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

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9 Practical arrangements and departure from the EU member state

9.1 Introduction

This chapter concludes the discussion of the first set of research questions, covering the scope and limits of the actions that third-country nationals can be expected to take as part of their obligation to return. It does so by looking at the third and final of the categories of actions that were identified as being necessary to successfully complete 'the process of going back': making practical arrangements for departure and, eventually, leaving the EU member state. In this chapter, I will discuss several aspects of this. First, section 9.2 will briefly look at some of the requirements that third-country nationals may have to fulfil before being allowed to leave an EU member state. Whilst member states would not normally be inclined to stop third-country nationals who have been issued a return decision from leaving, some formalities must be observed. These relate to the crossing of external borders, but also to possible outstanding obligations that third-country nationals may have towards the host state or individuals.

Second, the question of return assistance will be discussed. Although I specifically noted the importance of not confusing voluntary return as a legal concept and return assistance or AVR(R),[1] the two do have important interconnections. In particular, AVR(R) programmes may provide the necessary help to individuals to ensure that they can meet their obligation to return within the voluntary departure period. The issue of interest here is not the practical efficacy of such programmes, but their legal significance in relation to the Directive. Section 9.3 will deal with two aspects of the interlinkage between the obligation to return and return assistance. On the one hand, this is the question whether, under the Directive, third-country nationals can claim access to assistance programmes set up by member states, or whether those states have full discretion in deciding who gets to benefit from them. On the other hand, it will discuss whether failure to apply for assistance, when available, is a factor that should be taken into account when assessing if third-country nationals have made all necessary efforts to return.

So far, when the obligation to return has been discussed, it has focused on the efforts that individuals could be expected to make to return. However, the obligation to return also means that those efforts should normally lead to the desired result. While this result appears to be clearly

1 See 2.10.1.3.

defined ('returning'), section 9.4 will show that the benchmark by which member states establish that third-country nationals have indeed successfully returned may not be so unambiguous, either conceptually or practically. This is particularly the case because both 'returning' and 'leaving' are used for this in the Directive, which may create confusion. In this respect, the section will also discuss whether the return decision has a sufficient 'European effect' to provide a framework to prevent third-country nationals from meeting their obligations by simply moving irregularly to another member state. Conclusions are presented in 9.5.

9.2 Fulfilling obligations for exiting the member state

The key objective of the Directive is to end irregular stay in EU member states, by ensuring that third-country nationals leave their territories and return to an appropriate destination. This interest in seeing third-country nationals return does not mean that the process of leaving the member state itself is without legal constraints. While it may seem somewhat counter-intuitive from this perspective, there may be reasons why member states want to restrict third-country nationals' freedom in exiting their territory. Furthermore, member states themselves have certain obligations under EU law to not let third-country nationals leave in any manner that they see fit. This section outlines some of these issues related to exit, to complement the picture of possible constraints in relation to return and readmission in the previous chapters.

9.2.1 Fulfilment of specific conditions in the individual case

In general, third-country nationals will rarely be prevented from leaving.[2] However, there may be reasons why states "before allowing persons to leave, make every effort to determine they are not seeking to depart for the purpose of evading legal obligations either towards the State or individuals."[3] Preventing a third-country national from leaving, in whatever form, would amount to an interference with the right to leave. However, a range of legitimate aims in making such interferences have been recognised.[4] For example, states may restrict departure to ensure individuals are not absconding from criminal procedures in progress against them, or from penalties that have not yet been paid or sentences that still need to be executed. Furthermore, member states may want to ensure third-country nationals do not leave before paying relevant taxes.[5] In addi-

2 Hannum 1987, p. 5; Hailbronner 1994, p. 109.
3 Cassesse 1983, p. 221.
4 See 7.2.2.
5 Hofmann 1988, p. 98.

tion to obligations towards the member state at large, relevant reasons to restrict departure may also include obligations towards other individuals. For example, restrictions on the right to leave to prevent a parent taking children abroad without the consent of the other parent can be a legitimate interference. This may also be the case if restricting departure is necessary to ensure financial obligations to third parties are met.

It would go too far to discuss these various grounds for preventing departure in detail, but it must be assumed that such same factors may lead to the denial of departure in the context of voluntary return. In that context, it will be incumbent on third-country nationals to fulfil any obligations for departure, to ensure that this is not unnecessarily delayed. In principle, they can be held responsible for their failure to remove legal barriers to departure, if this leads to non-return within the voluntary departure period. However, this must, in my view, have been reasonably possible, in at least two ways. First, it must relate to factors over which they have control. This may be the case, for example, for the payment of taxes or settling of financial obligations, as well as ensuring that proper arrangements with the other parent are in place in case third-country nationals seek to return with children. By contrast, other factors, such as the continuation of criminal proceedings, may be outside their control.[6] Furthermore, even if removing barriers to departure is within third-country nationals' possibilities, there may have to be considerations about the reasonableness of the expectation that they can do so within the voluntary departure period granted. This relates both to the length of the initial period and the possibility of extending it. The issue of the length of the voluntary departure period and how it relates to steps to be taken by third-country nationals, including dealing with issues such as discussed here, will be considered in detail in Chapter 11. More generally, cooperation between individuals and member states can be expected here, particularly so that a person seeking to leave is not affected by "manifold legal and bureaucratic barriers."[7] States must therefore ensure that procedures that may be necessary to leave the country are sufficiently accessible and expeditious.

9.2.2 General conditions for exiting external borders

In addition to such specific issues that may arise in individual cases, there are more general conditions that all persons exiting EU member states through their external borders must fulfil, which also apply to third-country nationals leaving voluntarily. In this respect, it should be

6 An argument could be made that this still falls within third-country nationals' responsibility, as these follow from their own conduct. But this, I would argue, is a matter outside the scope of the Directive, and thus the responsibility to return as such. Furthermore, in the case of criminal investigations, the exact conduct of individuals may still be in question.

7 HRC General Comment 27, paragraph 17.

recalled that the Directive and the Schengen acquis are interwoven.[8] Two key terms in the Directive, 'third-country national' and 'illegal stay,' are defined in the Directive in direct reference to the Schengen Borders Code.[9] These definitions relate to the conditions for entry into, and stay in, the Schengen area. However, the Schengen acquis has a broader relevance to the issue of voluntary return, as it also sets rules on exiting the Schengen area. As already noted, 'leaving' is a core part of voluntary return and the Schengen acquis, in particular the SBC, sets rules on how and where persons should leave the Schengen area. The SBC, for example, provides that external borders may only be crossed (both by persons entering and exiting the Schengen area) at official border crossing points during fixed opening hours.[10] It also requires member states to conduct border checks on outgoing persons, including thorough checks on third-country nationals.[11] Such thorough checks comprise certain elements, including verification that a third-country national is in possession of a document valid for crossing a border and verification of such a document for signs of falsification or counterfeiting.[12]

Whilst the requirement to leave the Schengen area only through an official border crossing point and the fact that third-country nationals will be subjected to certain checks does not seem to be very intrusive and, indeed, a logical requirement, it may have consequences on how individuals engage with voluntary return. For example, in Chapter 8 the possibility was discussed that third-country nationals, in limited situations, could return to their countries of origin without travel documents, for example when they share a border with the expelling EU member state. Although an overland crossing may be possible, the member state should ensure that this is only done at official border points. Furthermore, the possibility of doing so without valid travel documents may be limited by the member state's obligation to verify that the crossing occurs only with such documents. While it is for the member state to enforce such rules, third-country nationals can be expected to ensure that the appropriate conditions for exit are met. Conversely, and in line with the discussion on returning with fraudulent or otherwise questionable documents in the previous chapter, member states cannot expect that third-country nationals circumvent such rules just to achieve effective return in the quickest or most convenient way.

8 RD Recitals 25-30.
9 RD Article 3(1) and 3(2).
10 SBC Article 4.
11 SBC Article 7. On thorough checks, see Article 7(3).
12 SBC Article 7(3)(b).

9.3 Return assistance and the obligation to return

In the introductory chapter, I discussed that confusion often arises over voluntary return as a legal concept enshrined in the Directive, on the one hand, and return assistance, such as through assisted voluntary return (and reintegration) programmes (AVRR), on the other. Clearly, the two are closely related in many cases, but one cannot be equated with the other. It is perfectly possible for third-country nationals to return voluntarily, without resorting to return assistance. Conversely, return assistance programmes may have a wider scope and also cater to persons who have not (yet) been issued a return decision. Nevertheless, the two may also interact. Some examples of where the question of return assistance may come into play have already been provided in previous chapters, such as regarding the extent to which individuals' choices about the type of travel documents they prefer to obtain can and should be supported financially. Furthermore, return assistance can play a role in shaping individuals' decision to opt for voluntary return, rather than to wait for enforcement of the return decision.[13]

There is an expanding literature on the role of AVR(R), including about how assistance impacts on decisions about return, and about the reintegration prospects of persons who return to their destination countries.[14] While these are important issues for return policy more broadly, I will limit the discussion below to those issues where return assistance interacts with elements of the obligation to return under the Directive. Following a more general introduction of the role of return assistance (9.3.1), this will focus on two issues. First, whether third-country nationals have a right to receive return assistance under EU law, including those normally excluded from AVR(R) programmes (9.3.2). And second, the opposite question, namely whether seeking return assistance is part of third-country nationals' obligation to return, and whether failure to solicit such assistance could thus be considered non-compliance with that obligation (9.3.3).

9.3.1 Return assistance and voluntary return: general comments

Return assistance programmes are offered in virtually all member states. The content and scope of assistance programmes may vary, and even within member states different types of assistance may be available to different groups of third-country nationals. However, broadly speaking, a few elements commonly form part of such programmes. First, informa-

13 Although how much the availability of assistance actually is a deciding factor in return decisions may not always be clear. For a discussion of this, see, for example, Brekke 2015; Leerkes, Van Os & Boersema 2016; and an overview in Kuschminder 2018, pp. 266-267.

14 See, among others, Black et al 2004; Strand et al 2008; Ruben, Van Houte & Davids 2009; EMN 2011; Black, Collyer & Somerville 2011; Leerkes et al 2014; Brekke 2015; Strand et al 2016; Kuschminder 2017.

tion provision to potential returnees about the possibilities of assistance, including, in many cases, individual counselling. Such counselling looks more closely at the individual case, identifies potential barriers to return and explores ways to overcome them. Another element may be mediation with the competent authorities to help the third-country national obtain travel documents. A key element of virtually all assistance programmes is that they facilitate the transport of voluntary returnees, for example by providing (or reimbursing) air tickets to the third-country national's country of return, as well as covering costs associated with his or her travel from the point of arrival to the final destination in that country. Many programmes also include a financial assistance component, which may either be framed as covering some additional costs, or as creating an incentive for the third-country national to take up the option of voluntary return. Further assistance may be available to support the reintegration of the third-country national after returning. This component has been further developed over the years, with a shift from providing monetary grants to in-kind assistance or other support, for example to help the returnee achieve self-reliance after return. Some return programmes, especially for vulnerable individuals, may also provide assistance in relation to the socio-economic situation of third-country nationals while they are still in the EU member state preparing return, which may include providing temporary accommodation.

It is not easy to say, when dealing with the specific group of third-country nationals faced with a return decision, how many benefit from return assistance. The Frontex data presented in Chapter 2 also provides information on the number of voluntary returns that have been assisted, although significant gaps remain. The clearest figures are presented in the category of voluntary returns 'without assistance.' In 2018, these amount to 46 per cent, while in 2019 they make up 51per cent of the voluntary returns reported by Frontex. However, especially given the substantial numbers in the 'not available' column, the clearest conclusion that can be drawn is that about half of the reported voluntary returns are unassisted *at a minimum*, but that this figure may be significantly higher.[15]

It may also be difficult to draw conclusions from other data, although some tentatively support this estimate. IOM, for example, provides aggregated data about the number of returns it has facilitated. In 2018, it reports having done this in approximately 34,000 cases from Europe, while in 2019 over 28,000 persons were assisted.[16] However, this includes the whole

15 For 2018, for 27,556 voluntary return cases (out of 72,773 in total) information about whether these were assisted was not available (38 per cent). For 2019, this information was missing for 22,223 out of 67,656 total cases (33 per cent). Frontex 2020a, Annex Table 13.

16 IOM 2019, p. 29; IOM 2020, p. 16. The figures also show the prominence of assisted voluntary returns from Europe in IOM's global caseload, amounting to 54 per cent of all IOM-assisted returns worldwide in 2018, and 43.5 per cent in 2019.

European region rather than just the EU/EEA area. Furthermore, while IOM has played a key role in developing and providing return assistance across the EU for decades, and continues to do so in many cases, its almost-monopoly on such services has disappeared over the last few years, with others, including governments themselves, providing (parts of) assistance. As noted in Chapter 1, Frontex is likely to play an increasing role in this area as well. As such, IOM figures alone may only provide part of the story. The 34,000 cases in 2018, if we would assume these are mainly returns from EU member states and Schengen-associated states, would make up about half of the almost 73,000 voluntary returns that Frontex reports for that year. As such, while return assistance is far from being a feature in each case of voluntary return, it plays a role in a significant number of such cases,[17] which should prompt further scrutiny of its relation to the obligation to return under the Directive.

9.3.2 A right to return assistance under the Directive?

As noted, the notion of voluntary return in the Directive and return assistance are not the same. However, there are links, arguably not just in practice, but also legally. In a way, the first 'harmonisation' attempts in relation to return, in the sense of trying to have better coordination between member states but also to give more focus at the EU level to the priority of voluntary return came in relation to assistance programmes.[18] Nevertheless, when the Directive was eventually adopted, return assistance was not part of the substantive provisions setting out common standards and conditions for return procedures. Still, Recital 10 of the Directive acknowledges the interconnection, by stating that:

> *"[i]n order to promote voluntary return, Member States should provide for enhanced return assistance and counselling and make best use of the relevant funding possibilities offered under the European Return Fund."*

Since then, a range of Council conclusions and Commission recommendations have emphasised the links between the Directive's objective of giving preference to voluntary return, and the provision of return assistance. In May 2016, the Council adopted a set of non-binding standards on return assistance.[19] These relate, for example, to the active promotion of voluntary return possibilities, ensuring broad access to assistance schemes, setting up broad and worldwide coverage, enhancing cooperation and coordination, and the use of EU funds. It also sets out key elements of AVR(R) packages

17 Also taking into account that government agencies and non-governmental organisations may also be providing assistance, which is not necessarily captured in these figures, unless this was done in cooperation with IOM.

18 See 2.2.1.

19 Council doc. 8829/16, 11 May 2016, Annex.

that member states should ideally offer, including many of the elements discussed above. As part of the New EU Pact on Migration and Asylum, a Voluntary Return and Reintegration Strategy has also been developed.[20] The Commission's recast proposal, if adopted, would constitute an important step towards cementing the legal links between the Directive's return procedure and return assistance. In the explanatory memorandum, the Commission notes the need to establish a framework for the granting of financial, material, and in-kind assistance to voluntarily returning third-country nationals. In particular, it proposes a new provision stating that member states:

> *"shall establish programmes for providing logistical, financial and other material or in-kind assistance, in accordance with national legislation, for the purpose of supporting the return of illegally staying third-country nationals…"*[21]

This obligation would be limited, however, to nationals of countries that do not enjoy visa-free travel to the EU. The assistance offered may include support for reintegration in the country of return. The granting of assistance "shall be subject to the cooperation of the third-country national concerned with the competent authorities of the Member States…"[22] In terms of the establishment of programmes, the new provision, if accepted by the Parliament and Council, would likely not have too much practical impact, since virtually all member states already provide some return assistance, although the basis on which this is done may differ. However, it would explicitly tie the achievement of the Directive's objectives to the existence of such programmes.

The fact that there are as yet no explicit substantive provisions on return assistance in the Directive does not mean that there are no legal links. Actions or omissions by member states that are not specifically within the scope of the Directive may still imply obligations on their part. This is evident, for example, from the CJEU's case law on the use of criminal sanctions for irregular stay. In a range of cases, the CJEU has clarified that, although such sanctions are not part of the Directive, member states must refrain from imposing these if they would interfere with the effective achievement of the Directive's objectives. For example, if such sanctions involve imprisonment or house arrest that would delay removal, member states' obligations under the Directive dictate that they should not impose these.[23] In those cases, the obligation on member states is a negative one. However, it might be wondered whether positive obligations, such as the

20 COM(2021) 120 final, 27 April 2021.
21 COM(2018) 634 final, 12 September 2018, Article 14(3).
22 *Ibid*.
23 See, for example, CJEU C-61/11 PPU *El Dridi* [2011]; CJEU C-329/11 *Achughbabian* [2011]; CJEU C-146/14 PPU *Mahdi* [2014]; also see Vavoula 2016; Progin-Theuerkauf 2019b, pp. 37-38.

provision of assistance, may also arise. In Chapter 6, I discussed the situation in which member states could be required to trigger a readmission agreement on behalf of third-country nationals, so that they could effectively enjoy their possibility to return voluntarily to transit countries. The explicit acknowledgement of the importance of readmission agreements in the Directive provided an important foothold for this. The same link can be seen in Recital 10, cited above, as regards return assistance. If member states can be expected to give effect to voluntary return by triggering readmission agreements, the same should be considered to apply to return assistance.

However, I suggest this would only be the case under specific conditions. First of all, the priority for voluntary return must be in play. That is, it must deal with situations in which member states do not have legitimate grounds to deny a period for voluntary departure, as will be discussed in Chapter 10. Furthermore, since the trigger for a right to assistance would be the effectiveness of the priority of voluntary return, it must first be clear that voluntary return would not be possible, in the individual case, without return assistance. This means that only certain elements of return assistance would fall within the scope of a right to assistance on this basis. As noted above, AVR(R) programmes usually consist of multiple elements, which may impact on stimulating the willingness of individuals to return, or improving their reintegration prospects. Arguably, only those elements that are directly related to the practical possibility of returning can be captured by a right to assistance. This would then be fairly limited. For example, it may apply to persons who do not have the means to pay for their own transport to have this facilitated through state-sponsored return assistance programmes. After all, without the physical possibility of moving from the member state to the destination country, no voluntary return is possible. For other forms of assistance which may be of benefit to individuals, but which do not determine whether they can return in practice, it will be much more difficult to establish an individual right.

The effectiveness of the priority of voluntary return may only provide one reason why member states may be required to provide assistance. It has been suggested that AVR(R) programmes have an important role to play in ensuring more 'humane and dignified' returns.[24] As noted in Chapter 7, issues of fundamental rights compliance may arise in relation to the social and economic conditions after return. To the extent that return programmes can mitigate those problems, it may be argued, both from a fundamental rights perspective and because this would allow for effective return, that member states can be required to provide it.

Apart from the situation described above, there may be groups of returnees towards whom member states have particular obligations to provide assistance. Under the Trafficking Protocol, state parties should consider implementing measures to provide for the physical, psychological

24 See the discussion in 2.2.1; also see PACE 2010.

and social recovery of victims of trafficking, which could include medical, psychological and material assistance, as well as assistance with appropriate housing, employment, educational and training opportunities.[25] Although this provision is not explicitly aimed at return situations, it does not necessarily exclude those either. The obligation, however, that they "should consider" such measures is weak, and the Protocol also does not establish whether it is the expelling state or the state of return that should then provide assistance. However, it does open the door for expectations of broader assistance, also in helping victims of trafficking reintegrate in their countries of return. Under the Council of Europe Convention Against Trafficking in Human Beings, however, member states *must* adopt measures as may be necessary to assist victims of trafficking in their physical, psychological and social recovery.[26] The Convention also specifically requires states to make their best effort "to favour the reintegration of victims into the society of the State of return," including in relation to education, labour market reintegration and the improvement of professional skills.[27] As such, EU member states which are party to the Council of Europe Convention may be required to provide enhanced assistance, including support for reintegration, to returnees, which must be assumed to also cover voluntary returnees, since voluntary return should be preferred.[28]

Beyond potential general requirements to offer assistance to those that would not be able to return otherwise, or groups for which specific treaty obligations exist, member states should normally have considerable discretion to decide on eligibility criteria and the type of assistance offered. In the Netherlands, for example, eligibility for specific forms of assistance, and sometimes for access to any kind of assistance at all, have frequently changed. From 2010 onwards, in response to concerns that this acted as a 'pull factor' or was otherwise abused, nationals of several countries were

25 CTOC Trafficking Protocol, Article 6(3).
26 CoE Trafficking Convention, Article 12(1).
27 CoE Trafficking Convention, Article 16(5).
28 CoE Trafficking Convention, Article 16(2). Although not particularly central to this analysis, which does not go into detail on the position of victims of trafficking, an argument is to be made that this would have effects as a matter of EU law as well. While the CJEU has not explicitly clarified the role that the CoE Trafficking Convention might have within EU law, AG Szpunar referred to member states' obligations arising of it, see CJEU, Opinion AG, C-340/14 and C341/14 *Trijber* [2015], paragraph 77. Also noted by Szpunar (footnotes 46 and 48), the CoE Trafficking Convention is referred to in the preamble of Directive 2011/36 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA, OJ L 101, 15 April 2011, pp. -11, Recital 9. And that trafficking, as defined in the CoE Trafficking Convention, falls within the scope of the prohibition of slavery and forced labour in Article 4 ECHR (see ECtHR *Rantsev* [2010]), which is mirrored in Article 5 CFR, and which must thus give at least equivalent protection. Finally, it should be noted that all EU member states (as well as the EEA/EFTA states implementing the Returns Directive) have ratified the CoE Trafficking Convention, which further opens the door to using it as a means of interpretation on EU law issues related to trafficking.

excluded from reintegration assistance. This exclusion from this part of the assistance package was first applied to nationals of Georgia, and subsequently expanded to Northern Macedonia the same year, Belarus in 2011, Kosovo and Mongolia[29] in 2015, and Ukraine in 2016. In 2016, access to the basic assistance programme for voluntary returns in the Netherlands (the Return and Emigration of Aliens from the Netherlands (REAN) scheme), run by IOM, was cancelled for persons from the Western Balkans, who from then on were only eligible for an air ticket provided by the Repatriation and Departure Service, while persons from Morocco and Algeria were still allowed access to the core components of REAN programme, mediation in obtaining travel documents and air tickets, but without having access to any financial or in-kind assistance. From 2017, this was expanded to nationals of all countries in "the ring around Europe." Finally, in that same year, all forms of assistance were cancelled for third-country nationals able to enjoy visa-free travel.[30] Although these changes were quite far-reaching, the Netherlands is by no means unique in taking measures to exclude certain groups of third-country nationals from assistance, or specific elements of it.[31] In the Netherlands, many of these measures, including as regards persons enjoying visa-free travel, have since been reversed. This follows indications that the measures led to less effective return in some cases – including by making it more difficult for those that wanted to return to do so –, shifted the workload from IOM to government authorities, and impacted on IOM's ability to communicate to third-country nationals that it could be approached for return assistance.[32]

As noted, the discretion of member states to provide return assistance would be reduced by the Commission's recast proposal, albeit only in relation to those that do not benefit from visa-free travel to the Schengen area. As in the example of the Netherlands above, this limitation seems to be fuelled by concerns that they may 'abuse' the assistance on offer. They are able to enter the Schengen area easily, and could use return assistance as a 'free ride' back to their country of origin when the purpose of their stay in the EU has ended. The recast proposal itself, in the wording suggested by the Commission, would not necessarily exclude the possibility of providing assistance to nationals of countries enjoying visa-free access, but would

29 Although in the case of Mongolia, this only applied to those for whom a claim was made to transfer them to another EU member state under the Dublin system.

30 ACVZ 2018, p. 43.

31 Szytniewski, Buysse & Van Soomeren 2018, p. 76, looking specifically at third-country nationals from 'safe countries,' note that access to assistance is reduced or denied to some such in Belgium (where rejected asylum seekers from safe countries only receive a ticket), Austria (where rejected asylum seekers from the Western Balkans are excluded from certain financial assistance), and Germany (where (financial) assistance to persons from the Western Balkans is reduced).

32 Letter from the Dutch Minister of Migration Affairs to the Lower House, parliamentary year 2017-2018, doc. 19 637 no. 134, 8 June 2018. Also see Szytniewski, Buysse & Van Soomeren 2018, pp. 77-79.

apparently leave this at member states' discretion and outside the scope of the Directive. However, this discretion to exclude certain nationalities from assistance, including those from countries enjoying visa-free travel, may actually be limited, in the light of the discussion above. Arguably, as long as programmes exist, member states can be expected to use them in those cases that voluntary return would be impossible, as a result of the combination of ensure the *effet utile* of both the objective of effective return and of prioritising voluntary return. Further questions may also arise from a non-discrimination standpoint, and whether the blanket exclusion purely on the basis of nationality, even when there are concerns over abuse by some who hold the same nationality, can be objectively justified and would be proportionate.

9.3.3 An obligation to seek assistance?

As with many other issues related to voluntary return, the issue of assistance has two sides. The question about the obligation on member states to provide assistance and the right of third-country nationals to access it, is mirrored by the question whether they must seek it. In other words, if assistance to facilitate voluntary return is available, are third-country nationals required, as part of their obligation to return, to seek such assistance?

There may be situations in which seeking return assistance may be considered by member states as obligatory. This is evident, for example, by Dutch rules on non-departure and regularisation. Under Dutch law, if third-country nationals who are otherwise obligated to return cannot do so, and they have done everything in their power to return, they may exceptionally be granted a so-called 'no fault' permit.[33] This is subject to a number of conditions, including that the individual has sought the assistance of the Return and Repatriation Service in enabling his or her return. This is particularly focused on the Service's mediation with consular authorities of countries of return to provide travel documents. Until 2013, the criteria also included that the individual should have sought assistance from IOM, and that IOM had subsequently declared it was unable to facilitate the return. The requirement of such a declaration by IOM was subsequently scrapped on the recommendation of the Advisory Committee on Migration Affairs, although the individual's request for assistance to IOM could still be part of the overall assessment whether he or she had met the obligation to return.[34] Whether a third-country national applied for return assistance (with the authorities or IOM) was also taken into account in some other

33 Such permits, however, are rarely issued. Based on available figures, it appears that only ten or fewer of such permits are issued each year. See, for example, ACVZ 2017; Answers to parliamentary questions, ref. 2019Z17264, answers of 6 November 2019. The latter only relate to applications made by stateless asylum seekers, showing that fewer than 40 permits were issued between 2016 and August 2019.

34 ACVZ 2017.

cases, such as the issuing of a permit to an undocumented child who has become integrated in Dutch society.[35] From the fact that a third-country national's refusal to seek assistance is considered evidence of him or her not doing everything in his or her power to return, we can surmise that seeking such assistance was considered part of the obligation to return at least in these cases.[36] But could a general principle, within the context of the Directive, that a third-country national is obliged during the voluntary departure period to seek assistance be established?

As a general rule, this does not seem to be tenable. Third-country nationals are responsible for their own return, which also means they should themselves take the steps to obtain travel documents, get permission to access the state of return and make practical arrangements for their departure, including transport. Although most assistance programmes provide quite broad-ranging access to third-country nationals, I have argued that, from a legal point of view, access becomes an issue only when this is strictly necessary to achieve return. This also means that an obligation to seek assistance would only become an issue if this is essential to the third-country national achieving return. In this respect, I believe it is useful to differentiate between different types of assistance, namely assistance with the practical aspects of return, especially transport, on the one hand, and assistance in obtaining travel documents, on the other. Seeking the first type of assistance could be considered an obligatory step if third-country nationals do not have the means to pay for their own transport. If they are eligible for assistance in this area, and this is the only barrier to return, they can be expected to make use of the opportunities provided.

The second type, seeking assistance in obtaining travel documents – as in the example above – I find much more problematic. Although in practice there may be benefits to member state authorities or others, like IOM, assisting in the application for travel documents, from the perspective of the triangular model of rights and obligations, this should not matter. Where the country of return has an obligation to readmit, it should do so regardless of whether it is the third-country national him or herself, the member state authorities or another actor making the readmission request. This is particularly the case when the country of return is the third-country national's country of nationality, as it will be in the majority of cases. A country of nationality that provides travel documents and admission only, or more easily, in those cases that the EU member state's authorities or others intervene on behalf of the third-country national, is not meeting its obligations under international law, at least not in the way as EU policy

35 Vegter & Van Werven 2017.

36 However, in a change in policy, aimed at wrapping up the so-called 'children's amnesty' the criterion that they should have cooperated in return (evidenced, inter alia, by turning to the authorities or IOM for assistance) was replaced by the criterion that they should have remained 'available' for return. See Netherlands Official Journal 2019, 8116, 11 February 2019, Article I.

believes it exists.[37] And, as I have argued, this failure of the state of return should not and cannot be put on the shoulders of the third-country national. This is also the case if the country of nationality makes distinctions between voluntary and forced returns, since the intervention of IOM, for example, cannot be the sole indication that the third-country national is truly returning voluntarily.[38] As such, when return should take place to the country of nationality, the third-country national's failure to seek mediation of the member state's authorities or others to obtain travel documents or admission cannot be seen as non-compliance with the obligation to return. This may be different, however, in other cases. In particular, this would be the case when return should take place to a transit country based on a readmission agreement which needs to be triggered by the EU member state. In such cases, the failure to seek or accept mediation by the authorities could indeed play a role in finding non-compliance with the obligation to return.

9.4 When have third-country nationals successfully 'returned'?

As noted in Chapter 1, the obligation to return can be seen as both involving an obligation of effort (as encompassed by 'the process of going back') and of result. This section reflects on the result, and in particular how and when member states may establish that the appropriate result has been achieved. It appears that the Directive provides for a clear answer to this: return is completed when the person has gone back to one of the destinations set out in Article 3(3). While perhaps a clear benchmark, it also raises questions over ensuring that this is adequately verified. This is discussed in paragraph 9.4.1. To make matters more complicated, however, various member states have not transposed the obligation to return in precisely those terms. Rather, they may refer to the obligation to leave instead. Paragraph 9.4.2 discusses what the implications of this may be, including whether the return decision has a European effect, and as such provides a clear framework for obligatory departure from *all* EU member states.

9.4.1 Proof of arrival in the destination state: an unsettled matter?

Much of the previous chapters have been an attempt to provide some more clarity about the inherently vague concept of 'return' in the Directive. This is true for the steps to be taken by third-country nationals, but in a way also for the end result. Given the Directive's emphasis on ensuring effective return, it is somewhat surprising that no clear mechanism is included in its provisions for establishing that successful return has taken place, if

37 See 4.2.

38 From this perspective, Iran's insistence that only those whose return is facilitated by IOM, as discussed in 5.3.1, appears to be misguided if the aim is to establish willingness to return, rather than just voluntary compliance.

understood as arrival in the destination country,. This is despite the fact that consideration was given to this before the Directive was adopted. The 2002 Green Paper on a Community Return Policy, for example, contains a section on verification of return. It notes that member states have possibilities to verify that a third-country national has left its territory (although with limitations, see below), "but not that he or she has reached the country of supposed destination."[39] It is easy to see how this would be the case for removals. But it is not immediately clear how such verification can be shaped in a way that it captures all, or at least the majority, of voluntary returns. If a member state would not want to rely solely on the third-country national, it could imagine striking agreements with destination countries about the exchange of information on arrivals. However, given the complexity of international cooperation in the area of return and readmission, it is unclear why destination states would want to take on this additional administrative burden, and whether EU member states would be able to set up a fully functioning network and would be able to manage the information flow. Practically, whereas third-country nationals who are removed are easily identifiable by destination states, voluntary returnees will often be indistinguishable from other international travellers. Finally, such information exchange may run into issues of privacy protection.[40]

Another option would be to rely on information from organisations providing assistance to voluntary returnees. IOM, for example, often has a presence on both sides (the EU member state from which third-country nationals leave and the state of arrival). The member state may rely on the data of such organisations to verify the third-country national has arrived,[41] although this again raises questions about the consent of individuals to have this information shared. Furthermore, while this provides an option for verification, it is far from airtight. First, not all forms of assistance will lead to further contacts between providers and returnees, for example when only tickets and basic financial assistance are provided. More elaborate assistance activities, including reintegration support, are more likely to lead to contacts between third-country nationals and service providers in the country of return, and thus to possibilities of verification. But second, as discussed above, not all returnees benefit from assistance, so this option would not be applicable to all third-country nationals.

A further option is related to self-reporting by third-country nationals, either to service providers, to consular representations of the EU member state in the country of return, or perhaps directly to the authorities responsible for overseeing returns in the EU member state by means of remote verification. However, the question arises what reason, beyond the receipt

39 COM(2002) 175 final, 10 April 2002, paragraph 3.1.6.

40 Including under Regulation 2016/679 (the General Data Protection Regulation), OJ L 119, 4 May 2016, pp. 1-88.

41 See, for example, EMN 2014a.

of further assistance, third-country nationals would have to cooperate in this. The Directive only provides for one and that is the possibility of having an entry ban lifted or its duration shortened. Article 11(3) provides that member states:

> *"shall consider withdrawing or suspending an entry ban where a third-country national who is the subject of an entry ban … can demonstrate that he or she has left the territory of a Member State in full compliance with a return decision."*

The Return Handbook also notes that, in this process, reporting back to a member state's embassy may be a way of verifying this.[42] Whether this is a sufficiently strong incentive for most third-country nationals to indeed report back remains unclear. Clearly, for those who seek to travel to an EU member state at some point in the near future, this will likely be the case, since an entry ban will prevent them from doing so. But for those who do not have such intentions, reporting back may be more trouble than it is worth. It also increases the burdens on member states' embassies and consulates if this option would be used regularly. At any rate, the incentive of reporting back might be diminished by the fact that the lifting of an entry ban remains optional for member states, even if they have duly verified that third-country nationals have returned.

Overall, therefore, considerable questions remain about the viability of an effective system for verifying that third-country nationals have actually returned. And the question arises whether this is what the drafters or member states had in mind. It has already been noted that the way that the Directive uses 'return' and 'departure' may not be very consistent,[43] and the provision on the lifting of entry bans, quoted above, shows that too. In particular, it says that third-country nationals must show their full compliance with their obligation to *return*, but which is apparently satisfied when they have "left the territory of the Member State."[44] It could be argued that the difference is just semantic, because when third-country nationals leave a member state, they may be presumed to be on their way to their destination country.[45] Indeed, the legislation of a number of member states refers to an

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42 C(2017) 6505 final, 16 November 2017, Annex (Return Handbook), paragraph 11.6.

43 See 2.10.1.1.

44 A similar contradiction can be found in the Directive's definition of 'removal,' relating to the enforcement of the obligation to *return*, but doing so through "the physical transportation *out of the Member State*" of third-country nationals, rather than them being brought to a destination state, RD Article 3(5) (my emphasis).

45 Although strictly speaking this may not be the case in practice. For one, unless the EU member state and the destination country share a common border, the third-country national will be *en route* (for example by air or sea) in between and, as discussed in 7.3.3, this is not necessarily outside the responsibility of the member state. In that process, third-country nationals may also have to pass through other countries to reach their destination, which further shows that departure and arrival in the destination country are not the same.

obligation to leave, rather than to return,[46] although this obligation would still have to be read in the light of the destinations of return set out in Article 3(3) of the Directive. From this perspective, perhaps a clearer distinction between the obligation of effort and the obligation of result in Article 3(3) must be made. The former requires third-country nationals to take steps to return to the country of origin or a transit country (and only those), while the latter is satisfied if the third-country national leaves the member state. But even if this is the case, this raises new questions over the moment when third-country nationals can be considered to have 'left,' as discussed below.

9.4.2 Departure from the member state and the lack of a European effect

Problems of verification of return are clearly much easier to overcome if this only relates to departure from the member state. Both the Green Paper and the Return Handbook mention this as a key option. The Green Paper talks about the issuing of a certificate of departure by member states,[47] while the Handbook notes the existence of an exit stamp or evidence of exit in border data systems as verification possibilities.[48] However, if the final outcome of the obligation to return should be departure from the member state, rather than arrival in the country of destination, this may create other issues related to the overall role of the Directive in ensuring a truly European return procedure.

Possibilities of exit checks would depend, primarily, on third-country nationals leaving through external (Schengen) borders. And, as discussed in 9.2, third-country nationals can be expected to comply with Schengen rules when doing so, including using only official border crossing points and submitting themselves to checks. Under Regulation 2018/1860 on the use of the Schengen Information System (SIS) for the return of illegally staying third-country nationals,[49] member states are also generally required to enter alerts into the SIS on return decisions with the explicit objective of verifying compliance with such a decision.[50] However, what if departure does not happen through an external border? In theory, departure via an

46 See, among others, Austrian Federal Law concerning Entry, Residence and Settlement (1997 Aliens Act), Article 40(1) ("the alien must depart without delay"); Belgian Aliens Act 1980, Article 7 ("give the order to leave the territory before a specific date"); French *Code de l'entrée et du séjour des étrangers et du droit d'asile*, Article L251-1 ("*obligation de quitter le territoire français*"); German *Aufenthaltgesetz*, paragraph 50 ("*Ausreisepflicht*"); Netherlands Aliens Act 2000, Article 61 ("leave the Netherlands of their own accord").

47 COM(2002) 175 final, 10 April 2002, paragraph 3.1.6.

48 C(2017) 6505 final, 16 November 2017, Annex, paragraph 11.6. For member states' practices, also see EMN 2014a.

49 OJ L 312, 7 December 2018, pp. 1-13.

50 Regulation 2018/1860, Article 3(1). Although the Regulation refers specifically to the Returns Directive in this regard and thus incorporates the ambiguity about leaving and returning.

internal border, with third-country nationals moving from one member state to another, would also mean that they are no longer on the territory of the member state that has issued the return decision, and which would meet the requirement of leaving.

This may even include irregular (secondary) movements between member states. Indeed, what we might call irregular or informal voluntary departure may be one of the main ways in which 'return' is achieved in member states. In the Netherlands, for example, official figures on returns included a specific category of persons who "left with unknown destination," until several years ago.[51] These are people who disappeared off the radar and would thus be considered as having absconded within the meaning of the Directive. In many cases, it is impossible to verify what has happened to such persons, unless they are found later. This can be after they are apprehended in the Netherlands, having continued to stay irregularly, or when they are found in another member state after having moved there. But since they are administratively considered as having 'left,' the impression might be given that this is part of successful return. Between 47 and 54 per cent all registered 'departures' from the Netherlands between 2008-2010 consisted of such persons having 'left' with an unknown destination.[52] The group was later re-categorised, but now as having "left without supervision." In 2019, the Dutch government reported 25,600 'departures' from the Netherlands, but more than half of these (13,940) had left without supervision.[53] Although this is of course not official policy, such categorisations suggest that the disappearance of third-country nationals, including by moving irregularly to another EU member state, is at the very least accepted as a fact of life contributing to the 'success' of return policy, and it may actually be the main way in which 'return' is achieved. And, with the absence of internal border checks, such departure would not be verified.

It is evident that the notion that the objectives of the Directive could be achieved by third-country nationals simply moving irregularly from one EU member state to the next is not the intention of an instrument that specifically aims to combat irregular stay in EU member states. But it brings into focus the extent to which a European effect of the Directive is truly safeguarded. That it was always the intention to have a proper EU-wide regime for this is not in doubt. The Green Paper, for example, noted that:

> *"The legal obligation to leave might not be deemed to have been met by persons entering into another Member State, when the entry and residence is not permitted there. Member States should ensure that measures terminating illegal residence are applicable throughout the whole EU."*[54]

51 In Dutch: "*met onbekende bestemming vertrokken*" or MOB.
52 Ministry of Security and Justice 2011, p. 34.
53 Ministry of Justice and Security 2020, table 6.1.
54 COM(2002) 175 final, 10 April 2002, at paragraph 3.1.2.

This intention was also highlighted in the impact assessment accompanying the Commission's initial proposal of the Returns Directive, when it noted:

> *"A return should be judged successful only if the illegal resident concerned has left the territory of the EU rather than of a particular Member State, providing that no other Member State has granted legal residence. The mere fact that a third country national illegally staying in a Member State may comply with his/her obligation to leave by moving to another Member State leads to uncontrolled secondary movement among Member States and may lead to further illegal presence in another Member State."*[55]

Despite this clear intention, it is difficult to see how this European effect is actually grounded in law. As discussed in Chapter 1, the Directive does not cover all EU member states, but does apply in several Schengen-associated countries.[56] Perhaps it is more appropriate, therefore, to speak of an obligation to leave the Schengen area? After all, in its preamble, the Directive is presented as a development of the Schengen acquis.[57] But there are some mismatches here as well, since, at the time of writing four EU member states that are bound by the Returns Directive are not part of Schengen. In those countries, cross-border movement is still a matter of national law. However, in anticipation of Schengen accession, these countries have made significant steps to harmonise national rules with the Schengen acquis. Furthermore, Schengen accession of all four countries is foreseen in reasonable time, so this discrepancy may be resolved soon.

But the problem of simply seeing Schengen as 'forbidden' (that is, the place where third-country nationals issued a return decision may no longer stay) runs deeper. On the one hand, the Directive bases its definition of illegal stay, inter alia, on Article 5 of the Schengen Borders Code. Whilst the SBC provides for a common regime for external borders of the entire Schengen area, it does leave the possibility for member states to issue a visa that is only valid for their own territories. As such, it is possible for a third-country national to be unlawfully present on the territory of one member state, while his or her stay in another member state would not be irregular. The Directive explicitly takes this into account by providing that a third-country national who is irregularly present on the territory of one member state, but holds a "valid residence permit or other authorisation offering a right to stay issued by another Member State," should immediately go to the latter member state.[58] This is, however, an exception to the normal regime of the Directive; the obligation to go to another member state where one is legally present does not flow from a return decision. Rather, only if

55 SEC(2005) 1057, 1 September 2005. Also see Lutz 2010, p. 44.
56 See 1.2.1.3.
57 RD Recitals 25-30.
58 RD Article 6(2).

third-country nationals fail to move immediately to the member state where their stay is legal, a return decision shall be issued.[59]

The Directive does not make any provisions for member states to 'take over' a return decision already issued by another member state. A mutual recognition system of return decisions, which would also cover voluntary returns, was proposed by the European Commission, but never made it into the final version. At any rate, the mutual recognition proposed was also facultative and not automatic.[60] This problem could theoretically be solved through an earlier piece of legislation, Directive 2001/40/EC on the mutual recognition of expulsion decisions.[61] However, this Directive only created the option of mutual recognition, not an automatic and binding mechanism. Rather its purpose is "to *make possible* the recognition of an expulsion decision issued … in one Member State … against a third-country national present within the territory of another Member State."[62]As such, from the perspective of third-country nationals, moving from a Schengen state where they are under obligation to return to another would not automatically make them subject to an obligation to return in the latter, unless it takes specific action to make this happen.

It would appear that, to the extent that we can speak of a 'European' or 'Schengen effect' of the Directive, this lies in the provisions on entry bans.[63] Recital 14 of the Returns Directive explicitly acknowledges this.[64] An entry ban, once imposed, in combination with the third-country national's signalling in SIS,[65] would prevent him from traveling to any Schengen state. However, this only takes effect *after* the third-country national has left.[66] Also, member states are only obligated to impose entry bans in case no period for voluntary departure is provided, or if the obligation to return is

59 "In the event of non-compliance by the third-country national concerned with this requirement ... paragraph 1 [of Article 6] shall apply." Article 6(1) subsequently provides for the mandatory issuing of a return decision, containing an obligation to return.

60 Lutz 2010, p. 15.

61 OJ L 149, 2 June 2001, pp. 34-36.

62 *Ibid*., Article 1(1) (my emphasis).

63 As noted in Chapter 1, the issue of the entry ban as such is outside the scope of this analysis, as it is not part of the obligation to return or the voluntary departure period itself. However, for detailed discussions of the entry ban, see Boeles 2011; Majcher 2020, part 3, in particular, as regards the European effect of the entry ban, pp. 256-267.

64 RD Recital 14: "The effects of national return measures should be given a European dimension by establishing an entry ban prohibiting entry into and stay on the territory of all the Member States." Also see C(2017) 6505 final, 16 November 2017, Annex (Return Handbook), paragraph 11.1.

65 Boeles 2011, p. 44: "the Returns Directive does not contain any operational provision giving the Entry Ban the effect that it pretends to have. Only in combination with a SIS-alert will an Entry Ban effectively bar entry and residence in the territory of other Member States."

66 CJEU C-225/16 *Ouhrami* [2017].

not complied with within the voluntary departure period.[67] The extent to which this form of 'European effect' will thus be applicable to third-country nationals still within the voluntary departure period, is questionable and will depend on individual member states' practices. In terms of the obligations of third-country nationals, this presents a gap, and leaves space for a reading that would make moving irregularly from one member state to the next a legitimate indicator of compliance.

9.4.3 A gap in the Directive?

Considering the discussion above, neither 'returning' nor 'leaving' seem to provide perfect indicators for member states to verify compliance. The Directive leaves an unintentional gap in its formulation: either the final result should be the arrival of third-country nationals in one of the destination countries set out in Article 3(3), but then the act of departure itself may not be sufficient to verify this. Or departure from the member state is sufficient, but then the lack of a European effect provides no clear guarantee that third-country nationals have left the area where the Directive is applied. Article 11(3), quoted in 9.4.1 above, might even suggest that a combination of both is necessary: departure from the territory of a member state in full compliance with the obligation to return to one of the obligatory destinations of Article 3(3). But then it may be presumed that member states are also required to verify this, to ensure effectiveness of the return procedure. So that would mean that they verify both the departure of third-country nationals and their arrival in the destination country, which may too burdensome and at any rate not always practically possible. From this perspective, return seems to be the most airtight indicator conceptually, but problematic to implement in practice, whilst departure is the most realistic, but as regards verification it is conceptually unsatisfactory in various ways.

It should be noted that this is a question of verification of return, and not, as such, of the scope of third-country nationals' obligations. Read in conjunction with Article 3(3), the obligation to return still imposes on them the requirement to take the necessary steps in relation to the country of origin or the transit country, within the limits set out in the previous chapters. It should also be those steps, rather than the mere fact whether persons are still in an EU member state, which provide the basis for assessing whether they have fully complied with their obligations, as will be discussed later.[68]

67 RD, Article 11(1), although the Commission's recast proposal seeks to make entry bans obligatory also in case of voluntary departure, which would arguably undermine the role of entry bans as incentives for voluntary return.

68 See 11.3.1.

9.5 Conclusions

This chapter has looked at various elements of the practicalities of preparing the departure from EU member states, as the final necessary element of successful return, and thus of the analysis of the actions third-country nationals can and cannot be expected to take in fulfilling their obligation to return (research questions 1a and 1b in relation to return element (iii)). First, it examined whether third-country nationals must meet specific requirements or obligations before being able to leave the member state. It was found that third-country nationals can be held responsible for meeting all necessary exit requirements, including as they arise from the Schengen Borders Code. Third-country nationals cannot circumvent these, for example by crossing external borders outside of official borders posts or without undergoing checks. But it also means that EU member states must ensure that these requirements are not circumvented, even if this would cause delays in departure. Furthermore, third-country nationals should, as part of their preparation of return, ensure they meet all their outstanding obligations towards other individuals, or towards the member state. In some cases, however, they may not be able to do so during the voluntary departure period. This may be the case for making the appropriate legal arrangements for taking children with them when they have separated from the other parent. But it may also include remaining available for investigations or proceedings related to crimes of which they are suspected. In such cases, these circumstances should become part of the consideration of the prolongation of the voluntary departure period.

The second issue related to return assistance. It was found that, in principle, there is no unambiguous right to such assistance arising out of the Directive. However, there may be circumstances in which third-country nationals cannot be excluded from existing programmes. This is particularly the case when voluntary return would otherwise be impossible. This follows from the obligations of member states to secure not only effective return, but effective return that is preferably voluntary. Any right to assistance on this basis, however, would be limited to what is strictly necessary to make return possible, and not wider assistance, such as reintegration support. This would only be different if the lack of reintegration support would be a decisive factor in the non-returnability of individuals on fundamental rights grounds. Although the ability of such assistance to reshape the prospects of third-country nationals upon return is likely to be limited, where it can mitigate such barriers to return, member states can be expected to make it available.

If return has not materialised by the end of the voluntary departure period, the fact that a third-country national has not asked for return assistance cannot, in general, be considered part of their responsibility. This would be different if it can be established that return was only possible with such assistance. However, even here distinctions should be made. It is quite possible that the lack of means to pay to transport creates a barrier to return,

which could have easily been overcome by asking for assistance. However, if the lack of return is related to the denial by the country of return of travel documents, this may be different. As discussed in previous chapters, questions of readmission and travel documents should not normally depend on the voluntariness of return, and it should also not depend on whether IOM, the member state or any other actor is mediating. If readmission is not granted in violation of the country of return's legal obligations, the fact that it would have agreed to readmission only if a third party had mediated cannot be part of the third-country national's responsibility.

The third issue that was addressed related to the question when a third-country national had actually 'returned' within the meaning of the Directive. It was noted that both arrival in the country of return and departure from the EU member state had been used as indicators, but that these were not necessarily the same. The former may be more correct in light of the Directive, but there are considerable practical difficulties in establishing this. The latter provides an easier benchmark, but also raises questions whether any type of departure from a member state's territory is sufficient. In this respect, the question was raised whether the provisions in the Directive sufficiently guarantee a European effect that would prohibit third-country nationals from meeting their obligation to return by irregularly moving to another member state. It was found that this is a gap in the Directive, which is only partially filled by the European effect of the entry ban, which only comes into effect after the individual leaves, and not at the moment the return decision is issued. As such, the questions of establishing that third-country nationals have effectively returned, and the European effect associated with it, remain somewhat unsettled in terms of the specific provisions of the Directive.