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

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11 The length of the voluntary departure period

11.1 Introduction

This chapter engages with research question 2b, which relates to the application of the Directive's provisions on the initial length, extension and shortening of the voluntary departure period. In contrast to the question whether a voluntary departure period should be granted in the first place, discussed in Chapter 10, the question of the appropriate length cannot be understood only by reference to the internal dimension of the Directive. The question of the length of this period is closely linked to the actions that third-country nationals should take to meet their obligation to return, which was discussed in Chapters 3 to 9. After all, whether third-country nationals can comply in a timely manner will depend, to a considerable extent, on the time they are provided for this. And, as the previous chapters show, timely compliance is also intertwined with the role of the prospective country of return, especially as regards readmission and obtaining travel documents. There is a clear obligation on third-country nationals to provide – within the limits of what can legitimately be expected of him – the necessary evidence to the country of return.[1] And their action or inaction in this respect may play a key role in the timely realisation of return. But even when third-country nationals comply fully with their obligations, the actions or omissions of the country of return will be determinative of both the success and the timing of return. And these actions and omissions are almost fully beyond the control of either the third-country national or the EU member state. Furthermore, the obligations on third-country nationals in this respect are not unlimited, as discussed at various points in the previous chapters. As such, they may be faced with demands from the state of return that, if met, would likely result in a quick return. But if they legitimately refuse to acquiesce to such demands, the return process may be delayed significantly. Finally, timely compliance with the obligation to return may not just depend on third-country nationals and the country of return, but in some cases also on the EU member state itself, such as in relation to triggering readmission agreements or issuing travel documents. Beyond this, there are other factors that may play a role. For example, organisations providing return assistance may have their own procedures and timelines, which may affect how long it takes before a voluntary return is completed.

1 Where relevant, using the EU member state as mediator, such as when return will take place to a transit country under an EU readmission agreement.

Now that these various issues have been clarified in the previous chapters, a better foundation exists to discuss the length of the voluntary departure period. This involves examining two particular provisions of the Directive, which are interconnected. First of all, Article 7(1) states that a "return decision shall provide for an appropriate period for voluntary departure of between seven and thirty days", unless exceptions as discussed in Chapter 10 apply. The meaning of an appropriate period will be discussed in section 11.2. Second, Article 7(2) provides that member states "shall, where necessary, extend the period for voluntary departure by an appropriate period." In doing so, they 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." Issues of extension are discussed in section 11.3. In addition to the length of the initial period granted, and the extending of such a period, I will also briefly look, in section 11.4, at the issue of cutting short a voluntary departure that has already been granted. On the basis of Article 8(2) this is possible if "a risk as referred to in Article 7(4) arises during that period." Conclusions to this chapter are presented in 11.5.

11.2 Establishing an appropriate voluntary departure period

As mentioned above, Article 7(1) requires member states to grant, as part of the return decision, an appropriate period for voluntary departure ranging between seven and thirty days. A shorter period may only be provided on the basis of Article 7(4), which has been discussed in detail in Chapter 10 regarding denial. The provision leaves considerable leeway to member states in deciding on the length of a voluntary departure period and the way that this is done. Evaluations of the Directive show that all member states provide voluntary departure periods within the range of seven and thirty days, as required by Article 7(1), and that many of them actually provide, as a general rule, a period of thirty days or close to it.[2] However, there are also member states that provide for shorter periods. Furthermore, some member states have defined a particular one-size-fits-all period, which they apply to all third-country nationals who are issued a return decision. Others distinguish between different categories of illegally staying third-country nationals, such as rejected asylum seekers and those who never applied for asylum, who receive voluntary departure periods of different lengths.[3] Yet other member states may decide on the length of a voluntary departure period on a case-by-case basis.

In its 2017 Recommendation on making returns more effective when implementing the Directive, the Commission addresses the length of the

2 European Commission 2013, pp. 82-83.
3 See 11.2.5.

voluntary departure period.[4] In particular, it recommends to member states to provide "for the shortest possible period for voluntary departure needed to organise and proceed with the return, taking into account the individual circumstances of the case."[5] This should involve assessing, in particular, "the prospects of return and the willingness of the illegally staying third-country national to cooperate with competent authorities in view of return."[6] It further seems to imply that a period of seven days is the most appropriate, and that a longer period "should only be granted when the illegally staying third-country national actively cooperate [sic] in view of return."[7] A number of these recommendations are reiterated in the revised Return Handbook.[8]

The 2018 recast proposal of the Directive does not incorporate all these recommendations. However, it proposed to change the provision on the length of a voluntary departure period from its current formulation of a period of "between seven and thirty days" to a period of "up to thirty days."[9] This would eliminate the lower limit of seven days and open the door to member states providing periods of six days or fewer even in the absence of the specific exceptional circumstances discussed in Chapter 10.[10] The proposal does add that the length of a period "shall be determined with due regard to the specific circumstances of the individual case, taking into account in particular the prospect of return."[11]

Below, the question of what an appropriate period is will be discussed in detail, including the recommendations and proposals of the Commission. It will specifically focus on the initial voluntary departure period, with the question of extension discussed separately later. In 11.2.1, the focus will be on the notion of 'appropriateness' in the light of the possibility of third-country nationals to effectively enjoy their right to a voluntary return period. 11.2.2 will look at the individual circumstances to be taken into account when deciding on an appropriate period, especially whether member states' concerns about non-cooperation or non-return by the individual should be a factor. The issue of how member states can and should make an assessment of what voluntary departure period is realistic is discussed in 11.2.3. This is followed by consideration of minimum periods that should be granted in 11.2.4, while the question whether member states can assign a voluntary departure period of a specific length based on third-country nationals' prior legal status is briefly addressed in 11.2.5.

4 C(2017) 1600 final, 7 March 2017.
5 *Ibid*, paragraph 18.
6 *Ibid*., paragraph 19.
7 *Ibid*., paragraph 20.
8 C(2017) 6505 final, 16 November 2017, Annex, paragraph 6.
9 COM(2018) 634 final, 12 September 2018, new Article 9(1).
10 Majcher 2020, p. 565, notes that the Commission does not explain why it proposes to depart from the current rule that a voluntary departure period should be at least seven days.
11 *Ibid*.

11.2.1 The 'appropriate' length of the voluntary departure period and effective enjoyment of the right to voluntary return

In addition to a voluntary departure period being granted in the first place, the length of such a period is a crucial element in ensuring the effective achievement of the Directive's objectives. As noted above, only a period that is long enough to allow third-country nationals to effectively meet their obligation to return will be able to ensure that the priority of voluntary return, as a key mechanism to protect the fundamental rights of third-country nationals, fulfils its function. Additionally, it has been noted that voluntary returns play an important role in the overall achievement of the objective of effective return,[12] and in some cases may be the only way in which return can be achieved at all.[13] More generally, a period that is too short to allow third-country nationals a real opportunity to meet their obligation to return would deprive both the individual and the EU member state of the benefits associated with voluntary return.[14] While attention in Article 7(1) is naturally drawn to the specific range of seven to thirty days, it may be more useful to first consider the significance of the fact that any period accorded should be 'appropriate.' The inclusion of this word must be assumed to have specific meaning and adds an additional requirement to the period accorded being within the above-mentioned range. After all, if the purpose was simply to ensure that member states do not provide periods shorter than seven days (unless grounds for shortening can be applied) and no longer than thirty days, this could have been conveyed just as effectively by omitting the word 'appropriate.' In this context, it can be viewed as implying that the period, which is at any rate between seven and thirty days, must *also* be appropriate in relation to something. That something must logically be the objectives of the Directive. And, as discussed, these are twofold: securing effective return and ensuring the protection of fundamental rights during the return procedure.

As regards the first objective, securing effective return is an issue that is already part of the assessment whether a voluntary departure period should be provided in the first place. If the granting of a voluntary departure period would undermine that objective, member states should not grant it.[15] But once it is established that a voluntary departure period can be granted without undermining effective return, there seems little place for using it as an indicator to establish the length of that period. In this respect,

12 See 2.2.2 on the contribution of voluntary returns to the overall number of effective returns.

13 See 5.2.2.3 and 5.3.1 for examples of countries that refused to cooperate in removals and only allowed voluntary returns.

14 See 2.2.1, discussing, inter alia, the perceived 'humane and dignified' nature of such returns, the reduced administrative burdens and costs associated with it, as well as its role in domestic and international politics.

15 RD Recital 10.

it is important to reiterate that the voluntary departure period provides an opportunity for autonomous compliance with the obligation to return, but that the guarantee of effective return lies in the possibility of enforcement.[16] And granting a voluntary departure period only delays that possibility somewhat, a matter which I will also discuss below.

This leaves the second objective, the protection of fundamental rights. In Chapter 10, I have discussed extensively the key role that the granting of an opportunity for voluntary return plays in meeting this objective. I concluded that there is a strong basis for the protection of a right to voluntary return. This objective is not only relevant for the granting of a period, but also for its length. As discussed briefly above, whether a third-country national can indeed enjoy this opportunity is not only a matter of whether he or she is granted a voluntary departure period, but whether this period is long enough to take all the necessary steps, also taking into account the roles of the country of return and of the EU member state. The question of the length of the voluntary departure period is thus intrinsically tied up with the enjoyment of the right to return voluntarily. And if it has already been established that the right to return voluntarily should not be limited by denying a voluntary departure period, the exercise of this right must logically also be effective. This means, at a minimum, that member states should not use their decision on the length of the voluntary departure period to undermine the right to voluntary return. Providing a period that is not sufficient to actually return voluntarily would make this right, and thus the achievement of one of the key objectives of the Directive, illusory. From this perspective, only a period that is sufficiently long to ensure that the third-country national has a realistic opportunity to return voluntarily effectively upholds this objective. What is realistic depends on individual circumstances, and that assessment is discussed further below (11.2.3). The main point here is that, considering the discussion above, Article 7(1) should be read not only as requiring member states to provide any period of between seven and thirty days, but a period within that range that is appropriate to secure for the third-country national a realistic opportunity to return voluntarily.

This also means, in my view, that a voluntary departure period of fewer than thirty days would need to be duly justified as appropriate in the individual case. This would not be the case if the member state automatically accords a period of thirty days.[17] This is not to say that thirty days will automatically be sufficient for the effective exercise of voluntary return. Indeed, there may be situations in which even a thirty-day period is too short to allow a third-country national who is acting with due diligence to return voluntarily.[18] However, since the initial period to be accorded

16 RD Article 8(1).

17 Although this may raise issues over whether member states are allowed to be more generous, see 11.2.4 below.

18 Also see Majcher 2020, p. 554.

is normally capped at thirty days, such situations would then have to be resolved through the application of the provision on the extension of the period, which is discussed in 11.3.[19]

11.2.2 Individual circumstances: a role for concerns about non-compliance and non-cooperation?

As regards the time needed to return, in addition to factors beyond the third-country national's control, there are also clearly factors that depend on his or her own action or inaction. The above-mentioned requirement to provide a period that is sufficient to return voluntarily can therefore be based on the scenario that the third-country national takes all necessary steps towards return with due diligence. In other words, member states should make a realistic assessment of the period necessary if the third-country national would do all that can legitimately be expected of him or her in a timely manner. This is something different, however, than what is suggested in the Commission Recommendation and the Return Handbook.[20] These seem to tie the length of the period to expectations of the extent to which third-country nationals will comply with their obligation to return and whether they will otherwise cooperate during the return process. Before going into the assessment of the circumstances which should help decide the length of the voluntary departure period, it is useful to address the extent to which such expectations about compliance and cooperation are suitable elements of such an assessment.

It should be noted that the requirement to take into account such subjective elements when deciding the length of the voluntary departure period is not part of the Directive itself.[21] From the perspective of member states, it may however make sense to tie the length of the voluntary departure period to willingness to return and to cooperate. As discussed in Chapter 10, both member states currently, and the Commission in its recast proposal, seek to tie indicators of this – such as statements by the third-country national that he or she does not want to return – to a risk of absconding, which in turn would allow them to deny a voluntary departure period. However, such indicators may conflate different elements of the Directive.[22] Furthermore,

19 The Return Handbook, paragraph 6, at p. 31, for example, suggests that granting a longer period, such as 60 days, as a general rule, would be incompatible with harmonisation and common discipline provided for by the Directive, but, in paragraph 6.1, at p. 32, states that if conditions for extension in Article 7(2) are fulfilled, a longer period can be granted from the outset. Also see 11.3.3 on the links between the initial voluntary departure period and extension.

20 C(2017) 1600 final, 7 March 2017, paragraph 18; C(2017) 6505 final, 16 November 2021, Annex (Return Handbook), paragraph 6.

21 Although there is a general requirement to take into account all circumstances of the case, the only limitation on Article 7(1) are the situations set out in Article 7(4) that would allow denial or shortening.

22 See 10.4.3.2.

lacking specific statements by the third-country national, it may be difficult for member states to show sufficiently clearly that the third-country national does not intend to return voluntarily. If a voluntary departure period must be granted despite concerns from the member state about the non-compliance or non-cooperation of the third-country national, they may want to make sure such a period remains short, so that the enforcement of return is not delayed too much.

While connecting the length of the voluntary departure to expectations of compliance makes intuitive sense, there are several reasons why it would be problematic in view of the role of voluntary return in the Directive. First, as noted above, the role of a voluntary departure period is to provide the third-country national an *opportunity* to return of his or her own accord. If this leads to effective return, this is clearly the most preferrable option. But the voluntary departure period does not *guarantee* effective return. The role of safeguarding effective return is clearly allocated to the enforcement stage. The Directive takes into account that when third-country nationals are provided with an opportunity to return voluntarily, they may not make use of it. But giving that opportunity, and thus a level of autonomy, is in itself part of the objective of safeguarding fundamental rights and dignity during the entire return procedure.

It should also be emphasised that effective return is not necessarily the equivalent of the quickest return. The Directive is in fact quite permissive of delays, as long as eventual return is still guaranteed. This is evident from the fact that, as a general point, the Directive would see a delay in enforcement of thirty days, the upper limit of a voluntary departure period in Article 7(1), as acceptable. While it also provides that this "shall not exclude the possibility for the third-country nationals to leave earlier," this formulation can hardly be seen as a clear rule that the voluntary return should be as quick as possible. Furthermore, Article 7(2) provides for possible further extension, which is not time-limited.[23] The Return Handbook even suggests that to account for children attending school, prolongations of a voluntary departure period of up to a school year could be acceptable.[24] As such, the fact that effective return may take slightly longer is not, in and of itself, a reason to limit the voluntary departure period.

The question of compliance and cooperation is also highly unpredictable. This unpredictability is intrinsically tied up with the autonomy accorded to the third-country national to make decisions about the return process. The third-country national's views about return, even when he or she has made statements indicating a reluctance to return, may not be determinative of the outcome of the voluntary departure period. In this respect it should be recalled that the threat of enforcement has also been regarded as a way to 'encourage' third-country nationals to take up voluntary return. As a result of this, as well as other personal factors, persons initially unwilling

23 See 11.3.2.

24 C(2017) 6505 final, 16 November 2017, Annex, paragraph 6.1.

to return voluntarily may change their minds as the moment of enforcement, possibly including detention, draws closer.[25] It is true that uncertainty over the future is something member states have to deal with in other areas of the Directive too, and that this does not preclude them from making decisions on the basis of their best assessment of the risk involved. The clearest example in relation to voluntary return is the risk of absconding. However, the effect of that uncertainty on the return procedure is very different. If there is a risk of absconding, this infringes on the key issue of whether effective return remains possible. As discussed above, the question of compliance and cooperation during the voluntary departure period is fundamentally different, since neither unambiguously affect the eventual possibility to ensure effective return through enforcement. When this key objective of effective return is not immediately at risk, it would make sense for member states to be more cautious in drawing conclusions on the basis of expectations, especially if it has already been established that such risks are not so serious that they would warrant denying an opportunity for voluntary return altogether.

In the light of this, the urge to limit the voluntary departure period in case of doubts that the third-country national will seriously engage with the return process is understandable, but a basis for such limitation is lacking both in the substantive provisions of the Directive and its overarching principles. To the extent that such concerns are part of the member state's decision-making process, they need to be based on objective criteria, but furthermore cannot override the requirement to provide for a fair opportunity to return voluntarily in those cases that there has been no ground to shorten or deny a voluntary departure period in the first place. At most, it is imaginable that such considerations play a part in the assessment of whether a more generous voluntary departure period should be granted than what might be strictly necessary for return. Say, for example, that a member state has established – in line with 11.2.3 below – that a two-week period would provide a realistic opportunity for voluntary return. It may then be feasible to draw upon its concerns, if sufficiently substantiated, that the third-country national might not cooperate in his or her return, and therefore decide to limit the period to those two weeks, rather than granting a four-week period as it may have done in other cases. However, as a general point, such issues of potential non-compliance or non-cooperation should not be primary considerations about the length of the voluntary departure period, which must focus on what is necessary to secure a realistic opportunity for voluntary return.

25 As noted in 10.4.3.2.

11.2.3 Decision-making about the voluntary departure period: a joint effort?

Even when there is a clear obligation on member states to ensure the voluntary departure period provides for a realistic opportunity for voluntary return, assessing appropriateness is by no means an easy exercise.[26] How long it might take to return voluntarily will depend on several factors, which may be on the side of the third-country national, the country of return, the EU member state, as well as external actors, such as those providing return assistance. However, the process of making such an assessment primarily triggers obligations of the third-country national and of the EU member state, respectively. Here, attention will turn to the process of decision-making about the voluntary departure period and the obligations of individuals and member states in this respect. In particular, it will look at the efforts that both can be expected to make to ensure all relevant elements to make an informed decision are available. While this discussion focuses on the question of the length of the voluntary departure period, it has already been noted that, in practice, the return decision will encompass different elements simultaneously, such as whether a voluntary departure period should be granted in the first place, its appropriate length, or whether any measures to prevent absconding need to be imposed. As such, this discussion also has relevance to such decisions described in other chapters.

11.2.3.1 Cooperation obligations of third-country nationals: providing relevant information about their 'starting position'

A first crucial information point for the assessment of whether a voluntary departure period should be granted and what length would be appropriate, is what could be called the starting position of third-country nationals. By this, I mean, for example, whether their country of nationality or habitual residence is known, if they have transited through other countries and, importantly, what kind of evidence they already have at their disposal to show their eligibility for readmission or obtaining new travel documents. Furthermore, their ability to act autonomously, such as the financial means at their disposal, but also any specific circumstances, such as their health, age, dependence on others, and – in relation to this – their need for return assistance, will be part of this. In addition to this factual information about their situation, intentions as regards the destinations that third-country nationals intend to pursue may also be relevant to this assessment, since this may particularly affect the time frame necessary for achieving return.[27]

This implies that third-country nationals can be expected to share such information with EU member states' authorities charged with making decisions about voluntary return. This would speak in favour of a general

26 See, for example, EMN 2014b.
27 See 11.3.

obligation to cooperate with the authorities in this regard.[28] While this makes sense, such a general obligation to cooperate also raises questions as to the consequences of not providing information. I have already discussed how relatively broad notions of 'cooperation' are easily misconstrued as non-compliance with the obligation to return. However, in this case the provision of such information does not impact, as such, on the possibility of return, but rather on the member state's ability to make an assessment of what is an appropriate voluntary departure period. As such, the consequence of 'non-cooperation' should therefore only be related to this element. Simply put, if the third-country national fails to provide necessary information to make such an assessment, member states may be justified – taking into account all other considerations in the next paragraphs – in providing only the shortest period. Such a period may then not provide, in practice, a proper opportunity for the individual to enjoy the opportunity for voluntary return. Given the role of the voluntary departure period as a mechanism to protect fundamental rights, the non-provision of such information may be one of the factors to be taken into account in decision-making about the length of the voluntary departure period, but it cannot be the only decisive factor as all relevant circumstances would have to be weighed to ensure the decision meets the requirement of proportionality. However, non-provision of such information would undermine any later objections that the length of the voluntary departure period was not appropriate to a considerable extent.

The other side of this is that the EU member state should ensure an opportunity to provide such information is accorded. This follows from the right to be heard,[29] which is not specifically addressed in the Directive and as such represents "[a]n important lacuna,"[30] but has been recognised by the CJEU as applicable to return procedures. [31] While this may not always entitle third-country nationals a separate hearing specifically on return, if the return decision is taken simultaneously with the dismissal of residence, it requires member states "to enable the person concerned to express his point of view on the detailed arrangements for his return, such as the period allowed for departure, and whether return is to be voluntary or coerced."[32] This may necessitate, therefore, organising specific moments of contact between the EU member state and the third-country national, during which relevant information can be presented. Not agreeing to having such a contact moment, such as failing to show up for an interview with

28 As foreseen in the Commission's recast proposal, see 1.2.3.
29 CFR Article 42(2)(a), setting out "the right of every person to be heard, before any individual measure which would affect him or her negatively is taken."
30 Progin-Theuerkauf 2019, p. 41.
31 CJEU C-383/13 PPU, *G. & R.* [2013]; C-166/13 *Mukarubega* [2013]; C-429/13 *Boudjlida* [2014].
32 CJEU C-249/13 *Boudjlida* [2014], paragraph 51.

the authorities in charge of return, without justification, may thus have the same consequences as set out above.

11.2.3.2 Due diligence obligations of the member state?

However, it must be wondered whether decision-making about voluntary return can be done effectively only based on obligations of the individual. As has been highlighted at various points in this dissertation, while the concept of voluntary return allocates primary responsibility to the individual, this does not mean that the member state can stay entirely passive. Although member states can generally be expected to help move the return process forward, since this is in their own interest, becoming actively involved in this, in specific aspects, is not a matter of goodwill or discretion. Rather, the effective implementation of the Directive's objectives will sometimes require member states to act. This has been discussed, for example, in the context of the triggering of readmission agreements to make voluntary return possible, and in relation to facilitating access to consular authorities to allow the third-country national to obtain travel documents.

Since the member state is ultimately responsible for ensuring that it provides an effective opportunity for voluntary return, this would imply that it has, to the extent possible, a clear picture of how long it will take for a country of return to meet its obligations regarding readmission and, where necessary, issuance of travel documents, given the specific situation of the third-country national. Even if the third-country national fully cooperates in this respect, this may not be sufficient for such an assessment. As a result, I suggest that the fact that member states must guarantee a fair possibility for voluntary return also implies they can be expected to act with due diligence to gather relevant information themselves, in addition to receiving information from the third-country national about his or her situation. Member states will generally have extensive possibilities to draw on their relevant agencies' and authorities' own experiences with return procedures, as well as any data collected on this. While statistics on the time it takes to organise a voluntary return are not generally published, it can be reasonably assumed that member states collect information about return procedures and practices, including with regard to specific destination countries. Similarly, organisations providing assistance to voluntary returnees may collect such information. For example, online information about IOM-assisted returns in several member states gives rough indications of time frames. For example, the Finnish government website providing information to third-country nationals suggests that "[o]rganising a voluntary return takes an average of two weeks from the application."[33] The Latvian information site notes that, for migrants who have all necessary documents, "travel arrangements will only take a few days, but if a person does not have any identity

33 Voluntaryreturn.fi 2020.

documents, their order and coordination can take a few weeks (depending on the diplomatic missions)."[34] In Hungary, this process "can take up to one month,"[35] whereas in Greece, "you could wait from 2 weeks to several months to go home."[36] IOM in the Netherlands suggests "a flight back to your country can be arranged within 4 weeks after applying for IOM's assistance," although this may take longer, including if the person still needs to obtain a travel document.[37] Since such assisted voluntary return programmes are funded by member states, and they take place within the context of return procedures as governed by the Directive, it must be assumed that member states have access to such information.

Since it is the member state's responsibility under the Directive to issue an 'appropriate' voluntary departure period, it can be expected to use information available to it to make an assessment of such appropriateness. Furthermore, I would suggest that the member state should exert due diligence in collecting information on typical return times. This due diligence may be limited to those cases in which it is reasonable to do so. For example, it may be more difficult to collect accurate information about returns to destinations that are far less frequent. However, the more (voluntary) returns take place to a certain destination country, the wider the experience a member state may be able to draw on. In this respect, it is noteworthy that the Commission's recast proposal would require member states to set up so-called return management systems, which would likely yield further data on barriers and possibilities to return to specific destination countries, as well as relevant time frames.[38]

Another way to inform assessments of what would be appropriate voluntary departure periods may be to draw on legal frameworks governing returns. This would be the case, for example, if a third-country national would return to his or her country of origin or a transit country on the basis of a readmission agreement. After all, these do not only set out specific procedures for readmission, but also specific times in which the country of return must reply to a readmission request and provide travel documents. Although these provide for maximum response times, which in some cases can still be extended, they give at least a rough indication of the time needed to complete the procedure. For example, the fact that the EU-Pakistan agreement provides for a response time of thirty calendar days (extendable to sixty days),[39] would indicate that a voluntary departure period at the short end of the range of seven to thirty days is unlikely to be sufficient. While the Pakistan agreement provides for the longest time

34 IOM Latvia 2020.
35 IOM Hungary 2020.
36 Refugee.info 2020.
37 IOM Netherlands 2020.
38 COM(2018) 634 final, 12 September 2018, Article 14.
39 EU-Pakistan readmission agreement, Article 8(2), although a shorter period is provided for accelerated procedures.

frames of the six agreements used in this dissertation, the agreement with Serbia provides for the shortest. It requires the requested country to reply to a request within a maximum of ten calendar days,[40] which can be extended by another six days in case of legal or factual obstacles.[41] Once a request is accepted, Serbia has a further three working days to issue the necessary travel documents.[42] Without extension or an accelerated procedure being applied, the overall time limit is therefore 13 days before a return could take place. This does not mean, however, that a 13-day voluntary departure period is necessarily sufficient. This will also depend, for example, on the EU member state making a readmission request on the first day (which may in turn depend on the third-country national providing all necessary information). Also, it assumes that departure can take place as soon as travel documents are issued.[43] Furthermore, such time frames on paper must be cross-checked against actual experience, in particular whether the destination state normally meets these deadlines in practice, or whether it routinely requires longer to complete the necessary formalities.

Such information about return procedures must furthermore be connected to the specific situation of the third-country national. This may include, in addition to technical information such as the availability of evidence of eligibility for readmission and travel documents, other circumstances, including any vulnerabilities of the individual, which may require special measures that would further delay the return.[44] The aim here is not to provide specific answers to this, as this would contradict the notion that each assessment of the appropriate length of a voluntary departure period requires member states to draw on available information, and that they can be expected to make reasonable efforts to collate such information. In this way, especially for common countries of return, the member state should be able to justify why a certain voluntary departure period is accorded, especially if this is shorter than thirty days. The more obscure a return destination is, the more difficult this may become. In order to secure a fair chance of returning voluntarily, in such cases the member state may be required to err on the side of caution and issue a period in the upper range of the period provided in Article 7(1).

As such, decision-making about voluntary departure periods can be seen as more than just requiring action from the third-country national. It requires bringing together both information provided by the individual and that acquired by the EU member state. In the interaction between these sources, the best decision can be made. This is thus another area in which

40 EU-Serbia readmission agreement, Article 10(2).
41 *Ibid*., Article 10(3).
42 *Ibid*., Article 2(3).
43 In practice, carriers may refuse to issue tickets until a valid travel document can be shown.
44 See, for example, Rodenburg & Bloemen 2014, pp. 16-18, on specific issues that may arise in relation to third-country nationals with health problems.

the modalities of return may be considered to be 'negotiated' between the third-country national and the EU member state.[45] Furthermore, this process can be seen as reciprocal: the more useful information the third-country national can supply, the more relevant supplementary information member states are likely to be able to use in their decision-making process. Similarly, fewer efforts by the third-country national to provide such information may shift the decision-making process towards the shorter end of the scale, while lack of due diligence of the member state may have to mean the opposite, implying that a longer period may be necessary to safely assume that it will provide an appropriate period for voluntary return.

11.2.4 Minimum voluntary departure periods

In this paragraph, attention shifts back from the process of decision-making to certain substantive requirements on an appropriate voluntary departure period. Specifically, in view of the discussion above, it looks at the legitimacy of particularly short voluntary departure periods, such as those of seven days or close to it, as well as the recommendation to provide a period that is as short as possible. The issue of how short such a period can be has always been one of the contentious issues of the Directive and, as discussed, member states may be inclined to try and minimise this period.[46] But there may be limits on the extent that they can do so.

11.2.4.1 Extremely short voluntary departure periods

Article 7(1) does not, at first glance, distinguish a situation of granting a short period, such as seven days, from a situation in which a much longer period is provided.[47] However, the previous chapters have discussed the complexity of the process of ensuring voluntary return, with many elements outside the immediate control of the third-country national. The various steps to be taken, and barriers encountered – both legal and practical – by certain groups of third-country nationals, such as stateless persons, already indicate that quick return is not always feasible.[48] Furthermore, the various time frames provided by IOM above, for example, all exceed the period of seven days, often considerably. This does not mean that returns cannot take place quicker, but in most cases this is unlikely. Similarly, the time frames provided in readmission agreements strongly point towards the fact that seven days are unlikely to be sufficient, especially when the response times allowed to countries of return are significantly longer than that.

45 See the characterisation of expulsion processes as 'negotiated' in 7.3.4.

46 Acosta 2019a, p. 39, notes, for example, that several member states, such as the Czech Republic, France and Hungary, pushed for a shorter minimum voluntary departure period than the proposed seven days during the negotiations on the current Directive.

47 It simply provides that such a period must be between seven and thirty days.

48 See 4.3 in relation to readmission and 8.3.4 regarding travel documents.

It must be emphasised that such short periods are not prima facie incompatible with the Directive. It explicitly provides for them and, in a general sense, there may indeed be situations in which a period of seven days (or slightly more), would be enough to allow a realistic opportunity of voluntary return. However, the counterpoint to that is that this would likely only be the case in the most advantageous situations, such as when the third-country national is already in possession of valid travel documents and transport can be arranged at short notice. As such, given the many counter-indications, member states would be advised to at least work on the basis of a strong assumption that a seven-day period would be insufficient to meet the requirement of an effective opportunity of voluntary return. Additionally, it may be assumed that the shorter the period provided, the stronger the justification must be from the side of the member state that this is appropriate, in keeping with the principle of proportionality, which is key to the provisions on the voluntary departure period.[49] As such, the member state must have very strong reasons to believe, in the specific case, that return can duly take place within seven days.

The problem of short periods would only be compounded if the Commission's proposal to provide periods of "up to" thirty days were to be adopted. In that case, voluntary departure periods of six days or fewer could be provided without the need to justify this in relation to the grounds for exceptions. However, in line with the above, the presumption of incompatibility of such a period with the objectives of the Directive, and thus the need to provide factual justification for this, would need to be applied even more strongly.

11.2.4.2 The shortest period possible?

As already noted, while I agree with the Commission that a measure of flexibility should be observed in according voluntary departure periods, I disagree that this should be based on ensuring the voluntary departure period is as short as possible. Rather, it must be based on effective enjoyment of the opportunity of voluntary return. This is a difference in outlook, which may be relevant in the way that member states deal with voluntary return. However, at least theoretically, the two approaches would be compatible. This would be the case if the member state would make an assessment of what period is necessary to secure that enjoyment, but then to limit the time frame strictly to that period, and not more. However, this does not mean that a member state would not be implementing the Directive effectively if it would nevertheless provide for a more generous period. After all, the Directive allows for more favourable treatment of third-country nationals.[50] Also, while Article 7(1) says that the provision of a voluntary departure "shall not exclude the possibility for the third-

49 See 10.2.3.2.
50 RD Article 4(3).

country nationals concerned to leave earlier," this formulation can hardly be seen as implying a clear obligation to do so. As discussed, the provision of a voluntary departure period secures for the individual a possibility, within limits, to make autonomous choices about how, where and when to leave, to ensure that this is most compatible with his or her fundamental rights and dignity. Although this cannot be used to avoid eventual return, the return of a person on the thirtieth day of the voluntary departure period is no less legitimate than on any earlier day, even if he or she was already in possession of authorisation of admission, travel documents and transport in the days before. In this respect, the discussion above about the permissiveness of the Directives of reasonable delays should also be recalled. As such, the Directive can be seen as prioritising voluntary return with some delay over the quickest possible return if such a return would be less able to safeguards fundamental rights and dignity – provided this does not undermine effective return.

From this perspective, the Commission's recommendation can only remain that: a call on member states to limit the duration of the voluntary departure period, but without a clear legal basis in the Directive to expect this. From my discussion of expectations of compliance and cooperation in 11.2.2, it should also be evident that the recommendation not to provide periods longer than seven days unless the third-country national actively cooperates is particularly problematic, and would, in my view, lead to clear incompatibility with the Directive in all but those cases in which it can established that this period still provides for a realistic opportunity for voluntary return.[51]

11.2.5 Assigning voluntary departure periods on the basis of the third-country national's (prior) legal status

Although this practice does not seem to be widespread, a short note may be in order about member states providing specific voluntary departure periods on the basis of the third-country national's prior legal status. For example, an evaluation of the implementation of the Directive in 2013 showed that Denmark provided pre-set voluntary departure periods of 15 days to rejected asylum seekers and of seven days to other third-country nationals.[52] This is a slightly more sophisticated approach to the provision of a 'one-size-fits-all' voluntary departure period mentioned in the introduction to this chapter. Whilst a person's prior residence may have to be taken into account in establishing the length of the voluntary departure period, it is doubtful that setting specific voluntary departure periods only

51 For a similar conclusion, see Majcher 2020, p. 555.

52 European Commission 2013, p. 83. Denmark also provides for a 100-day period for victims of trafficking. Switzerland is identified as another state that makes distinctions based on prior status.

based on prior legal status is compatible with both the criterion of appropriateness and of an individualised approach.

In this context, it is important to note that the Directive only recognises one legal category, being 'illegally staying third-country nationals.'[53] This covers a range of situations, such as persons who lost their earlier right of stay or residence, visa-overstayers, persons who had their asylum applications rejected, as well as those who entered irregularly and never attempted to apply for a right of residence at all. However diverse these backgrounds may be, the fact that they are currently 'illegally staying' within the meaning of the Directive is determinative, and any action from member states and individual responsibilities must be based on this. This is not to say that all their situations are the same in relation to return. For example, those who had prior residence rights in an EU member states may have engagements and obligations there, which need to be dealt with before departure, that perhaps irregular migrants do not. Rejected asylum seekers, even if their claims have been rejected, may face certain constraints in ensuring safe return, for example if the rejection was based on a so-called internal flight or relocation alternative. At the same time, it cannot be said in the abstract that irregular migrants would never face such constraints.

This is why the requirement that decisions on return, which include the setting of the voluntary departure period, must be done on the basis of individual circumstances, to ensure that such a period is appropriate and does not undermine the effective enjoyment of an opportunity to comply voluntarily with the obligation to return. There may indeed be reasons for a member state to apply different voluntary departure periods to different cases. However, in my view, the Directive does not leave space for treating certain categories of illegally staying third-country nationals less advantageously than others, solely on the basis of their legal status prior to the return decision.

11.3 Extending a voluntary departure period

According to Article 7(2), member states

> *"shall, where necessary, extend the period for voluntary departure by an appropriate period, taking 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."*

Two questions are thus central to the extension of a voluntary departure period. First, when it should be considered "necessary" to extend a voluntary departure period (11.3.1). And second, how and when the specific circumstances of the individual case should be "taken into account" to decide on the extension of the voluntary departure period and the appro-

53 RD Article 2(1).

priate length of such an extension (11.3.2). Attention will also be paid to the links between the initial period and the extension (11.3.3).

11.3.1 The extension of a voluntary departure period 'where necessary'

In relation to the necessity of an extension of a voluntary departure period, the Return Handbook suggests the following:

> *"The term 'where necessary' refers to circumstances both in the sphere of the returnee and in the sphere of the returning State. Member States enjoy discretion relating to the substance and the regulatory depth of their national implementing legislation on this issue."*[54]

However, this neither indicates more clearly what 'necessity' means in the context of voluntary return, nor how an assessment of the above-mentioned circumstances should take place. As regards the first issue, the logical reference point for defining necessity is again to look at the objectives of the Directive: ensuring effective return and safeguarding fundamental rights, with the priority of voluntary return being a key mechanism for the latter. And, as discussed in 11.2.1 above, if this priority is to have practical meaning, the voluntary departure period must ensure that its length provides for an effective opportunity for the third-country national to comply with the obligation to return, without being subjected to enforcement measures. When the initial voluntary departure period ends, member states are at a crossroads: they must decide either to continue giving the third-country national an opportunity to meet the obligation to return voluntarily, by extending the voluntary departure period, or they must move ahead with enforcement. [55] The scheme of the Directive only leaves these two options as long as the return decision remains in force.[56] As such, at its most basic, the necessity of extension arises when the interests of the individual in having an opportunity to meet the obligation to return voluntarily (in particular the protection of his or her fundamental rights), continues to outweigh the interest of the member state in enforcing the return decision.

An initial clue how to weigh these elements against each other – the second issue in relation to the quotation from the Return Handbook above – may be found in Article 8(1) of the Directive, which deals with enforcement. According to Article 8(1) member states "shall take all necessary measures to enforce the return decision if … the obligation to return has

54 C(2017) 6505 final, 16 November 2017, Annex, paragraph 6.1.

55 RD Article 8(1).While the Directive provides for circumstances in which removal may be postponed under Article 9, this does not affect, strictly speaking, the fact that the procedure moves on to the enforcement stage.

56 Which will be the case unless they decide to grant the third-country national an autonomous residence permit or other authorisation offering a right to stay after all, see RD Article 6(4).

not been complied with within the period for voluntary departure granted in accordance with Article 7." As such, the question of compliance is a key issue here. In this way, the question of extension is fundamentally different from that of the granting of the initial period. Regarding the latter, I have suggested, the member state's expectations of compliance should not play a central role.[57] At that point, no concrete information exists about the third-country national's compliance with the return obligation, as a matter of fact and not just as a matter of expectation. This is different once the initial voluntary departure period has ended and the third-country national has had an opportunity to take the steps to meet this obligation. In that situation, the member state does not only have a factual basis for assessing compliance but, in view of Article 8(1), should make such an assessment to determine whether enforcement is required.

This also implies the reverse: if, at the end of the initial voluntary departure period, the member state does not find that the third-country national has failed to comply with their obligations, there is no legal basis for enforcement. In this respect it is important to emphasise again that the continued presence of the third-country national in the member state is not, in and of itself, a sufficient indicator of a failure to meet the obligation to return. As discussed, this obligation combines both the desired end result (departure) but also the process of going back.[58] It is quite possible, both practically and legally, that the third-country national takes all necessary steps, but that the desired result is not achieved by the end of the voluntary departure period. Although member states should make a best estimate of the time necessary to achieve return, an element of uncertainty always remains, and there may be a range of factors affecting the actual time frame for each action. For example, the arrival of documents needed in support of a readmission application may be delayed, the third-country national's appointment with the consular authorities may be postponed, he or she may fall ill, or a plethora of other factors may cause the voluntary departure period to be insufficient to complete all steps. A key question, therefore, will be whether such delays are the result of actions or omission by the third-country national, in which case they could be qualified as non-compliance with the obligation to return.[59] However, if this is not the case, and the third-country national can reasonably be seen as having acted with due diligence, and within their possibilities, this cannot be qualified as non-compliance.

This important distinction between non-return and non-compliance notwithstanding, there may of course be cases where there are reasons on

57 See 11.2.2.

58 See 1.3.1.

59 See, by analogy, CJEU C-146/14 PPU *Mahdi* [2014], in which it was found that the fact that a third-country national had not received travel documents could not, in and of itself, be considered sufficient evidence of not having cooperated. See in particular paragraph 80, in which the CJEU makes clear that this may be the case if such a lack of documents can be "attributed solely" to the actions of the individual.

the side of third-country nationals that have contributed to non-return. For example, they may not have submitted evidence for readmission or documents, or failed to make an appointment with consular authorities with due diligence. They may have delayed reaching out to assistance providers even though such assistance would be essential to achieve return. In such a case, non-return can – at least in part – be linked to the failure of the third-country national to take the necessary steps to return with due diligence. Does that then mean that the voluntary departure period should not be extended, and that enforcement should take place automatically? This, in my view, is not always the case. First, Article 7(2) is formulated as imposing a clear obligation on member states to extend the voluntary departure period where necessary. However, this does not mean member states could not decide to extend a period in the absence of a necessity which is grounded in the fact that the third-country national has fully complied. This would be more favourable treatment of the third-country national that is allowed under the Directive, provided it still in line with its objectives.[60] Furthermore, this is not only a question of necessity, but of proportionality. This means that, if member states are faced with the question of extension of the voluntary departure period of a person who has not fully complied with his obligation, certain factors need to be taken into account, on a case-by-case basis. In particular, the member state will have to consider whether the extension would harm the prospect of effective return. This would necessitate considering whether extension would still lead to voluntary return within a reasonable time period. If this is the case, this may still give reason to extend, as this would preserve the priority of voluntary return as well as the objective of effective return.[61] Here, however, there is a clear role for assessing whether a person who has not taken all necessary steps in a timely manner can be expected to do so in the near future. In contrast to previous discussions, there seems to be considerable space here for member states to take account of the third-country national's past behaviour, as well as any statements about intention of non-compliance.

11.3.2 Specific circumstances of the case to be taken into account

As noted above, Article 7(2) does not only require member states to provide an extension with an appropriate where necessary, but they must also to take into account the specific circumstances of the case. In this way, Article 7(2) reinforces the general principle, relevant throughout the Directive's procedure, that all decisions should be taken on a case-by-case basis. However, it lists, non-exhaustively, some specific circumstances that member states should, at a minimum, take into account: the length of stay, the existence of children attending school and the existence of other family

60 RD Article 4.

61 Again, see the tolerance of Directive of reasonable delay if this allows for voluntary return.

and social links. This invites further consideration, first, of what it means to take such circumstances 'into account' and secondly, whether there are other circumstances that are relevant other than those listed in Article 7(2).

11.3.2.1 What does it mean to take circumstances 'into account'?

According to the Return Handbook, "[m]ember states enjoy a wide margin of discretion in determining whether the extension of the period for voluntary departure would be 'appropriate.'"[62] This discretion would seem to bear out in the fact that member states are only required to 'take into account' certain individual circumstances. However, despite that requirement not being very strong, it must be given specific meaning within the context of EU law and cannot simply be left up to states to fill in. One way to approach this is to look a bit deeper than just the circumstances listed. These do not simply represent practical matters with which third-country nationals and member states are faced in return procedures. They can be said to be further elements of ensuring a return in line with fundamental rights and dignity. As noted in Chapter 10, the CJEU, in *Zh. and O.*, acknowledges the important role of voluntary return in this respect, but does not outline explicitly which fundamental rights might be at stake.[63] From the process set out in the Directive, it can be surmised that this relates, first and foremost, to the protection of personal integrity, the prohibition of inhuman or degrading treatment, and the protection of the right to liberty, which may all be affected when enforcement takes place. However, it is possible to take a wider view. This could include the perspective that giving the third-country national and their family time to get their affairs in order in different aspects of their lives, so as to minimally disrupt it, is itself a way to contribute to a humane and dignified return.[64]

Another perspective on this is that the circumstances mentioned in Article 7(2) are not only practical issues or specific interests of the third-country national, but rather that they can be framed in fundamental rights

62 C(2017) 6505 final, 16 November 2017, Annex, paragraph 6.1. It should be noted that this formulation is already problematic, since it suggests that member states should grant an extension where appropriate. Rather, Article 7(2) clearly requires this "where necessary", which – as discussed above – provides for clear obligations. The appropriateness, in the formulation of Article 7(2) relates to the length of an extension, when granted. Although the two issues (granting and length) are interconnected, the formulation in the Return Handbook may be cause for confusion in this respect.

63 See 10.2.3.

64 See, for example, Iran-US claims tribunal, *Yeager* [1987], paragraph 49, finding that "[o]ne of the procedural requirements almost unanimously recognized [in relation to expulsion] is that a State must give the foreigner to be expelled "sufficient time to wind up his affairs" (referring to Pellonpää 1984, p. 420). In the specific case, it found that the expulsion "was carried out with unnecessary haste and in violation of minimum procedural standards under customary international law" (paragraph 50). While this finding was mainly related to leaving behind assets due to the sudden nature of a (wrongful) expulsion, it may have wider relevance.

terms themselves. The issue of school-going children, for example, can easily be reframed as a question of the extent to which the member states must mitigate any negative impact on the right to education, as guaranteed by the Charter of Fundamental Rights.[65] And as a matter of ensuring that the best interest of the child of the child are a primary consideration in any action by the member state.[66] Similarly, the references to the length of stay and family and social links are all issues that have been subject of questions related to the protection of private and family life under the Charter or the ECHR.[67] Negative impacts on these rights cannot be assumed to be sufficient to negate the obligation to return as such – otherwise a return decision should not have been issued in the first place. But states should consider whether such negative impacts can be mitigated by providing a longer period for voluntary return, and how this balances out against possible further delay of enforcement. From this perspective, the question of extension, in the light of these circumstances, requires more than just taking them into account. It comes back, again, to the need to make a proper proportionality assessment of the impact of such a decision.

In this way, it can be surmised that the role of the circumstances listed in Article 7(2) can both affect the question of the necessity of the extension and the appropriate length of such an extension. Even in the absence of circumstances above in relation to compliance with the obligation to return, the need to avoid disproportionate harm to certain rights may still necessitate extension. On top of this, these circumstances may provide for a guide to the appropriate length of that extension. For example, if the disruption of a child's education due to imminent return would be of such nature that it would make an extension of the return necessary, this extension must be long enough to mitigate this impact. As noted, this may lead to quite long extensions, such as suggested in the Return Handbook, which considers a school year as appropriate in certain situations.[68] Similarly, an extension may be necessary to ensure family unity is not disproportionately affected, for example, in cases where the third-country national has already received a return decision, but a family member's claim to legal stay has not been finally assessed. This would most likely mean an extension by a period sufficient for the family member's claim to be finally assessed should be considered appropriate within the meaning of the Directive. How such assessments will work out in each individual case is impossible to say in the abstract. However, when fundamental rights are at stake, it is important that member states give due consideration to them as rights, which gives particular weight to the requirement to take certain individual circumstances into account. This may therefore not be as discretionary as the Handbook suggests.

65 CFR Article 14.
66 CFR Article 24(2).
67 CFR Article 7; ECHR Article 8.
68 C(2017) 6505 final, 16 November 2017, paragraph 6.1.

11.3.2.2 Financial interests and property rights as circumstances to be taken into account?

Article 7(2) of the Directive does not exhaustively list the circumstances to be taken into account with regard to extending a voluntary departure period. Member states can thus add more circumstances to this list, but not remove any. This raises the question whether there are any other circumstances which member states can be expected to take into account, even though they are not expressly mentioned in the Directive. In the light of the discussion of the connection between those circumstances and fundamental rights, as well as the interplay with other EU legislation, at least one other specific example can be offered. This relates to the financial and property interests of the third-country national.[69] These interests may be affected by the obligation on the third-country national to return. For example, it may take a certain amount of time to transfer assets or dispose of them in the EU member state. This might particularly be the case if the third-country national has a business or owns real estate in the EU member state. In this respect, it should be noted that the right to own, use, dispose of and bequeath lawfully acquired possessions is specifically protected by the Charter of Fundamental Rights.[70] And that an appropriate voluntary departure period may have to be provided to safeguard that right. Additionally, the Iran-US Claims Tribunal's finding that, as a matter of customary international law, persons expelled should normally be provided with time to wrap up their affairs in the host state, is also of relevance here.[71] In the particular case, the Tribunal made this finding specifically in relation to the fact that the individual had property in Iran, which he had not been able to ship out or dispose of properly, since the expulsion had been so sudden.

While the Charter only refers to "lawfully acquired" possessions,[72] and the Tribunal's finding also came in relation to an alien who had, up to that point, been lawfully resident, this does not mean that financial or property interests of third-country nationals who have always been irregularly staying in a member state could not also play a role in relation to the voluntary departure period. It could be argued, for example, that the right to leave also encompasses an element to do so without losing one's possessions. More concretely, the CMW sets out the principle that "[i]n case of expulsion, the person concerned shall have a reasonable opportunity before or after departure to settle any claims for wages and other entitlements due to him or her and any pending liabilities."[73] The CMW does not

69 Strasbourg Declaration, Article 5; Inglés 1963, draft principle I(h) ; Uppsala Declaration, Article 5.

70 Article 17(1).

71 Iran-US claims tribunal, *Yeager* [1987], paragraphs 49-50.

72 Also see Hofmann 1988, p. 313, although talking about the departure of persons from their own countries: "Every emigrant should be entitled to take along, as a minimum, all the goods which the legal order of his or her country considers as personal property."

73 CMW, Article 22(6).

differentiate between lawfully and unlawfully staying migrant workers in this regard. While the CMW has no effect in EU law, and has therefore been left out of this analysis, a similar principle could be read into Directive 2009/52 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals (the Sanctions Directive).[74] It imposes obligations on member states to ensure that any outstanding renumeration to an illegally employed third-country national is paid.[75] While the Sanctions Directive in principle requires member states to ensure any claims for back payment can also be made after return, if any steps need to be taken in the EU member state beforehand, the effective implementation of that Directive could require that the voluntary departure period is extended, at least up to such a point that effective claims to back payments can be made.

Other circumstances may be relevant as well. In Chapter 7, for example, I discussed the issue of choice of destinations, which may impact on the timing of the return. Member states should thus also take such a situation into account as part of the whole set of circumstances to consider, to see for how long a voluntary departure period should be extended. Similarly, the possibility that third-country nationals may prefer to apply for a passport, rather than a single-use travel document, discussed in Chapter 8, may also play a role. Neither would appear to be sufficient, in and of itself, to require the extension of a voluntary departure period, but if the question of extension arises, these may also have to be taken into account.

11.3.3 The links between the initial voluntary departure period and extension

While there are some clear differences between the provisions on the initial voluntary departure period and its extension, including on what basis member states' obligations are triggered, the two may also interact. This may particularly be the case as regards the initial length of the period and the need for extension. If the member state has issued a voluntary departure period that takes a minimalist approach – only assigning such a time frame as would likely be strictly necessary to achieve return – it may have to be more cautious in concluding that non-return should be attributable to failure of the third-country national to meet his or her obligations. If the initial period was more generous, however, there may be a larger burden on the third-country national to provide reasonable justifications why return has been delayed. In this way, the initial voluntary departure period and the extension should be seen to act as communicating vessels. In this context, it can also be assumed that, if the member state has failed to make an assess-

74 OJ L 168/24, 30 June 2009, pp. 24-32.
75 Directive 2009/52, Article 6.

ment of which initial voluntary departure period is 'appropriate' within the meaning of Article 7(1), and has provided only a short period, it must have particularly weighty and substantiated reasons for considering that non-return equals non-compliance on the part of the third-country national.

It may furthermore be wondered whether member states could already take circumstances enumerated in Article 7(2) into account when deciding on the length of the initial period. There seems no reason in the Directive for this not to be possible as a general principle. However, the initial voluntary departure period is limited to thirty days by Article 7(1). As such, individual circumstances may lead a member state to provide for a longer voluntary departure period than strictly necessary to fulfil the obligation to return. But if those circumstances require longer than thirty days, the question of extension will again become relevant. The Return Handbook suggest that, in certain cases, however, the decision on the initial period and the extension can be taken together. It notes that "[a]n extension beyond 30 days can be granted from the outset … if justified by the individual assessment of the circumstances of the case," and that this is not subject to a requirement to first issue a thirty-day period and then to extend it.[76] Indeed, strictly speaking, Article 7(2) only speaks about extending the period for voluntary departure in a general manner, and does not indicate that this can only be done after the initial period has lapsed.[77] This would mean, I suggest, that questions of compliance and cooperation, which normally will come into the picture at the time of the extension decision, will have to be put aside, as in the case of any decision on the initial period.[78] It is less clear how the Handbook came to the conclusion that the period (initial plus extension) should then necessarily be within the range of thirty to sixty days, since the extension is not limited to thirty days and can indeed be much longer.[79] If Article 7(1) and Article 7(2) are applied at the same time, this also means that an immediate extension cannot be capped at a maximum period that is not firmly rooted in the necessity of the extension and/or the specific circumstances of the case.

11.4 Cutting short a voluntary departure period already granted

Once a voluntary departure period of a certain length is provided, whether initially or including extension, it does not mean that member states have no more possibilities to intervene until the end of that period. Article 8(2) of the Directive states that a member state may only enforce a return decision after the voluntary departure period has expired "unless a risk as referred

76 C(2017) 6505 final, 16 November 2017, Annex, paragraph 6.1.
77 Although normally the logic of the procedure would dictate this.
78 See 11.2.2.
79 C(2017) 6505 final, 16 November 2017, Annex, paragraph 6.1.

to in Article 7(4) arises during that period." This implies that member states have a possibility to cut short a voluntary departure period already granted. However, this must be connected to grounds which have been discussed at length in Chapter 10: a risk of absconding, the dismissal of an application as manifestly unfounded or fraudulent, or a risk to public policy, public security or national security. Not all of these, however, seem applicable. This goes particularly for the dismissal of an application as manifestly unfounded or fraudulent. First, such dismissal is not a "risk" and the text of Article 8(2) suggests that it only applies grounds for denial of a voluntary departure period that constitute risks. Second, the question of whether an application was manifestly unfounded or fraudulent needs to be addressed at the moment when the return decision is issued.[80] Even though new information might emerge that the third-country national acted in a fraudulent manner during his or her application, Article 7(4) sets out that it can be applied only if the *application* was dismissed for this reason. This is therefore a point of fact when the return decision is issued and not subject to change. As such, the past dismissal of an application as manifestly unfounded or fraudulent cannot form a basis for cutting short a voluntary departure period already granted.

In contrast, the question of whether a third-country national can be considered to pose a risk to public policy, public security or national security may be subject to change. New information might emerge, or circumstances might change. Typically, this would be the case if the third-country national is found to have committed (or being suspected of) a criminal offence during the voluntary departure period. Although there is no case law from the CJEU on this, I would venture that the Court could find, depending on the severity of the threat, that the state's interests in protecting public policy, public security or national security could outweigh the third-country national's interest not only in having a voluntary departure period, but also the right to legal certainty that might be affected by that period suddenly being rescinded. In addition to the threat having to reach a certain level of severity, it should also be reiterated that this threat should be sufficiently real and continue into the future.[81] The mere fact that the third-country national has committed or is suspected of a criminal offence, if this is unlikely to be repeated, and depending on the severity of the offence, may not be sufficient.

Perhaps the most likely scenario in which the rescinding of a voluntary departure period might arise is in relation to the risk of absconding. Again, this is a situation that might change after the return decision has been issued. If there is a sufficiently real risk of absconding, this would legitimise the revocation of a voluntary departure period. After all, absconding fundamentally jeopardises the achievement of the Directive's main objec-

80 See 10.5.

81 CJEU, C554/13 *Zh. and O.* [2015] and the discussion thereof in 10.3.

tive of ensuring effective return. It would be odd if member states would be allowed to deny a period for voluntary departure at the time of issuing the return decision to safeguard this objective, but not later on if the circumstances so demand. However, the strict requirements for denying a period for voluntary departure need to be observed in this situation as well. Of particular importance in this situation is that the circumstances must relate clearly to the risk that the third-country national will disappear from the member state's view. The mere fact that he or she is not doing enough to return voluntarily, even if they say they have no intention of returning, is not sufficient.[82] After all, the possibility that the third-country national will not return voluntarily is part of the procedure set out in the Directive, with its enforcement stage following the voluntary departure stage. As such, the possibility to revoke the voluntary departure period cannot be abused to pressure the third-country national into taking certain steps in the return procedure or to have him or her 'cooperate' with that procedure.[83]

Perhaps the clearest situation in which the prospect of cutting short the voluntary departure period would arise is when third-country nationals fail to meet the obligations imposed to prevent them from absconding, such as regular reporting or staying in a certain place. These directly connect to safeguarding the possibility of enforcement. As with other issues, this must be regarded in the context of the circumstances of the case. This would mean, at a minimum, that the third-country national is allowed to put forward reasons for not complying, such as illness or other facts making compliance impossible. Furthermore, the principle of proportionality may require the member state to exhibit some flexibility. For example, if the third-country national fails to report to the authorities once, or once violates the obligation to stay in a certain place, this may not be enough reason to rescind the voluntary departure period, unless there are other objective indications that the third-country national will likely abscond.

In cases where no measures to prevent a risk of absconding have already been imposed, the possibility of cutting short the voluntary departure period must also lead to a consideration if such measures could still be imposed effectively. While the decision on the imposition of such measures would normally be made at the moment of the initial granting of the voluntary departure period, Article 7(3) allows such measures to be imposed "for the duration of the period for voluntary departure." This, in my view, does not exclude the possibility of imposing them later if the third-country national's situation changes. This would also be consistent with the obligation on member states to prevent absconding more generally, as well as the preservation of the priority of voluntary return if this can be done without undermining effective return.

82 See 10.4.2.2.

83 On the matter of undue pressure, see 7.3.4.

11.5 Conclusions

This chapter has focused on the various elements of the length of the voluntary departure period, both the one initially granted and questions of extension or cutting short that period. With regard to the initial period, it was found that it should be long enough to provide third-country nationals with an effective opportunity to return voluntarily. From this perspective, not every period of between seven and thirty days is 'appropriate' in the sense of the Directive. If member states choose to provide an initial period shorter than the upper limit of thirty days set out in Article 7(1), they can be expected to justify this choice on the basis of an assessment of what would realistically enable individuals to take all necessary steps, although this may be based on the assumption that they take all these steps with due diligence. Making such an assessment requires joint and reciprocal efforts from third-country nationals and member states. Third-country nationals should provide relevant information on, for example, evidence for readmission, travel documents, financial constraints, the need for assistance and personal characteristics and vulnerabilities. If such information is not provided, member states may more easily justify granting shorter periods. However, they can also be expected to exercise their own due diligence as regards the likely return times, including using their own insights, information from service providers, and the contents of agreements or arrangements on which the return will be based. The fewer the efforts made by member states in enacting this due diligence, the more they should incline towards a voluntary departure period of thirty days, taking into account all other relevant circumstances too. Member states should act on the presumption that a period of only seven days, or close to it, will normally be insufficient to meet the requirements of an 'appropriate' period. Decisions on the length of a voluntary departure period can also not be made purely on the basis of the prior legal status of the individual.

As regards extension, at a minimum this should be granted when this must be considered necessary, which is the case if the interests of the individual to have an opportunity to meet the obligation return voluntarily continues to outweigh the member state's interest in enforcing the return decision. Such necessity arises, first of all, when there is no evidence that the fact that return has not yet materialised at the end of the initial period is due to acts or omissions of the individual. If there is evidence of lack of due diligence, member states could still be expected to extend the voluntary departure period if they believe that voluntary return could be achieved within a reasonable period and the individual will still take the necessary steps. Furthermore, if enforcement of the return decision would disproportionately harm the rights of the person involved or family members, such as in respect of education of children, maintenance of family life, health issues or financial or business interests, an extension may still be necessary. In addition to taking account of what is realistically necessary for voluntary return, the length of the extension should also be based on the circum-

stances mentioned above, including those specifically listed in Article 7(2). Other elements, such as ensuring third-country nationals can leave to their preferred destination,[84] or the facilitation of the possibility of applying for a travel document with the widest possible scope,[85] should also be taken into account where relevant.

When a voluntary departure period has been granted, either initially or after an extension, this may only be cut short if there is a change of circumstances creating a risk to public policy, public security or national security, or a risk of absconding. In assessing this, all requirements set out in Chapter 10 should be observed. The mere fact that third-country nationals are not exercising due diligence or are uncooperative do not fall within the scope of Article 8(2) of the Directive and can therefore not be grounds for cutting short a voluntary departure period, unless there are specific circumstances related to such non-cooperation that would indicate a risk of absconding, such as non-compliance with measures to prevent this. However, cutting short a voluntary departure period must be proportionate and therefore not every instance of non-compliance, especially if it is unlikely to be repeated, can be sufficient to take this step. If a risk of absconding arises during the voluntary departure period, and no measures to prevent absconding have yet been imposed, member states must consider the efficacy of doing this before they can decide to cut short the period.[86]

84 See 7.2.
85 See 8.3.3.
86 In line with 10.4.6.