discussing these questions, I suggest focusing on specific categories of action which can be considered to provide a minimum core of what needs to be done to achieve return.

First, this is ensuring that third-country nationals are indeed readmitted by the destination state (hereinafter: *return element (i)*). If such guarantees are not in place, third-country nationals will normally be unable to even attempt return. Or, if they would do so nonetheless, run the risk of being sent back to the EU member state immediately or, worse, remain in legal

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115 While the analysis in some cases draws on examples of how member states have dealt with specific issues in practice, it does so to advance the normative analysis, rather than as an attempt to set out descriptively or comparatively member states' administrative or judicial practices in this regard (also see 1.4.3.4).

116 See 2.4 and its characterisation of the CJEU's judgement in the *Zh. And O.* case, and its extensive analysis in Chapter 10; CJEU C-554/13 *Zh. and O.* [2015].

117 See 1.4.2.



limbo between the EU member state and the country of return.<sup>118</sup> The question of readmission is therefore central to understanding the scope of the obligation to return. This question itself raises several further issues. First, which destinations are relevant in the individual case. As discussed, each of the three destinations set out in Article 3(3) raise questions of interpretation and application, and the extent to which individuals may be expected to make efforts to return to them, and to seek readmission there, may differ. Second, for each of these destinations, specific requirements for readmission may apply, which will have implications for the actions third-country nationals must take to return successfully. And third, if multiple destinations are available to third-country nationals, do they then have a choice between them, or can the member state decide where they should seek readmission? This is also particularly relevant when the third-country national has concerns about the suitability of specific destinations from a security perspective. These issues related to the destinations and the obligation to seek readmission will occupy a considerable part of this dissertation.<sup>119</sup>

A second necessary element of the process of going back relates to obtaining travel documents (*return element (ii)*). In the contemporary system for international travel, the possession of valid travel documents is crucial.<sup>120</sup> Beyond boarding transport, they are also needed for entry into the destination state. If third-country nationals are not already in possession of valid travel documents, renewing expired documents or replacing lost documents will be an essential step in securing voluntary return. In many cases, attempts to gain readmission and to obtain travel documents will overlap. For example, when returning to the country of origin, obtaining a travel document will usually also comprise permission to enter.<sup>121</sup> However, the actions may also be distinct, for example when third-country nationals seek to return to a country that is different from the country competent to issue travel documents. Furthermore, as will be discussed in the relevant chapters, legal frameworks for readmission and obtaining travel also draw on different sources, which reveal different limitations on the actions of third-country nationals as part of the voluntary return process. For this reason, it is useful to discuss them separately.

When readmission and travel documents are secured, a third necessary element still remains. This is comprised by the practical arrangements that third-country nationals should make to enable their travel from the EU

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118 For this reason, for example, the Interpretative Notes to the CTOC Smuggling Protocol, in paragraph 113, suggest that states should not return individuals until their nationality or right of residence, which would form the basis for readmission, are duly verified.

119 On the identification of obligatory destinations, see Chapter 3. On the steps to be taken to gain readmission to such destinations, see Chapters 4 to 6.

120 For example, Inglés 1963, p. 13; Turack 1972; Hannum 1987, p. 20; Torpey 1999; Boeles et al 2014, p. 120.

121 Conversely, in some cases the formal notification by a transit country that it will accept the readmission of a third-country national can be used in lieu of a travel document, and no separate action in regard of travel documents will thus be needed, see 8.1.2.

member state to the destination country (*return element (iii)*). This generally means booking international transport and other arrangements to make travel possible. It also means clearing any obstacles to departure from the member state. This is another area in which concrete do's and don'ts as regards the obligation to return need to be identified.

Together, these three return elements thus provide a roadmap to establishing concrete actions that third-country nationals can and cannot be expected to take in returning voluntarily. This does not mean that other actions might not be relevant, but this would at least cover the types of actions that almost all third-country nationals coming within the scope of the Directive will have to take. In this respect, it should be noted that the actions that they can and cannot be expected to take provide two sides of the same coin. While sometimes concrete obligatory actions may be identified, it may also be the case that what member states can legitimately expect can only be defined negatively, by reference to actions that definitely cannot be expected. In this way, the process of making the nebulous concept of the obligation to return a bit more concrete will likely leave a grey area between actions that third-country nationals clearly have to take, and those that they cannot be expected to take. However, even in this way, it will provide a more solid basis than is currently available for assessing their compliance with the obligation to return during the voluntary departure period. As a result, each of the subsequent chapters dealing with the various elements of the obligation to return will try to provide answers to sub-questions 1a and 1b simultaneously.

It should be noted that this is not the case for sub-questions 2a and 2b. Although the issues of the entitlement to a voluntary departure period and the appropriate length are also connected, these are much more clearly laid down in the specific provisions of Article 7 of the Directive.<sup>122</sup> Analytically, they can more easily be separated, which allows for more in-depth discussion. The precise treatment of each of the sub-questions in the various chapters, including the return elements in relation to the obligation to return, will be discussed in section 1.5.

#### 1.4.2.2 *A triangle model for dealing with questions of responsibility*

While the focus of this analysis is on the responsibility of third-country nationals, it is important to recognise that this responsibility does not exist in a vacuum. Not only are third-country nationals responsible *for* something (return), they also hold this responsibility *towards* someone or something, in this case the member state which has imposed this responsibility on them. In other words, responsibility is the product of a specific relationship between the third-country national and the member state. And this relationship is a two-way street. While the individual is responsible to the member

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122 With the first mainly relying on Recital 10 and Article 7(4), with some elements of Article 7(3) as regards absconding, and the second being rooted clearly in Article 7(1) and 7(2).

state for fulfilling the obligation to return in a timely manner, the member state also has responsibilities, not least to safeguard the third-country national's fundamental rights during the return process. In legal terms, the rights and obligations that the third-country national and the member state hold vis-à-vis each other form the basis for this responsibility.

This means, in principle, that all the questions posed in relation to voluntary return could be approached from two sides. When talking about the extent of the actions third-country nationals must take to return, we may consider the state's rights to impose obligations, but also the individual's rights not to take certain actions. Similarly, the individual's entitlement to a voluntary departure period and the scope and limits of the state's ability to deny such a period under the Directive are two sides of the same coin. Furthermore, the relationship between the individual and the member state is dynamic. Specific actions and omissions on the part of one may have implications for the rights and obligations of the other. Seeing the scope of voluntary return not as a static issue, but as a dynamic one that is shaped by the relationship between the actors involved is a key element of the approach taken here. This relational approach becomes particularly important as voluntary return is not only shaped by the third-country national and the member state, but also by other actors, whose role should be taken into account.

Identifying the way these rights and obligations between third-country nationals and member states impact on the former's responsibility is one part of the puzzle, but by no means the only one. It merely identifies what could be termed the 'internal' dimension of the Directive's provisions. But this analysis also requires adding an 'external' dimension. While the rules in the Directive pertain only to the way EU member states should relate to third-country nationals staying on their territories, the fulfilment of these rules, by definition, stretches across the borders of the EU. The essence of the obligation to return, after all, is that third-country nationals move to a country *outside* the EU. This is ingrained in the definition of return, which – as noted – does not just require third-country nationals to leave the EU member state, but requires them to return to a non-EU state. Whether this can take place does not only depend on the actions and omissions of third-country nationals, but also on the extent to which the country of return allows them to enter. And, additionally, whether third-country nationals manage to obtain travel documents, which will also (usually) be in the hands of a non-EU state.<sup>123</sup> The importance of the cooperation of third countries is explicitly acknowledged in the Directive.<sup>124</sup>

The introduction of the country of return creates two new relationships of interest. First of all, there is the relationship between third-country nationals and the country to which they seek to return. But there is also a relationship between the country of return and the EU member state.

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123 Although the state issuing travel documents is not necessarily the state of return, see 1.4.4.3.

124 RD Recital 7.

While in the context of voluntary return, it should mainly be third-country nationals who take action towards the country of return, many rules that govern return have been agreed between states. As such, the rights and obligations that the EU member state and the country of return hold towards each other may play an important role in shaping the boundaries of the concept of voluntary return. The analytical usefulness of separating out these different relationships to enhance the understanding of the legal issues arising in return situations has previously been noted by Noll.<sup>125</sup> This is particularly so for ensuring that the legal obligations involved are addressed to the appropriate actor, and that those obligations can be clearly defined.<sup>126</sup> Following on from this approach, schematically, the three sets of relationships – between the third-country national and the EU member state, the third-country national and the country of return, and the country of return and the EU member state – form a triangle (see figure 1 below).

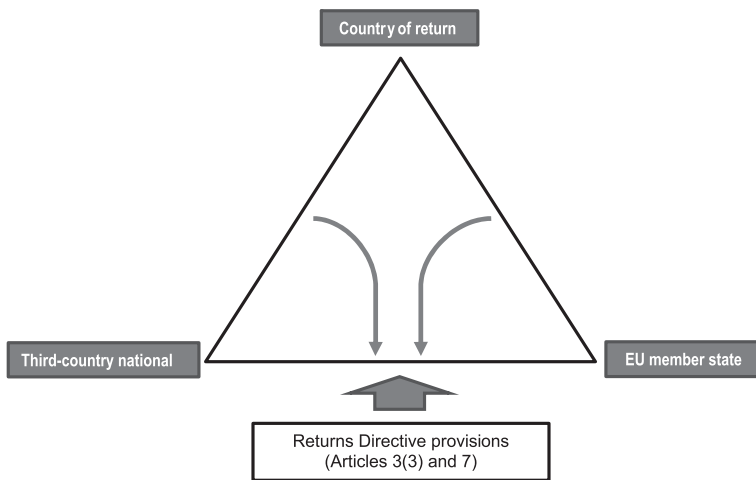


Figure 1: *voluntary return as a triangle of relationships*

The relationship between the third-country national and the EU member state is regulated by the Directive (the internal dimension). The other two are regulated by norms that are generally outside the scope of the Directive and thus represent an external dimension. Nevertheless, the analysis in this dissertation rests on the assumption that these external rules can and should play an important role in clarifying the boundaries of voluntary return within the Directive. Some of these rules may produce effects within the EU legal order, and could thus directly shape the interpretation of the relevant provisions in the Directive, which need to be applied in accordance with international law.<sup>127</sup> However, even when such direct effect in the EU legal

125 Noll 1999, p. 276; Noll 2003, pp. 62-63.

126 Noll 2003, pp. 70-74.

127 RD Article 1.

order does not exist, the importance of the external dimension for fulfilling the objectives of the Directive should, at the very least, prompt interpretations that are, as much as possible, consistent with the rules governing both the relationship between the third-country national and the country of return and that between the country of return and the EU member state. Discounting this external dimension would lead to a warped view of the Directive's provisions, in particular the obligation to return. After all, as noted, if countries of return are unwilling or unable to cooperate in the return of third-country nationals, this would make their obligation *de facto* impossible to meet.

To be of relevance to the analysis, this triangle model needs to be filled with concrete legal norms. The identification of these norms is an important step that requires some explanation as to their applicability to the topic of voluntary return and their possible effect on the provisions of the Directive. For this reason, the identification of the appropriate legal framework will be presented separately in Chapter 2, which will precede the substantive analysis of the component parts of voluntary return and the third-country national's responsibility.

Broadly speaking, this identification will be based on the presumption that voluntary return contains both elements of expulsion and international movement. From an international law perspective, expulsion deals with compelling the return of a non-national who is not or no longer allowed to stay on a host state's territory. As will become evident, voluntary return in the Directive should be considered a specific form of expulsion.<sup>128</sup> However, since third-country nationals are given an opportunity to make their own arrangements and to travel to the state of return freely, returning in this way will also have some characteristics of the process of crossing borders that are applicable to any person, regardless of the reason for their travel. As such, international rules on departure from states and entry into them may also provide some guidance for examining the scope of voluntary return. Relevant rules on expulsion and international movement can be found in particular in customary international law, certain international human rights instruments, a number of multilateral treaties governing different aspects of movement, and agreements concluded specifically on return and readmission by EU member states, either individually or collectively, with third countries. This complements the tools available within the EU legal order, such as the case law of the CJEU, the object and purpose of the Directive, the clarification of certain concepts in related EU legislation, fundamental rights, and, as a supplementary means, other 'soft law' guidance produced on the Directive. Taken together, they provide a rich palate of norms and principles from which to draw a closer analysis of the notion of voluntary return and the scope of the responsibility allocated in this respect to the third-country national.

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128 See 2.3.1.

### 1.4.3 Scope of the analysis and limitations

Although the analysis of voluntary return and its meaning in the Directive aims to be broad-ranging, it will be subject to certain limitations, with regards to the specific part of the return procedure addressed, the scope of actors included, and the role of national practices. These will be discussed in turn below.

#### 1.4.3.1 *Specific focus on the voluntary return stage*

As noted above, the focus of this dissertation is the scope of the responsibility of third-country nationals as arising out of the concept of voluntary return. It therefore limits its focus to the voluntary return stage of the Directive. This means, first of all, that it is not concerned with the process that precedes it. Questions about third-country nationals' admission to the EU member state, including any asylum procedure or other processes they have gone through, are not included in the analysis. Although I acknowledge that this may be an important part of the legitimacy of return,<sup>129</sup> as well as third-country nationals' acceptance of voluntary return, this analysis will not deal with whether the decision to require them to return was, in and of itself, fair. It only concerns itself with the application of the standards related to the implementation of the return. In this respect, it takes the issuing of a return decision as its starting point. Although there are important questions about such a decision as well, including the coming together of asylum decisions and return decisions, these are not addressed.<sup>130</sup>

Second, just as issues preceding voluntary return are excluded, so are issues that follow it, at least to a large extent. Questions of voluntary return and enforcement are closely related. After all, if a period for voluntary departure is not granted, or if third-country nationals have not complied with their obligation to return within that period, member states should enforce the return decision. What happens, and what does not, during the voluntary departure period thus has an impact on the issue of enforcement. This is also a key reason why it is important to establish more clearly what can be expected, and what not, of a third-country national in relation to voluntary return. This, after all, will have relevance for the use of coercive measures by the member state during the enforcement stage. This interlinkage will be discussed to some extent, especially in the discussion

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129 In this respect, Cavinato warns that "in the absence of specific procedural safeguards and of fair and efficient asylum system[s] in some Member State[s], the risk of *refoulement* could still arise for third country nationals who may have international protection needs." Cavinato 2011, p. 48 (citations omitted).

130 On the interaction between the asylum procedure and the Directive, see, for example CJEU C-181/16 *Gnandi* [2018] and Progin-Theuerkauf 2019a. The Pact on Migration and Asylum, presented in September 2020, also seeks to connect more closely the asylum and return procedures. As such, the question of their interaction will likely become even more important in the future, but is not dealt with here.

of the length and end of the voluntary departure period.<sup>131</sup> Furthermore, the obligation to return, which is discussed here with regard to voluntary return, may have residual effects during the enforcement stage, for example with regard to the third-country national's cooperation with the steps necessary to remove him or her.<sup>132</sup> Despite this interlinkage between voluntary return and enforcement, the discussion will be limited to those points that are closely connected to the concept of voluntary return, as encompassed mainly by Articles 3(3) and 7 of the Directive. As mentioned, analyses of the enforcement stage in its own right, including the use of detention and other coercive measures, as well as the use of instruments such as the entry ban, have been provided by others, often in great detail.<sup>133</sup> They are not included here.

Third, the focus is on the substantive responsibility of third-country nationals as part of the concept of voluntary return. The analysis will therefore not pertain in substance to the treatment of third-country nationals by member states during the voluntary departure period, such as in relation to questions of reception conditions or access to health care.<sup>134</sup> The same goes for the undoubted gap the Directive leaves in resolving the situation of third-country nationals who, for whatever reason, cannot return or be returned. These are important questions that certainly closely relate to, but are slightly distinct from, the core normative issue of how the scope of individual responsibility to return voluntarily should be demarcated. Similarly, while the analysis deals in depth with questions of denial and the appropriate length of voluntary departure periods, questions of remedies against decisions on such matters remain outside its scope.

#### 1.4.3.2 *The scope of return issues*

As mentioned above, an important blank spot in the Directive is that it leaves considerable open questions about what it means to 'return.' My initial attempt at providing an analytical framework for this, setting out the three main elements of the process of going back (readmission, travel documents and making arrangement for departure), is necessarily limited. Although getting third-country nationals from the EU member state in which they are staying to a country of return is clearly a key element of return, there are various aspects that could be added. Importantly, this would include the question of the third-country national's situation following arrival in the country of return. The analysis will address this matter to some extent in

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<sup>131</sup> See 11.3.

<sup>132</sup> See in particular RD Article 15(1)(b) on the avoidance or hampering of the preparation of the return or removal process in respect of the legitimacy of detention, and Article 15(6) on lack of cooperation as a factor in extending the period of detention.

<sup>133</sup> Note 5 above. On the entry ban, also specifically see Majcher 2020, part 3.

<sup>134</sup> Although such issues are briefly touched upon in regard of member states putting 'undue pressure' on individuals to take up voluntary return, which may have an impact on the prohibition of refoulement, see 7.3.4.



relation to possible risks that the post-return situation might entail, and how this impacts on the responsibilities of the individual. However, it does so mainly by looking at issues related to *refoulement* in the country of return or dangers on the route to that country.

Although the analysis focuses on the responsibilities of individuals, it could be said that this approach is still quite state-centric in the sense that the situation of those individuals is mainly regarded in relation to their rights and obligations vis-à-vis states. It is important to acknowledge that, from the side of third-country nationals, the issue of return is much broader than just this legal (or, some might say, legalistic) matter. For example, for individuals, issues of insecurity in the country of return, or their perceptions thereof, may fall short of the bars set by the relevant legal frameworks on return in a way that would affect their rights and obligations towards the EU member state. However, even if such issues do not have a legal effect on the relationship with the EU member state, they may play an important role in individuals' choices and (in)actions with regard to returning voluntarily, which may then impact on the question of compliance. Similarly, the question of the socio-economic situation that individuals might find themselves in after return may play a very important role in shaping their engagement with the voluntary return process and their eventual compliance with the obligation to return. This importance, for the individual but also for the success of the voluntary return process, is increasingly acknowledged, for example, in the expansion of reintegration assistance provided to returnees. However, there are also important questions whether such assistance in and of itself can seriously impact on the prospects that individuals will have after their return.<sup>135</sup>

In the analysis, such important but complex questions of the interconnection between the (expected) post-return situation and the responsibility of individuals to return voluntarily from an EU member state are largely left outside the scope of this discussion. Whereas, as noted, there is a role to play for the potential risks associated with return, the question of the (expected) socio-economic situation of individuals faced with voluntary return is beyond its scope. While the issue is touched upon briefly in the discussion of specific elements, especially where such issues interconnect with questions of *refoulement* and safe return,<sup>136</sup> doing justice to this complex question would likely require a completely new dissertation.

#### 1.4.3.3 *The limits of the triangle model*

As discussed in 1.4.2, the analysis is limited to the three key actors discussed above: the third-country national, the EU member state, and the destination state. However, it should be noted that the triangle model above, although already giving rise to sufficient complexity, is itself a simplification. Other

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135 Strand et al 2008; Kuschminder 2018.

136 See 7.3.



actors could similarly be relevant in the voluntary return process. One issue with the triangle model that already has been identified is that, in some cases, the country of return and the country responsible for issuing travel documents to third-country nationals may be different. In such a situation, the model would more appropriately be a square, with the country responsible for issuing travel documents being connected to both the EU member state (regarding inter-state obligations to issue travel documents) and the third-country national (regarding human rights-based obligations). Although the analysis will mainly focus on situations in which the country of readmission and the country responsible for issuing travel documents overlap, the potential divergence cannot be ignored given the centrality of the question of obtaining travel documents.

However, even in such an expanded scope of actors, there are still many that may play a role but are not captured in this model. This includes countries that third-country nationals may have to pass through on their way back from the EU member state to the intended destination. This may be necessary if, for example, there are no direct transport links to the individual's intended destination.<sup>137</sup> They also include facilitators of voluntary return, such as the International Organisation for Migration or other international institutions, or non-governmental organisations (NGOs). Although the role of return assistance is discussed with regard to the third-country national's rights and obligations, the role of such organisations is not explored in detail. Furthermore, private individuals, such as the third-country national's family members and other contacts, either in the country of destination or in the EU member state, could play a role in ensuring all necessary information to make return possible. Their specific rights and obligation, if any, in the voluntary return process, are not specifically incorporated. On the side of EU actors, the subsequent chapters focus specifically on EU member states, which are in the end the ones that must implement the Directive, and thus give shape to the notion of voluntary return. However, EU agencies, specifically the EU Border and Coast Guard Agency (Frontex) will play an increasingly large role in return, including the implementation of voluntary returns.<sup>138</sup> This development notwithstanding, it will be left outside this analysis.

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137 Somewhat confusingly, such countries to pass through on the way back may also be called 'transit countries.' They may be third countries, but also other EU member states. Furthermore, the fact that returnees pass through them on their return trip may be completely unrelated to whether they did so on their initial journey to the EU member state. As such, these are different 'transit countries' than those meant in Article 3(3), which deals with the destinations to which third-country nationals can be expected to return.

138 Regulation 2019/1896, Article 48(1)(a)(iii) and (iv), OJ L295/1, 14 November 2019. Also see, for example, Frontex 2020b and 2020c regarding the agency's facilitation of voluntary returns on charter flights.

#### 1.4.3.4 *Specific circumstances of the actors included in the analysis*

Finally, the analysis focuses, as much as possible, on providing generally applicable clarifications of the key components of voluntary return and their implications for the responsibility of the individual. Since the analysis presented here is, to my best knowledge, the first in-depth attempt at scoping out the responsibilities of individuals for voluntary return, I will mostly look at the general rules applicable to all third-country nationals covered by the Directive. The situation of specific groups mentioned in the Directive, especially vulnerable groups, will largely remain outside the picture, unless specific sources outlined in Chapter 2 give rise to this.<sup>139</sup> This does not mean that these vulnerable groups do not warrant attention. However, as will become clear from the subsequent chapters, even unpacking the general rules is already a complex endeavour. This is especially the case because the circumstances of each and every case are unique and these will determine the outcomes of decisions about the scope of obligations for which the third-country national can be held responsible, as well as about the voluntary departure period.<sup>140</sup> Discussing specific sub-categories of third-country nationals covered by the Directive in detail would risk drawing attention away from the generally applicable rules, which still require considerable clarification.

Similarly, the analysis does not seek to incorporate issues arising out of specific states' administrative and judicial practices. It is of course in the member states where these provisions truly take shape and impact on individuals. The Directive as such does not impose obligations on individuals. Rather, member states must ensure that their own obligations under the Directive are accurately and effectively translated into obligations for individuals under national law. Member states may and do deal with this in different ways, and these may thus have different impacts on the scope of individual responsibility allocated to third-country nationals. However, the harmonisation of standards and procedures that the Directive aims to achieve also necessarily limits member states' discretion in this regard. From this perspective, the analysis seeks to identify some of those limits, without prejudice to areas where member states may choose different approaches. In this respect, the approach taken in the analysis is top-down. It extrapolates from norms of EU and international law to draw conclusions that should be applicable, at a minimum, in any member state implementing the Directive.<sup>141</sup>

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139 In this respect, although I will refer to the Trafficking Protocol, it is not my intention here to present a comprehensive analysis of the application of the Directive's provisions on the return of victims of trafficking. Similarly, as already noted above, I will not specifically deal with the situation of minors.

140 For a typology of irregular migrants and their different situations, see Carling 2007.

141 Similarly, the analysis will only look at the norms that would apply to all – or at least the vast majority – of countries of return, as a matter of international law.

As discussed above, it is this overarching normative approach that seems to be distinctly lacking in the current understanding of voluntary return in the Directive, and this will therefore be prioritised in this dissertation. At various points the analysis does acknowledge that national laws or regulations, for example on the admission of aliens or the provision of travel documents, may indeed impact on the situation of third-country nationals in specific ways. But it does not engage with this beyond those points where EU or international rules set specific limitations for such national rules.

By taking this approach, some of the discussion is necessarily somewhat abstract, talking about third-country nationals, EU member states and countries of return outside of the specific individual or national contexts in which issues of voluntary return need to be resolved. However, as an initial exercise in determining the contours of individual responsibility in relation to voluntary return, I believe that taking such an overarching, more abstract, approach is justifiable. Comparative research on the implementation of the Directive across member states, or doing in-depth case studies of return situations from a particular member state to one or several specific countries of return, may provide further insights. But combining these various approaches would likely make this analysis too unwieldy. However, to avoid certain issues becoming too abstract, examples drawn from real life, whether national judgments, policies or operational practices, are sometimes given to help provide background to particular points, and hopefully put the reason why such abstract discussions are included into a more practice-oriented perspective. In addition to some insights drawn from EU-wide evaluations of the Directive,<sup>142</sup> most of the practical examples have been taken from cases involving the Netherlands. This is, on the one hand, because the country has a long history, which precedes the Directive, of framing the issue of (voluntary) return as a question of individual responsibility,<sup>143</sup> something which has shaped the way it has handled different dilemmas that may arise in the voluntary return process, helping to make these visible. On the other hand, it is also simply the result of the fact that the Netherlands is the member state that I know best, where I have done a considerable part of my professional work on issues of return and where, as a result, many of the dilemmas that inspired the questions at the heart of this dissertation first arose. It should be kept in mind though, that these are illustrations to help the reader, and should not be perceived at attempts to provide a systematic analysis of the country's compliance with the interpretation of the Directive's provisions provided here.<sup>144</sup>

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142 See, for example, European Commission 2013; Moraru & Renaudiere 2017.

143 Mommers & Velthuis 2010, p. 18.

144 Although inevitably, there will be certain examples that, on the basis of the more general analysis, must be identified as contradicting this interpretation.

#### 1.4.3.5 Time limits on sources used

Unless specified otherwise, the analysis reflects the state of play in terms of the content of legal instruments,<sup>145</sup> case law of the CJEU and bodies supervising international instruments, or other sources used, at the end of April 2021. Some updates on relevant factual developments have subsequently been included up to the end of August 2021.

### 1.5 CHAPTER OVERVIEW

The discussion in this dissertation will look as follows. *Chapter 2* will continue setting the scene for the substantive analysis of individual responsibility to return voluntarily. It will do so by providing, first of all, further background about the role that voluntary return plays in wider EU return policy, both conceptually and in practice. Secondly, it will discuss the various legal sources on which this analysis will draw, discussing their relevance to the issue of voluntary return, the place they occupy in the triangle model, and how they may impact on the interpretation of the Directive's provisions. And thirdly, it will clarify some of the concepts and terminology used.

Based on the frameworks set out in this chapter and *Chapter 2*, the other chapters will deal with the research questions in substance. This substantive discussion will be divided into two main blocks. The first block, consisting of *Chapters 3 to 9*, will discuss the questions related to the scope of the obligation to return. As noted above, questions 1a (on the steps third-country nationals must take) and 1b (on the steps which they cannot be expected to take) will often overlap, and they will be discussed simultaneously in these chapters. It was also noted that the discussion of these questions would cover three specific points which can be considered key elements of successful return: seeking readmission, obtaining travel documents, and making practical arrangements and leaving the EU member states.

The first element, identifying appropriate destinations and seeking readmission, will be discussed in four different chapters. *Chapter 3* will focus on the extent the specific categories of destinations set out in Article 3(3), namely the country of origin, transit countries, and other third countries, can indeed be considered obligatory. In other words, whether, and if so under which circumstances, third-country nationals can indeed be expected to return to such destinations, and be held responsible for their efforts in doing so. This chapter will find that only the country of origin and transit countries can be considered obligatory. As a result, *Chapter 4* will discuss readmission to the country of origin in more detail. It will look at the specific readmission obligations of countries of origin and what this

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145 Some of which are regularly updated, such as the Chicago and FAL Conventions' Standards and Recommended Practices, see 2.7.1.

means for the precise steps that third-country nationals should and should not take in triggering those obligations to facilitate their voluntary return. However, it will also identify potential dilemmas regarding different sets of readmission obligations, notably those based on customary international law and inter-state agreements on the one hand, and those based on human rights obligations on the other. As a companion to Chapter 4, therefore, *Chapter 5* will present a discussion of the way these frameworks interact and what this means for individuals faced with an obligation to return. Following this, attention will turn to readmission to transit countries. Again, this will look at the specific readmission obligations of such transit countries and what implications this has for third-country nationals, together with EU member states, for the triggering of such obligations. This will be the focus of *Chapter 6*. Finally, the discussion of the first return element of readmission will be wrapped up in *Chapter 7*, which will look at the extent to which third-country nationals have a choice in picking their destinations, and what the role of concerns about the safety of certain destinations may play in this.

*Chapter 8* will shift attention to the second element of the obligation to return, comprising action to obtain travel documents. It will set out in which situations this obligation is relevant, and to which authorities third-country nationals can be expected to turn for this purpose. It also discusses issues related to the individual's interactions with consular authorities, including ensuring effective access to them, and dealing with fees to be paid for such documents. Furthermore, it looks at the prevention of the use of fraudulent documents in the voluntary return process and the possibilities of EU member states to act as issuing authorities.

*Chapter 9* will then turn to the third element of the obligation to return, making practical arrangements for return and leaving the EU member state. This will focus on three issues that may affect the scope of the individual's obligations: the fulfilment of any exit requirements, the role of return assistance, and the question when a person can actually be considered to have 'returned' within the meaning of the Directive.

The second, much shorter, block of chapters consists of Chapters 10 and 11, dealing with issues pertaining to the voluntary departure period, as set out in questions 2a and 2b. *Chapter 10*, first of all, deals with question 2a by assessing the exact nature of the priority of voluntary return and the connected matter of the individual's entitlement to a voluntary departure period. It will look at the general principles governing the priority of voluntary return, as well as the role of each of the three specific grounds for denying such a period. It will also consider the possibility of member states to issue a period shorter than seven days. *Chapter 11* subsequently covers research question 2b, by looking at the appropriate length of any voluntary departure period that is granted to third-country nationals. This will cover the basis on which the length of an initial voluntary departure period should be established, as well as decision making about the extension of such a period or, alternatively, cutting short an existing period.

*Chapter 12*, finally, presents the overall conclusions of the analysis. It will bring together the findings from both sets of research questions, related to the obligation to return and the voluntary departure period, while also offering more general conclusions on the notion of responsibility inherent in voluntary return. But it will also provide concrete answers on the application of its provisions on the obligation to return and the voluntary departure period. This will be done in the form of suggested guidelines, which may assist member states in applying the notion of individual responsibility for voluntary return in a fair and transparent manner, in compliance with fundamental rights, and consistently with the external dimension of the return process.

A schematic overview of the way that the research questions will be tackled, and their relation to the various chapters in this dissertation, is provided in box 1 on the next page.

*Box 1: Schematic overview of chapters and relation to research questions*

Background and legal framework → **Chapter 2**

RESEARCH QUESTIONS 1A AND 1B (scope of the obligation to return):

- *Return element (i)* (identifying relevant destinations and readmission):
  - Identifying obligatory destinations → **Chapter 3**
  - Readmission to countries of origin:
    - Readmission obligations of the country of origin → **Chapter 4**
    - Ineffective inter-state obligations and the right to return → **Chapter 5**
  - Readmission to transit countries → **Chapter 6**
  - Choice of destinations and avoiding unsafe returns → **Chapter 7**
- *Return element (ii)* (obtaining travel documents) → **Chapter 8**
- *Return element (iii)* (practical arrangements and departure) → **Chapter 9**

RESEARCH QUESTIONS 2A AND 2B (application of the voluntary departure period):

- *Research question 2a* (entitlement to a voluntary departure period) → **Chapter 10**
- *Research question 2b* (length of the voluntary departure period) → **Chapter 11**

CONCLUSIONS → **Chapter 12**

