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

Mommers, C.M.F.

12 Conclusions

12.1 Introduction

This dissertation started by identifying the concept of voluntary return as a central but poorly understood element of the procedure for returning illegally staying third-country nationals from EU member states, as set out in Directive 2008/115 (the Returns Directive). According to the Directive, member states should give preference to voluntary return over removal and the use of coercive measures, to the extent that this does not undermine the purpose of the return procedure. The role of voluntary return is mainly to allocate responsibility for the successful conclusion of the return procedure to the individual, who is then required to take action to ensure his or her irregular stay is ended. It was noted that the formulation of the two component parts of voluntary return in the Directive, the obligation to return and the provisions on the granting, shortening or denying of a voluntary departure period, requires clarification on many points, and risks making the responsibility of the individual almost entirely open-ended. This further risks leaving the individual at fault for any situation in which return has not materialised and more generally could undermine the Directive's ability to provide for fair and transparent rules for return procedures.

On this basis, this dissertation set out to clarify the boundaries of the responsibility allocated to third-country nationals, as encompassed by the concept of voluntary return in the Directive. It specifically did so by breaking down the two above-mentioned component parts separately. This meant, first, in regard of the obligation to return, clarifying which actions third-country nationals can be expected to take to ensure they meet this obligation (*research question 1a*). And, conversely, whether there are any actions that third-country nationals cannot be expected to take, even if such actions would theoretically contribute to effective return. And if so, which actions this would comprise (*research question 1b*). Doing so further required focusing on certain types of (sometimes overlapping) actions that could be considered as crucial to the process of return: seeking readmission to another country (*return element (i)*); obtaining travel documents to enable return (*return element (ii)*); and making practical arrangements for return and leaving the EU member state (*return element (iii)*).

Second, this meant, in respect of the application of the voluntary departure period, clarifying the nature and extent of third-country nationals' entitlement to a voluntary departure period, in view of the priority of voluntary return and the specific exceptions to the granting of such a period

in the Directive (*research question 2a*). And additionally, clarifying how the provisions in the Directive regarding the initial length, extension and shortening of the voluntary departure period should be interpreted so that they give effect to the Directive's objectives (*research question 2b*).

I have argued that a proper understanding of the responsibility of third-country nationals can best be achieved by looking at it not only from the perspective of the relationship between these individuals and the EU member state that has issued the return decision. Rather, it requires bringing into the picture the key role of the country of return, without which no voluntary return can be achieved. I have framed this as a triangle of relationships, encompassing rights and obligations between the individual and the EU member state, the individual and the country of return, and the country of return and the EU member state. This brings into view not only the 'internal' dimension of the responsibility to return – the relationship between the individual and the member state – but also the 'external' dimension, through the other two relationships, which will impact on the achievement of voluntary return. As such, I have contended, the best understanding of responsibility for voluntary return is gained by ensuring the provisions of the Directive are read, as much as possible, consistently with that external dimension. The relevant rights and obligations, emerging out of EU law, customary law, international human rights law, and, to a lesser extent, multilateral treaties and readmission agreements (with a supporting role for 'soft law instruments) were discussed in Chapter 2, providing the legal foundations for the further analysis.

On this basis, the remaining chapters focused on the specific research questions. Their key findings are discussed below. This will start, in section 12.2, with a presentation of the conclusions in relation to research questions 1a and 1b on the scope of the obligation to return, and the three return elements considered crucial in this respect. In line with the extensive attention devoted to this in the preceding chapters, this will take up most of the rest of this chapter. This is followed, in section 12.3, by a shorter presentation of the findings in regard of research questions 2a and 2b, dealing with the entitlement to a voluntary departure period, and its appropriate length, respectively. Section 12.4, subsequently, presents some overall conclusions on the question of the boundaries of individual responsibility in the Directive. Combined, these conclusions provide the basis for 25 suggested guidelines, aimed at helping member states interpret this responsibility in a straightforward and accessible manner.

12.2 Conclusions on the obligation to return *(research questions 1a and 1b)*

The elaboration of the scope of the obligation to return has taken up the majority of the chapters in this dissertation. This is both due to its centrality to the understanding of the return procedure, but also because, despite

this importance, this obligation is hardly elaborated at all in the Directive. Rather, Article 3(3) simply refers to return as "the process of going back" in relation to three destinations: the country of origin, transit countries, and other third countries. While the attempt to clarify the scope of the obligation to return in principle encompasses two different issues – the actions that third-country nationals should take and those actions that they cannot be expected to take – these were discussed in tandem. The sources drawn upon in this analysis often contain rules that help elaborate both obligatory actions and limits upon them. Furthermore, when dealing with a nebulous concept like the obligation to return, it is particularly in the interaction between obligatory actions and their limitations that it can be given more solid form. As a result, they will be discussed together in the conclusions presented below. The conclusions will cover the three categories of action (or: return elements) which were identified as providing a minimum core for achieving successful return. First, seeking readmission to destination countries, which comprises a number of important issues to understanding the obligation to return (12.2.1). Second, obtaining travel documents (12.2.2), which may in many ways, such as in regard to contacting consular authorities, but also in relation to conditions to be fulfilled by the individual, overlap with the question of readmission. Nevertheless, it was suggested that, for analytical purposes, it would be useful to discuss them separately. And third, making practical arrangements for return and leaving the EU member state (12.2.3). In each case, the main findings as to the do's and don'ts for individuals are set out, as well as how these follow from the different relationships in the triangle model.

12.2.1 The obligation to seek readmission to destination countries *(return element (i))*

Of the three return elements identified, the obligation to seek readmission to destination countries has received the most extensive attention. This is because this element is foundational of the obligation to return and brings to light a number of issues crucial to the understanding of that obligation, and, ultimately, to the way in which individual responsibility for voluntary return should be regarded. First, this requires looking at the destinations set out in the Directive, since they will determine where third-country nationals should focus their efforts to return, including applying for readmission. Second, this raises the question whether there are specific obligations that third-country nationals must fulfil towards those destinations, since conditions for readmission may differ according to the relationship between the individual and each destination country. This, in turn, requires dealing with fulfilling readmission conditions vis-à-vis both countries of origin and transit countries.[1] And finally, this raises questions as to the way third-

1 But not other third countries, as discussed below.

country nationals can be expected to conduct themselves towards obligatory destinations, especially as regards destination choice and the avoidance of unsafe returns.

12.2.1.1 Obligatory destinations

As noted in Chapter 3, since the obligation to return is specifically defined in relation to three categories of destinations countries, any elaboration of this obligation must start with clarifying the meaning and status of each of these. In particular, it requires considering under which conditions third-country nationals can be expected to return to such destination countries or, in other words, when a particular destination is obligatory. This is, first and foremost, a question of the internal dimension of the return procedure, although it has important implications for the external dimension as well.

Purely based on the fact that the Directive defines return in relation to certain categories of destinations, and does so exhaustively, initial conclusions about the scope of obligatory destinations can be drawn. In particular, the principle of legal certainty requires that the obligation of third-country nationals to return can only encompass making efforts to return to, and seeking readmission in, countries that fit within one of these three categories in their individual case.[2] At first glance, this seems a purely theoretical constraint, since the three categories might be considered to cover all situations: if a specific country is neither a country of origin, nor of transit, it would still be 'another third country.' However, clarifications of the terms used, including the qualifications attached to the second and third categories, show that the scope of obligatory destinations is in fact surprisingly narrow.

The first destination, the country of origin, is not qualified. It might therefore be assumed that each third-country national has a country of origin, and thus at least one option for return. The Directive does not define this term, but it has been argued that a reading compatible with other legislative instruments in the area of asylum and migration is necessary, in particular the recast Qualification Directive, which defines it as any country of nationality or, for stateless persons, their country of habitual residence.[3] This means that third-country nationals can be required to return to any country where they hold nationality. However, the definition is mutually exclusive. Either a person has a nationality, and then the country of nationality is the 'country of origin' within the meaning of the Directive. Or the person is stateless, and then the 'country of origin' is the country of habitual residence. On this basis, a country of habitual residence of persons who hold nationality in another country is not part of the definition of 'country of origin' in the Directive. An obligation to return to such a country

2 See 3.1.
3 See 3.2.1.

of habitual residence can thus only arise if it falls within one of the other categories of obligatory destinations.[4]

This is different for stateless persons, for whom their country of habitual residence is indeed an obligatory destination. What constitutes 'habitual residence' in such a situation will have to be determined on an individual basis, taking into account the specific links of the individual with such a country. Short-term stay in such a country would clearly be insufficient to consider it a country of habitual residence, but neither will it be necessary that the individual lived in that country his or her whole life. In theory, even long-term residence without an official status could meet the requirement of habitual residence, although it was noted that in such cases gaining readmission may be even more complicated than it already is for stateless persons.[5]

While the clarification of 'country of origin' is purely a matter of EU law, it implicitly brings into view the external dimension. After all, while third-country nationals are expected to focus their return efforts on such a country, including seeking readmission there, the extent to which they can meet their obligations will crucially depend on whether that country will take them back. Therefore, this requires further consideration of the basis for readmission to such countries of origin. This is relevant in two ways. First, to establish any mismatches between the identification of a country as a 'country of origin' (and thus an obligatory destination in an individual's case) and any obligations to readmit incumbent on that country. Without readmission by the country of origin, meeting the obligation to return to such a destination would become practically impossible. And, it was suggested, the obligation to return can only encompass such obligations that third-country nationals, who act with due diligence and in good faith, can actually meet. Otherwise such an obligation would neither be able to contribute to the Directive's objective of effective return, nor would it be in line with the protection of fundamental rights.[6] And second, if such readmission obligations indeed exist for the country of origin, it is crucial to establish which conditions the individual should meet to trigger these obligations, as these will determine what can and cannot reasonably be expected of him or her.

The connection between the internal and external dimension is particularly clear when dealing with the second category of destinations defined in the Directive: transit countries. The obligation to return to such a country is qualified by the fact that this must be in accordance with EU or bilateral readmission agreements or arrangements. Without the existence of such agreements or arrangements – concluded between the EU or its member states and the country in question – no obligation to return can thus arise

4 See 3.2.2.

5 See 3.2.3.

6 In particular, third-country nationals could then be exposed to enforcement measures on the basis of a situation over which they did not have any control. Also see 1.3.1.

for third-country nationals under the Directive.[7] Furthermore, even when such agreements or arrangements are in place, their content may put further limits on the obligatory nature of this destination. While 'transit' should generally be considered to comprise any situation when a third-country national passed through a country, whether briefly or after a longer stay, the applicable agreements or arrangements may limit the scope of this concept. In most cases, EU readmission agreements only relate to situations of transit when third-country nationals have directly entered an EU member state from the country with which they have been concluded. Similarly, many exclude from their scope of application situations in which individuals have only transited through an international airport. As such, situations falling outside the scope of the applicable agreements cannot lead to obligations on third-country nationals to seek readmission to such transit countries.[8]

Additionally, further issues arise out of such agreements and arrangements. First, these have generally not been concluded with voluntary return situations in mind. However, at least theoretically, a number of such agreements (this is less clear for non-legally binding arrangements) could also be used in voluntary return situations, although this would require a specific intervention by the EU member state before any obligations on the individual are applicable.[9] Furthermore, not all agreements and arrangements may be substantively able to make return to a transit country obligatory. This depends on their ability to either bind that country under international law, or at least contain accessible rules on readmission that provide sufficient certainty for individuals as to the conditions to meet and the way to meet them. This would exclude, prima facie, agreements that only contain broad references to cooperation on readmission, those that do not specifically provide for readmission of non-nationals by the transit country, and secret arrangements.[10]

The third and last of the categories of destinations set out in the Directive, 'another third country,' raises the most questions in relation to its obligatory nature. It is qualified in two ways. First, by the requirement that the individual must be accepted there, which in itself seems to indicate any kind of consent to admit the person, and from that perspective is not a particularly onerous condition.[11] Second, however, the Directive states that it is necessary that the third-country national 'voluntarily decides' to return to such another third country. On the basis of the wording used in various language versions of the Directive, the drafting history of this provision, and other sources, such as the Return Handbook, it can be established that the phrase 'voluntarily decides' must be understood as making return to another third country an option for individuals, which member

7 See 3.3.1.2.
8 See 3.3.1.1.
9 Also see 12.2.1.3 below.
10 See 3.3.2.
11 See 3.4.2.

states should respect. But that it is not an obligatory destination.[12] As such, it must be distinguished from the other two categories, in that failure of third-country nationals to seek readmission to any country that does not fall within the scope of either a country of origin or a transit country cannot be considered non-compliance with the obligation to return. For this reason, specific conditions for readmission to other third countries were not further examined in the analysis.

In view of the analysis of the destinations set out in the Directive, it can thus be concluded that there is a clear obligation on third-country nationals to seek return to their country of nationality, to a country of habitual residence for stateless persons (but only for them), or, for all third-country nationals, regardless whether they are stateless, to any transit country meeting the conditions set out above. As such, the range of countries to which third-country nationals can be expected to seek readmission is indeed quite limited. This should prevent member states from expecting individuals to go 'embassy shopping,' and approach any country that could theoretically take them. Rather, it requires targeted efforts towards only a few destinations, which may sometimes be as few as one,[13] but would only exceptionally be more than two.[14] Nevertheless, when more than one obligatory destination exists, third-country nationals can be held responsible in relation to each of these.[15]

12.2.1.2 Specific obligations with regard to readmission to countries of origin

The matter of readmission to countries of origin was the subject of Chapters 4 and 5. In addition to establishing when a country of origin is an obligatory destination, clarification of the obligation to seek readmission requires establishing which conditions third-country nationals should meet to be taken back. This is a matter that is not at all clarified in the Directive, which could easily be assumed by member states to mean that third-country nationals can be expected to do "whatever it takes." However, the external dimension, in particular the obligations under international law of the country of origin, play a decisive role here. While states in theory have a large measure of discretion over whom to readmit, international law sets

12 See 3.4.1.

13 If no appropriate transit country can be identified, this would only be the country of origin.

14 A larger number might occur if the individual has more than one nationality and a transit country has been identified or, particularly exceptionally, if more than one transit country is obligatory, because for one of them the requirement of direct entry into the EU member state is not part of the relevant readmission agreement or arrangement.

15 This is without prejudice to the fact that, in principle, they can choose to pursue return to their preferred destination, see 12.2.1.4 below. A person who does not manage to return, despite his or her best efforts, to a transit country, if this is the preferred destination, can still be held responsible for not having made simultaneous efforts to return to the country of origin.

clear obligations on them to take back certain categories of persons expelled by other states. Working from the assumption that few states would agree to readmit persons when they are not required to do so under international law, this thus provides an important frame of reference for individuals' obligations under the Directive. Their obligation to return particularly translates into an obligation to trigger the country of return's international readmission obligations, so as to facilitate their de facto return. From the perspective of the country where readmission is sought, the fact that it is considered a 'country of origin' under the Directive may not mean much, as its readmission obligations are not defined in such terms. In line with the discussion above, consideration of these obligations must make a distinction between readmission requests from persons who hold nationality of the country, and those who are stateless but were habitually resident there.

As regards nationals, it is a central tenet of EU return policy that states have clear obligations under customary international law to readmit their nationals when they are expelled by another state. These obligations are considered, first of all, as a function of the sovereignty of states to control the entry and presence of foreigners. When these are expelled, responsibility thus falls on the country where they have the link of nationality. Such an obligation may be further buttressed by specific readmission agreements or multilateral treaties, which may clarify in particular the procedures and modalities for readmission, but it remains in force even when such instruments are not applicable to the country in question. Furthermore, the obligation of states to readmit nationals is often related to the individual right to return, as a matter of international human rights law. While questions may arise over how the inter-state (especially customary) readmission obligation and the readmission obligation under human rights law interact, generally this is a moot point, since the inter-state duty will have to be fulfilled regardless.[16]

In relation to this readmission duty, the most important point is that it is triggered as soon as sufficient evidence of the nationality and identity of the person expelled by the EU member state is provided. Translated to the obligation to return of third-country nationals under the Directive, this means that they are required to present to their country of nationality, accurately and in good faith, any relevant evidence of nationality and identity. Not all evidence will create equal duties on the presumptive country of nationality. Some forms will require immediate readmission, while others may only trigger a duty to investigate the readmission request further, if necessary through a personal interview. As such, third-country nationals can be expected to present the strongest evidence reasonably available to them, including by making efforts to obtain this, such as via family or other contacts, if this can be done without endangering the safety of the individual or such third parties. The obligation incumbent on third-country

16 See 4.2.1-4.2.4.

nationals also encompasses participating in an interview with the authorities of the country where readmission should be sought, if this is necessary for the successful completion of the readmission process.[17]

However, the fact that states' readmission duties can be triggered by evidence of nationality and identity also provides for a natural limit to the obligations of the individual. Such evidence is not only necessary but also sufficient to trigger the readmission duty. As such, during the readmission process there is no basis for countries of nationality to make any further demands that are not necessary for, or reasonably connected with, the establishment of the individual's nationality or identity. This would include payment of specific sums of money,[18] making statements about the reasons for going to the EU member state, or making declarations or apologies towards the country of return. Since this would fall outside the legitimate scope of demands by the country of nationality, an interpretation of the Directive consistent with the international law frameworks within which return must take place also prevents EU member states from requiring third-country nationals to meet such demands. Refusal of third-country nationals to acquiesce to such demands by the country of nationality, therefore, can thus not be regarded as non-compliance with the obligation to return.[19]

Conclusions about the readmission duties of states towards stateless persons who were habitually resident there are much harder to draw. This results from the lack of a clear rule in customary international law that states should readmit stateless persons based on their habitual residence. The absence of the all-important link of nationality plays a major role in this. While there may be a basis for readmission obligations in relation to former nationals who have subsequently become stateless, even this is not beyond dispute and might at any rate only apply to certain categories of former nationals, such as those purposefully deprived of their nationality.[20] This gap in the international readmission framework may be filled somewhat by specific readmission agreements, when applicable. In some cases, these may provide for readmission duties regarding former nationals, while in other cases stateless persons would be subsumed in the wider category of third-country nationals who, according to the specific conditions, may be readmitted on the basis of a residence right, a previously issued visa, or simply on the basis of their irregular entry into an EU member state.[21] However, in this respect it needs to be emphasised that such agreements hardly cover all countries of return. The Smuggling and Trafficking Protocols, the Chicago Convention and the FAL Convention may further provide for readmission obligations covering habitually resident stateless persons,

17 See 4.2.5.1.
18 Beyond relevant administrative fees for the issuance of documents, as discussed below.
19 See 4.2.5.2.
20 See 4.3.1.
21 See 4.3.2.

in particular those who still have an active residence right in the country, or for whom it can be established that they embarked on international transportation from that country. However, the extent to which these involve clear obligations of readmission, or rather only an obligation to give consideration to this, differs.[22] Readmission of stateless persons by their country of habitual residence may also be covered, to a very limited extent, by the 1954 Statelessness Convention, but this applies only to persons holding a travel document issued by that country that is still valid.[23]

As a result, it cannot be presumed automatically that the fact that a stateless person's country of habitual residence is identified as an obligatory destination under the Directive is matched by a clear readmission duty on the part of that country, at least in respect of the sources and instruments mentioned above. To the extent that applicable readmission frameworks can be identified in the individual case, however, stateless persons faced with a return decision can be expected to provide relevant evidence to the country of origin, in particular pertaining to former nationality, the links with the country in question, or (active or expired) residence rights. This may include the provision of documentary evidence, but EU member state should bear in mind the specific situation of stateless persons in this regard, who may never have been able to obtain documents like birth certificates, identity documents, military service booklets or other evidence because of their lack of nationality in the country of origin. As a general principle, in line with the obligations of third-country nationals when seeking readmission to their country of nationality, stateless persons should provide the strongest evidence reasonably available to them, but only demands necessary to satisfy the triggering of readmission obligations have to be met. Meeting demands that are not necessary to trigger the country of origin's readmission duties thus falls outside the obligation to return imposed by the Directive.[24]

The gaps in readmission duties vis-à-vis stateless persons bring into view the above-mentioned possibility of the individual right to return, particularly as guaranteed by the ICCPR, as a means to ensure readmission to the country of origin. According to the case law of the HRC, the right to return, and thus the associated duty of states to readmit, extends beyond just persons who hold the nationality of a state. Rather, it pertains to all situations in which a country can be considered as an individual's 'own country.' The latter involves an assessment of the specific links with that country, including long-standing residence, close personal and family ties and intentions to remain, as well as the absence of such links elsewhere.

22 See 4.3.3.

23 See 4.3.4.1. Furthermore, since the 1954 Statelessness Convention can be considered a human rights instruments, questions may arise as to the extent that third-country nationals can be compelled to make a claim to readmission on this basis, as discussed below.

24 See 4.3.5.

When a country is the person's 'own' in this way, strong readmission duties result for that country. These have been considered "virtually absolute" and a person seeking to return to his or her own country would thus have to be granted readmission, except in the most exceptional circumstances, which may have to amount to a situation in which the country has to derogate from its duties under the ICCPR altogether.[25]

The right to return also clearly pertains to persons who hold the nationality of a country.[26] As noted above, normally the human rights-based obligation to readmit of countries of nationality is not particularly important, because strong inter-state frameworks for readmission exist. Nevertheless, there may be circumstances in which these inter-state frameworks are not effective. In addition to cases where countries of origin simply ignore their international obligations, certain exceptional situations were identified in which this ineffectiveness may arise. It was suggested that this may be the case, for example, when the country of nationality considers the EU member state's decision to expel a person unlawful.[27] It could also arise when countries of nationality can present justifications that would preclude their responsibility for the wrongful act of not meeting their readmission obligations. This could be relevant when non-readmission results from *force majeure*, when this is done as a countermeasure against a wrongful act by the EU member state, or when a state of necessity arises. While these situations in relation to readmission are mostly theoretical, it was suggested that *force majeure* or necessity could arise, for example, in cases of natural disasters, conflict or post-conflict situations, or when faced with major health crises, such as the COVID-19 pandemic.[28] Furthermore, in relation to the duty to readmit under customary international law, its unwritten nature, and some remaining unclarity about its precise scope, may also lead to diverging views between the EU member state and the country of nationality as regards the extent of latter's legal obligations.[29]

If this is the case, the individual right to return may be able to fill the gap left by ineffective inter-state obligations. The triangle model shows, however, that the obligations arising out of human rights and inter-state frameworks are not the same, since the former are owed by the country of origin to the individual, while the latter are owed by the country of origin to the EU member state. In case of the right to return, this right is thus held by the individual, and not by the EU member state.[30] However, it has sometimes been suggested that, because they are under a legal obligation to return, third-country nationals can be expected to make an appeal to their individual right to return if this would facilitate their readmission,

25 See 4.3.4.2.
26 See 4.2.4.1.
27 See 5.2.1.
28 See 5.2.2.
29 See 5.2.3.
30 See 4.2.4.2.

and thus aid the fulfilment of their obligation to return under the Directive.[31] Such situations may particularly arise when countries of origin ask third-country nationals for a declaration that they are willing to return and refuse to cooperate in return without such a declaration. Such a declaration could be seen as acknowledgement that the individual is seeking to exercise his or her right to return.[32] However, it was argued that neither the purpose of human rights,[33] nor positive law – especially the case law of the ECtHR[34] – support the idea that EU member states can legitimately compel individuals to exercise their right to return against their will, even if this would result in the fulfilment of the obligation to return. Such a forced exercise of the right to return would amount to an unlawful interference with the individual's fundamental rights. As a result, EU member states are precluded from considering the refusal of third-country nationals to make such declarations, and to invoke their right to return, as non-compliance with their obligations under the Directive.[35]

This outcome has implications for the effectiveness of return, especially in those cases where countries of origin only facilitate returns on the basis of the declared willingness of the individual to return, and do not cooperate in removals. However, the requirement of effective return is subject to the respect for the third-country national's fundamental rights in the return procedure. Furthermore, the relevant question, from the perspective of the triangle model, is not necessarily whether individuals can be compelled to exercise their rights, but whether countries of origin are justified in limiting readmission to cases in which the individual declares to be willing to return. This would arguably undermine the international system of expulsion, which by definition deals with situations in which individuals are compelled to leave a state against their will. As such, this question is more appropriately regarded as one of the country of origin's responsibilities vis-à-vis the EU member state, and thus needs (political) solutions between them. Asking a third-country national to use his or her right to return to ensure effective expulsion would ignore, and potentially weaken, the responsibility of the country of return. And in the process it may undermine the idea that it is not just the individual who carries responsibility, but that each actor does so – and that a fair and transparent return process locates each of these responsibilities where they belong, rather than making the individual responsible for the acts of others.

31 See 5.3.2.
32 See 5.3.1.
33 See 5.3.3.
34 See 5.3.4.
35 See 5.3.5.

12.2.1.3 Specific obligations in relation to transit countries

Besides the country of origin, transit countries may constitute obligatory destinations under the conditions set out earlier. Readmission to such countries was discussed in Chapter 6. From the perspective of the transit country, readmission obligations may differ according to the specific legal frameworks in place. This also means that the individual's obligations under the Directive will differ, since these are bound up with the fulfilment of conditions for readmission set out in those frameworks. Furthermore, those frameworks impact on the Directive in two ways. First, when it comes to EU readmission agreements and some multilateral treaties, such as the Smuggling and Trafficking Protocols, they have an effect on the interpretation of the Directive because they have been concluded or ratified by the EU, and are thus binding in EU law. But secondly, because, as discussed above, such agreements and arrangements, regardless of their binding nature in EU law, are an integral part of the definition of the destinations of return. In this case, even more so than with returns to countries of origin, the external dimension can directly be translated to the internal dimension of the Directive.

Given the diversity of possible frameworks, the discussion in Chapter 6 primarily focused on EU readmission agreements. While there are questions about the extent to which they are used in practice to enable voluntary returns, such use is not excluded by the provisions of the Directive.[36] However, this would depend, at a minimum, on the EU member state making a specific request or notification to the transit country. Third-country nationals themselves cannot independently make an appeal for readmission on the basis of such agreements.[37] Successfully triggering readmission obligations of transit countries based on EU readmission agreements generally depends on the provision of evidence in relation to two issues. First, evidence that the third-country national irregularly entered or stayed in the EU member state, which is most easily satisfied by evidence of absence of legal stay.[38] And second, evidence of an appropriate link to the transit country, which may be in relation to the individual holding a visa or residence permit in the transit country, or due to having used the transit country as a route to enter irregularly into the EU member state.[39] EU readmission agreements provide for extensive lists of evidence that should be supplied to show the conditions for readmission are met. These lists may differ considerably from one agreement to another, and so it is necessary to establish in each individual case what means of evidence will be accepted. Furthermore, not each form of evidence listed will trigger the same obligations on the transit country. Some types of evidence trigger

36 See 6.2.1.
37 See 6.2.4.
38 See 6.2.2.1.
39 See 6.2.2.2. Although further exceptions might apply, see 6.2.2.3.

an obligation to readmit without further investigation, while others may trigger a rebuttable presumption of readmission, or even only an obligation to investigate further.[40]

While the primary responsibility for return lies with the third-country national, EU member states may submit to transit countries readmission requests or notifications that set the readmission process in motion without needing the individual's consent.[41] This also implies that the member state can expect cooperation from the third-country national in ensuring the appropriate evidence for eligibility for readmission can be presented to the transit country. Third-country nationals can be expected to provide, in principle, whichever evidence reasonably available to them that would trigger the strongest readmission obligations on the transit country. But this again is limited to what is necessary for readmission. Due to the diffuse nature of the means of evidence and the concomitant readmission obligations in EU readmission agreements, this requires a case-by-case assessment. This is particularly the case because, according to various agreements, readmission obligations may even be triggered when not all relevant information is submitted. As such, when assessing whether third-country nationals have met their obligation to provide evidence or information for readmission, EU member states must take into account the extent that non-provision of certain information has indeed impacted negatively on the outcome of the readmission process.[42] Furthermore, since readmission can only be triggered by the EU member state, its failure to do so negates the individual's obligations as regards this destination – unless this is due to the third-country national neglecting to provide sufficient evidence.

Under multilateral instruments, readmission obligations may also exist when third-country nationals hold residence rights in transit countries, or if they embarked there. In the latter case, however, this would normally apply to persons considered inadmissible in the EU member state, which may lead to them being excluded from the scope of the Directive.[43] Furthermore, neither the UN Smuggling and Trafficking Protocols nor the Chicago or FAL Conventions provide for clear procedures to be followed, and questions as to the ability of third-country nationals to invoke them directly may arise. However, to the extent that readmission under any of these instruments would be possible in practice in the individual case, making an application, or cooperating with the EU member state to submit such an application on their behalf, could fall within the scope of third-country nationals' obligations.[44]

40 See 6.2.3.

41 See 6.2.5.1. Whether the individual eventually chooses to use this option or rather return to his or her country of origin is another matter, see below.

42 See 6.2.5.2. While not analysed here in detail, to the extent that bilateral readmission agreements contain similar provisions to EU readmission agreements, the same principles as discussed above would apply.

43 RD Article 2(2)(a) and see discussion in 1.2.1.3.

44 See 6.3.

Finally, while the Directive considers non-binding arrangements as an appropriate basis for an obligation to return, their applicability to voluntary return situations – both in the abstract and in practice – may not be immediately obvious. This would depend, at a minimum, on those arrangements providing for clear procedures and guarantees for readmission of non-nationals, which are accessible and provide sufficient certainty about the status of the individual once readmitted. It was noted that such arrangements at the EU level usually already fail to meet the basic requirement that they cover persons who are not nationals of the country with which they have been concluded, although this could be different for bilateral arrangements, which were not analysed. Considering the uncertainties involved, it was considered appropriate to reverse basic assumptions about the effectiveness of readmission and the responsibility taken for returnees by the transit country, which are normally implied in legally binding agreements. This is especially the case because non-binding, more informal arrangements are less likely to be subject to judicial, democratic and public scrutiny. As such, it was suggested that EU member states should show the existence of appropriate safeguards connected to such arrangements before any obligation on third-country nationals to seek readmission on this basis can be imposed. If such conditions are in place, third-country nationals can be expected to make efforts to meet the conditions for readmission, which may be more widely defined than in formal agreements, although this should still be subject to the condition that these do not result in illegitimate requests (as discussed in relation to travel documents) and that they are not discriminatory.[45]

12.2.1.4 Choice of destinations and avoiding unsafe returns

After having identified obligatory destinations, and setting out specific obligations of third-country nationals in seeking readmission to them, one more set of issues remains. This relates to questions of choice between, and safety of, those destinations where third-country nationals should seek readmission, a matter discussed in Chapter 7.

The first point, choice of destinations, may arise not only when there are multiple obligatory destinations, but also if there would be viable possibilities to return to another third country, which must be preserved as an option for third-country nationals. While this option cannot be enforced, it should generally be open to individuals as a means to meet the obligation to return. The possibility to choose between different destinations follows logically from the fact that the third-country national is made primarily responsible for return, which would also imply freedom in this respect. However, for reasons of administrative convenience, speed of the return process, or concerns that effective return to the individual's preferred desti-

45 See 6.5.

nation may not materialise, member states may have their own preferences. And they may thus attempt to issue instructions or impose restrictions on third-country nationals in this respect, including by withholding certain confiscated documents that individuals need to pursue return to their preferred destination.[46]

Beyond the general idea of the autonomy implied in voluntary return, there are no clear provisions regulating destination choice in the Directive. The extent to which freedom of choice is legally guaranteed in expulsion proceedings under customary international law is a matter of debate in the literature. Perhaps the clearest outcome of this is a weak duty on EU member states to allow individuals to put forward their preferences, but with a lot of discretion for those states to decide whether to follow this preference.[47] However, further protections of the right to choose a destination arise out of human rights instruments, especially the right of everyone to leave any country, including his or her own, enshrined in the ECHR and ICCPR. The choice of destination is part of the legal guarantee provided by this right, which needs to be respected by member states even when a return decision has been issued. This means that any interference with the right to choose a destination, including through the withholding of documents, must be set out in law, justified as necessary to protect national security, public order, public safety, public health or morals, the prevention of crime or the protection of the rights and freedoms of others, and furthermore be proportionate. It was argued that, provided that return can still take place within the voluntary departure period, considerations of speed and convenience on the part of member states cannot provide sufficient justification in this respect.[48] Additional and increased protection of destination choice is in place when the third-country national prefers to return to his or her own country. Given the above-mentioned strong protection of this right, member states are generally precluded from preventing third-country nationals from trying to return to such a country, or from otherwise interfering with their attempts in this regard.[49]

If third-country nationals prefer to return to a transit country, the fact that triggering readmission procedures normally requires an intervention by the member state raises specific questions about the cooperation between the individual and the EU member state. Whereas the member state can trigger such obligations without the consent of the third-country national, the reverse situation may also be relevant: when the EU member state does not take action to submit a readmission request but the third-country national prefers to return to a transit country. In such a case, the duty on the member state to ensure effective implementation of the Directive's objectives results in an obligation to take action to facilitate the voluntary

46 See 7.1.
47 See 7.2.1.
48 See 7.2.2.
49 See 7.2.3.

return to a transit country by submitting a readmission request, as long as the third-country national provides the appropriate evidence for this.[50]

As regards the second point, safety of return, this can be considered an additional requirement to make a destination obligatory. As a general principle, returns under the Directive must be achieved in a manner that respects the safety and dignity of the individual, which is particularly grounded in the principle of non-*refoulement*. At first glance, it is not immediately clear what added value the reference to non-*refoulement* in the Directive has. In theory, any risks related to return should have been assessed during the admission or expulsion procedures leading to the return decision, which then sets the stage for the Directive's further steps. However, the additional safety net of *refoulement* in the Directive may be relevant when persons are excluded from protection or rejected on admissibility grounds during the asylum procedure, if access to asylum procedures is not effective, or if persons otherwise avoid such procedures.[51]

This raises further questions about the relationship between the EU member state and the individual with regard to safe returns and preventing *refoulement*. When the member state removes an individual, this clearly triggers its non-*refoulement* obligations. But during voluntary return procedures, it is the individual who takes steps towards return, which may also involve subjecting him or herself to unsafe situations. Is this then the responsibility of the individual, who makes this choice, or the member state, which is the addressee of the prohibition of *refoulement*? In this respect, it must first be noted that the fact that individuals take up voluntary return to a specific destination is not, in and of itself, a guarantee that they consider this a safe return. Both circumstances in the country of return, such as in respect of family members, and problems faced in the member state due their irregular status, may give rise to individuals accepting voluntary return even when clear risks in the destination country exist.[52] Second, the case law of the ECtHR acknowledges that voluntary return in the sense of the Directive cannot constitute a waiver of the right to be protected against treatment in violation of Article 3 ECHR, because the legal obligation to return and subsequent threat of enforcement do not provide for a context in which such a waiver would be given of the individual's free will, unequivocally and with safeguards commensurate with the importance of this right.[53] As such, member states, which must provide protection at least equivalent to that enshrined in Article 3 ECHR when implementing the Directive, can only be released from their obligation to protect third-country nationals from *refoulement* when return is truly voluntary in the common sense of the word, and not if this is simply the result of compliance with an obligation to return as under the Directive. The obligation of the member state to

50 See 7.2.4.
51 See 7.3.1.
52 See 7.3.2.1.
53 See 7.3.2.2.

prevent *refoulement* thus remains intact even in voluntary return situations, and as a result they cannot expect third-country nationals to take steps that would lead to their return to situations where they would face a real risk as covered by the principle of non-*refoulement*. This is in line with the overall nature of voluntary return as a form of expulsion.

When multiple obligatory destinations are available in the individual case, the fact that one of these is unsafe does not necessarily negate the obligation to return completely. However, when only one obligatory destination can be identified, and return, even voluntary, would violate the prohibition of *refoulement*, this would overrule the obligation to return. The obligation to prevent such 'voluntary *refoulement*' also applies to risks of so-called chain *refoulement* from transit countries, or in case the destination itself is safe, but no safe travel routes to get to that destination exist.[54]

Despite the clear applicability of the prohibition of *refoulement* to voluntary return situations, putting this into practice in the context of the Directive may not always be easy, given that it does not concern itself with the substantive reasons why a person should return, and because its procedural safeguards against *refoulement* are limited, mainly focusing on postponement of enforcement. This represents a structural gap in the Directive's architecture. However, some ways to ensure more adequate protection during the voluntary departure period have been suggested. This includes ensuring that the freedom to choose between destinations is fully protected and that *refoulement*-related concerns override any other considerations by the member state to justify interference with this choice. Additionally, a 'negotiated' expulsion, in which the EU member state and the individual come to a common understand of which destinations are viable in the specific case, can provide clarity by ensuring that all those destinations are assessed in view of the principle of non-*refoulement*. It also avoids leaving the third-country national with an obligation to go "anywhere but here." Similarly, member states should actively engage with third-country nationals' concerns about unsafe travel routes, and work with them to see if viable alternatives exist, rather than leaving this up to the individual alone. Finally, member states should avoid putting undue pressure on third-country nationals during the voluntary departure period. This is true in general, but also specifically applies to ensuring that third-country nationals do not subject themselves to unsafe situations, and to member states having to take responsibility for the postponement of removal. This may, in effect, create a 'right to be removed.' While the notion of 'undue pressure' would need to be further elaborated, the Directive's text appears to specifically preclude member states from preventing access to emergency health care or essential treatment, or depriving children from access to basic education, as means to pressure third-country nationals into returning voluntarily. Similarly, enforced family separation or measures amounting

54 See 7.3.3.

to deception (including misinformation or false promises of support) would almost certainly fall into this category of undue pressure. Further consideration would be necessary of the extent to which threats of detention, and particularly the deprivation from, or limiting access to, basic services such as shelter and food, would be unlawful ways to 'encourage' voluntary return.[55]

12.2.2 The obligation to obtain travel documents *(return element (ii))*

While most attention was paid to the question of destinations and readmission, a second category of actions was identified as crucial to compliance with the obligation to return: obtaining travel documents. This was the focus of Chapter 8. The need to obtain travel documents obviously does not apply to cases in which third-country nationals already have such documents. In such cases, questions may however arise when travel documents have been taken into custody by the EU member state. While possibilities to do so during the asylum procedure are included in EU law, such powers of confiscation as part of the return procedure are largely lacking in the Directive, apart from when this can be justified as a necessary measure to prevent absconding. As such, in other cases, it is questionable that member states can justify keeping a third-country national's travel documents, the possession of which is protected by the right to leave. Although national rules may foresee in this possibility, this would arguably amount to less favourable treatment than the Directive allows.

The other instance in which obtaining travel documents is outside the obligation to return is if such return is possible without them. This would only be so in exceptional circumstances, especially since possibilities for international travel are very limited when no appropriate documents can be presented. However, certain EU readmission agreements and the Chicago and FAL Conventions make some provisions on travel without official travel documents, in the context of return and readmission.[56]

If the above-mentioned situations do not apply, the obligation on third-country nationals to obtain travel documents must be considered as implied in the overall obligation to return. This includes making an application for renewal or replacement of travel documents with an authority competent to issue them. This, however, must be compatible with EU rules on asylum, especially the prohibition of exchanging information with authorities of the country of origin while an asylum request has not yet been finally decided. In most cases, the application for travel documents will overlap with the application for readmission. Countries of nationality, under customary international law, and transit countries, under EU readmission agreements, both have obligations to issue travel documents to make readmission

55 7.3.4.
56 See 8.2.

possible. In such cases, the conditions to be fulfilled to obtain travel documents cannot be broader than those relevant to readmission, with the exception of administrative necessities – such as the provision of a photograph for the document – and, where applicable, the payment of fees. In line with the discussion about readmission, meeting any demands not directly connected to this cannot be part of the obligation to return imposed by the Directive.[57]

However, the third-country national may also decide to turn to the authorities of the country of nationality when this is not the intended destination. This follows from the fact that the right to leave also guarantees a right to travel documents giving the broadest possibility of international travel, normally a passport, regardless of the intended destination or even a particular intention on the part of the individual to travel. Obtaining such a document may be crucial for third-country nationals to act on their possibility to return to another third country, which may not be authorised to issue travel documents itself. It may also put the third-country national in a more advantageous position when returning to a transit country. Countries of nationality can only refuse to issue passports in exceptional circumstances.[58] EU member states must not normally interfere with the attempts of third-country nationals to obtain a passport, rather than a one-off travel document for the destination state (such as a *laissez-passer* or emergency travel document) unless they can justify this sufficiently.[59] However, their positive obligations to facilitate the third-country national's attempts to obtain a passport may be more limited. Such limits may relate, for example, to the extent to which return assistance programmes cover costs of travel documents beyond the least costly option (which will normally be a *laissez-passer* or emergency travel document). When obtaining a passport takes longer, the right to apply for it may also be a factor to take into consideration by member states when deciding about the length and extension of a voluntary departure period, which will have to be weighed against other relevant circumstances.[60]

For stateless persons it might be assumed that the country of habitual residence acts as a surrogate in the absence of a country of nationality that can issue travel documents. However, obligations to issue or renew travel documents under the 1954 Statelessness Convention are very limited. They mainly encompass situations where the stateless person still has an active residence right in that country. If the country of return is a transit country, and the relevant agreements in place connect readmission to the issuance

57 See 8.3.1.

58 The example of failure to perform military service was mentioned. However, in such cases, they should still facilitate any request to be readmitted to the country of nationality itself, though such readmission can be effected on the basis of a one-off travel document only valid for return.

59 On the same grounds as already discussed above in relation to other interferences with the right to leave.

60 See 8.3.3.

of travel documents, this will also apply to stateless persons, since they are part of the general category of non-nationals covered by such agreements.[61]

Effective access to the consular authorities of a state competent to issue travel documents is a key issue in obtaining these documents. Without such access, third-country nationals will often be unable to fulfil this part of their obligation to return. Flowing from the provisions of the Vienna Convention on Consular Relations, EU member states are prohibited from preventing such access. In the context of return procedures, the Vienna Convention, the right to leave and the obligation on the member state to ensure the *effet utile* of the Directive all coincide to require specific action by member states to make access possible in certain situations. This is particularly the case when third-country nationals are subject to measures to prevent absconding during the voluntary departure period. EU member states are then under obligation to make their best efforts to help third-country nationals overcome barriers to contact with consular authorities, for example through the temporary lifting of measures or facilitating visits by consular authorities to the third-country national where he or she is staying. Further facilitating action by the member state may be necessary if the consular functions of the state competent to issue travel documents are exercised from the territory of another EU member state, and no alternatives for direct contact are available. This may again require ensuring such authorities can reach the third-country nationals in the member state where he or she is staying. Or making arrangements with the member state where the consular premises are located, so that the third-country national can temporarily travel there without falling foul of EU rules on irregular stay.[62]

When a personal interview with the consular authorities is necessary for the issuance of travel documents, participating in such an interview, as well as providing truthful and accurate information, is part of the third-country national's obligations.[63] Furthermore, as mentioned above, third-country nationals can be expected to meet administrative requirements necessary for that purpose.[64] However, this is limited, first and foremost, to requirements that the competent authorities can legitimately impose based on their own international obligations. In this respect, the question of fees is a particular point of attention. Customary international law limits the scope of demands for fees to those that are reasonable, while other instruments, such as the Chicago Convention, provide that these fees should not normally exceed

61 See 8.3.4.

62 See 8.4.1.

63 While the obligation to obtain travel documents cannot be effective without also implying an obligation on the individual to provide truthful and accurate information, this does not mean that compliance with this element will be easy to assess for member states. See, in this regard, the characterisation of interactions between the individual and the consular authorities of the country of return, as seen from the perspective of the EU member state, as a black box in 12.4.2 and footnote 111.

64 Although in some areas, such as the payment of fees, they may be able to rely on assistance, see below.

the cost of the operation required for it. Additionally, the Vienna Convention provides than any fees levied for consular acts, which includes the issuance of travel documents, must be set out in the laws and regulations of the state. This implies that any demands for fees not explicitly regulated, not reasonably connected to the process of issuing them or otherwise unreasonably high would be prohibited. Here again, the matter of ensuring that responsibilities of one actor (in this case the country of return) are not unduly shifted to another (the third-country national) comes into play. A consistent application of the Directive with international frameworks would prohibit member states from requiring third-country nationals to pay fees which are in violation of the country of return's obligations. As such, when confronted with clearly unreasonable or unregulated fees for travel documents, the refusal of third-country nationals to pay these cannot be considered by the EU member state as non-compliance with the obligation to return.[65]

Limits on such expectations also arise directly out of the EU member state's own obligations under international law, in particular CTOC. CTOC requires EU member states to act to prevent and combat corruption, which involves any situation of solicitation or acceptance by a public official, directly or indirectly, of an undue advantage so that that official acts or refrains from acting in the exercise of his or her official duties.[66] While not much is known about corruption in the process of readmission or the issuance of travel documents in expulsion proceedings, there are certain indications that the risks may be quite high, especially in relation to certain countries of return. A consistent approach to member states' obligations to combat corruption would also encompass that they do not contribute to this in the course of return procedures. As such, member states cannot consider the refusal of third-country nationals to meet demands that would amount to corruption as a failure to comply with the obligation to return. Turning a blind eye to signals that corruption is part of the process of obtaining travel documents, and worse still, implicitly or explicitly expecting third-country nationals to accommodate corruption, would clearly be in violation of the spirit and letter of EU member states' obligations, not to mention the dignity of the individual.[67]

A related issue is the prevention of procurement and use of fraudulent travel documents. Again, this involves the obligations of EU member states, both under the Smuggling Protocol and the Chicago Convention, to prevent the spread and use of such documents. Despite the need to ensure effective return, member states cannot allow third-country nationals to meet their obligation to return by leaving their territories using documents known to be falsified or fraudulently obtained. Similarly, member states cannot

65 See 8.4.2.

66 CTOC Article 8(1)(b).

67 See 8.4.2. Apart from monetary demands this would also cover the solicitation of "undue advantage," including, for example, sexual favours.

require or encourage third-country nationals, explicitly or tacitly, to try and obtain travel documents through processes or channels that risk producing false or fraudulent documents, even if this is the only way to achieve voluntary return.[68]

Finally, in relation to the obligation to obtain travel documents, third-country nationals may be expected to turn to the EU member state to obtain travel documents in certain circumstances. This, however, will require active cooperation from the EU member state, for example by informing stateless persons about any applicable possibilities to issue a travel document under the 1954 Statelessness Convention. The use of a so-called EU travel document is also recognised as a basis for return and readmission in certain EU readmission agreements and has been incorporated in certain non-binding arrangements on return. However, while it may facilitate return in practice, such an EU travel document is not an internationally recognised travel document, and questions may thus arise about the position of third-country nationals returning on this basis, especially if they do not return to their country of origin. In this respect, EU member states should ensure that appropriate guarantees of readmission and of the treatment of those returning based on these EU travel documents are in place before expecting third-country nationals to use them for voluntary returns.[69]

12.2.3 The obligation to make arrangements for departure *(return element (iii))*

The third and final category of actions to fulfil the obligation to return, discussed in Chapter 9, is making practical arrangements for such return and, eventually, leaving the EU member state. In this regard, third-country nationals may first have to meet exit requirements when leaving. While EU member states have a clear interest in seeing third-country nationals leave, they must also observe other requirements, such as in relation to the protection of the rights of others as well as EU rules on the control of external borders. In relation to the former, barriers to departure can include remaining available for pending criminal proceedings, the payment of outstanding taxes, the fulfilment of financial obligations to others, or preventing a parent from taking children out of the country without consent of the other parent. These were not discussed in detail but it was noted that each of these has been recognised by international (quasi-)judicial bodies as potentially legitimate interferences with the right to leave. To the extent that third-country nationals have control over such situations, they can be expected to make efforts to settle any matters preventing their legitimate departure. Where necessary, this requires positive cooperation by the EU member state, including in considering the extension of the voluntary departure period if such matters cannot reasonably be resolved within

68 See 8.4.3.
69 See 8.5.

the initial period granted.[70] Another set of exit requirements relate to the crossing of external borders. These may further limit the choices of third-country nationals about how they leave the EU member state. On the basis of the SBC, member states must ensure, for example, that external borders are only crossed at official crossings during fixed opening times, and that third-country nationals leaving are subjected to thorough checks, which include the verification of travel documents. While these do not seem particularly onerous requirements, and will normally be met by third-country nationals returning voluntarily easily, they may limit the possibilities, for example, for third-country nationals' discretion to determine how to leave, especially when returning over land. Considering the Directive's role as a development of the Schengen acquis, the obligation to return also implies that third-country nationals do not meet their obligation to return in violation of any of these exit requirements.[71]

A second issue of note is the interaction between the obligation to return and the availability of return assistance. Virtually all EU member states provide access to AVR(R) programmes to facilitate voluntary return in a variety of ways. Such programmes could have a positive effect in stimulating third-country nationals returning voluntarily, and in some cases may be crucial to make this possible, especially when third-country nationals do not have sufficient means to organise travel documents or transport themselves. While there is a clear interest of member states in promoting the use of AVR(R) programmes, there may also be reasons, whether budgetary or for fear of abuse, to limit access to such programmes. From this perspective, the question arises whether the existence of such programmes, in combination with the fact that third-country nationals are under a legal obligation to return, results in a right to receive return assistance. The current Directive does not provide for such a right explicitly,[72] but it acknowledges the role of such assistance in ensuring effective return. The CJEU's case law on ensuring the effective implementation of the Directive can also be interpreted as requiring EU member states to provide some forms of facilitation, both to ensure effective return and to uphold the priority of voluntary return. From this perspective, a right to receive return assistance may arise, but only in those circumstances that assistance programmes already exist, and assistance is necessary to ensure a successful return. From this perspective, this right would encompass assistance in areas essential for de facto return, such as travel documents and transport, if third-country nationals cannot cover this. However, a concomitant right to other assistance, especially post-return reintegration assistance, cannot be deduced on this basis. Nevertheless, to the extent that this is strictly necessary to ensure that they can return voluntarily and effectively, such a right should also extend to individuals normally excluded from AVR(R) programmes, such as may be

70 See 9.2.1.
71 See 9.2.2.
72 Although in the recast proposal this appears to change.

the case for persons having enjoyed visa-free travel to EU member states. At the very least, any refusal of assistance in such a situation would have to be objectively justified – for example in relation to the risk of abuse – and be proportionate.[73]

The question of return assistance must also be considered from the other side. If a third-country national has not returned within the voluntary departure period, can his or her failure to seek assistance be taken as non-compliance with the obligation to return? As a general point, this is not the case, since individuals are free to arrange their departure of their own accord, with assistance being optional. However, in individual cases it may be established that the lack of seeking assistance was a deciding factor in the non-return. In line with the discussion above, such a situation potentially arises if the third-country national does not have the means to pay for transport and AVR(R) programmes provide for this. Then, the third-country national could be considered to not have made the necessary efforts to achieve voluntary return. However, this issue is more problematic when dealing, for example, with the mediation services that the EU member states' authorities in charge of return, or organisations such as IOM, offer in obtaining travel documents. If such organisations are involved, consular authorities of countries of return may be more willing to issue documents, including on the presumption that this signifies that the individual is willing to return.[74] However, since the obligations of countries of return to readmit and issue travel documents for this purpose do not depend on the willingness of the individual to return, there may be questions whether such countries are justified in only providing documents when such mediation is involved. As discussed above, any non-cooperation with returns because these are not based on the willingness of the person involved is a matter, first and foremost, of the legal relationship between the country of return and the EU member state. For this reason, it may be more difficult to justify that not asking for mediation should be considered as non-compliance by third-country nationals with their obligation to return.[75]

A final point in relation to departure from the member state is the question when exactly the third-country national has actually met the obligation to return. Is this when he or she has left the territory of the EU member state or upon return in the destination state? The definition of return in the Directive suggests the latter, but other provisions tentatively point to the former. Using the arrival of the third-country national in the destination state as an indicator of compliance is most compatible with the obligation to return

73 See 9.3.2. It was also noted that the exclusion of certain nationalities from return assistance may raise questions of compliance with non-discrimination standards, but this falls outside the scope of the analysis undertaken in this dissertation.

74 But see the discussion in 12.2.1.2 above on issues of willingness.

75 See 9.3.3. But also see the discussion of readmission to transit countries, where mediation by the EU member state is a necessary condition, so in such cases refusal to cooperate preventing such mediation may amount to non-compliance.

under the Directive, but there may be a number of practical difficulties for member states to ensure that this result has been achieved, especially if third-country nationals return without assistance. Neither self-reporting schemes nor the possibility of applying for the lifting of an entry ban are fool-proof ways of doing this.[76] Member states may have better ways to verify departure at their external borders. But if the criterion is leaving the territory of the EU member state, this would leave open the possibility of third-country nationals meeting the obligation imposed by the return decision by moving irregularly to another member state, which was clearly not intended by the co-legislators. In this respect, the way the return decision is formulated in the Directive does not guarantee it has a European or Schengen-wide effect. Such an effect only comes into force with the imposition of an entry ban. While this does not affect the scope of the actions third-country nationals can and cannot be expected to take in complying with their obligation to return, it does amount to a gap in the Directive's ability to provide for a truly European return system.[77]

12.3 The application of the voluntary departure period *(research questions 2a and 2b)*

This section discusses the findings in relation to the second set of research questions, dealing with the application of the voluntary departure period. Like the obligation to return, the voluntary departure period forms a crucial part of the overall notion of responsibility inherent in voluntary return. It is only by virtue of giving third-country nationals the time to meet the obligation to return themselves that the allocation of individual responsibility makes sense. As such, the extent to which the voluntary departure period truly provides a sufficient opportunity to meet this obligation determines whether responsibility has concrete meaning or is just an empty phrase. If a voluntary departure period is too easily denied, or if the time provided to return is too short, the notion of voluntary return becomes a paper tiger.

In comparison to the issue of the obligation to return, the analysis of the voluntary departure period has the advantage of being set out more elaborately in the Directive. Additionally, the issue of the voluntary departure period is much more clearly located within the relationship between the EU member state and the third-country national, and thus mostly stays within the internal dimension of the triangle model. However, the external dimension has, or should have, an impact on decision-making in regard to the length of the voluntary departure period in particular.

The findings on research question 2a, dealing with the scope of the entitlement of third-country nationals to a voluntary departure period, and the possibilities of EU member states to deny such a period, will be presented in

76 See 9.4.1.
77 See 9.4.2 and 9.4.3.

12.3.1. This covers the general principles governing the priority of voluntary departure period, the scope of application of each of the three grounds for denying such a period, the issue of granting a period shorter than seven days, and the question when denial becomes prima facie incompatible with EU law, despite it being provided for in the Directive. The findings on research question 2b, regarding the appropriate length of the voluntary departure period so as to ensure an effective possibility for voluntary return, are discussed in 12.3.2. This includes findings on the establishment of the length of the initial period, its extension, and the cutting short of a period already provided.

12.3.1 The entitlement to a voluntary departure period and possibilities of denial *(research question 2a)*

The priority of voluntary return, the entitlement of the individual to a voluntary departure period and possibilities for denial were covered in Chapter 10. The priority of voluntary return is embedded, first of all, in Recital 10 of the Directive, which provides that "[w]here there are no reasons to believe that this would undermine the purpose of a return procedure, voluntary return should be preferred over forced return and a period for voluntary departure should be granted." Second, it takes shape in Article 7(1) which requires member states, when issuing a return decision, to "provide for an appropriate period for voluntary departure between seven and thirty days." This, however, is subject to the possibility to make exceptions in three cases, provided for in Article 7(4), namely if there is a risk of absconding, if an application for legal stay has been dismissed as manifestly unfounded, or if the person concerned poses a risk to public policy, public security or national security.

12.3.1.1 The general principles governing the priority of voluntary return

Article 7(1) of the Directive, as confirmed by the CJEU, sets out a right to a voluntary departure period conferred by EU law. This requires any exceptions to the provision of such a period to be construed in a strict manner. The right, however, is highly qualified, both by Recital 10 and the specific grounds for exceptions.[78] As regards the general point of undermining the return procedure, it was found that its relation to the priority of voluntary return is ambiguous. It could be seen as an additional requirement to be met, on top of the existence of a situation as listed in Article 7(4), before a voluntary departure period could be denied. However, this would raise questions about the applicability of at least two of the grounds in Article 7(4): the dismissal of an application as manifestly unfounded or fraudulent,

78 See 10.2.1.1.

and the risk to public policy, public security or national security. Neither relate directly to the possibility of enforcing the return decision, and their existence would, in this sense, not undermine the return procedure. Since the co-legislators explicitly provide for these grounds for denial, they are thus more appropriately considered as specific expressions of the more general principle set out in Recital 10.[79]

A particularly important element in regard of the priority of voluntary return is its connection to fundamental rights. The opportunity to return voluntarily could be read into the guarantees provided by the right to leave any country under the ECHR and ICCPR.[80] More concretely the priority of voluntary return is recognised as a mechanism to protect the fundamental rights of third-country nationals in the return procedure more broadly, by providing them with an opportunity to avoid enforcement, but also by ensuring that any recourse to enforcement is proportionate. This is the way in which the CJEU, in the *Zh. and O.* case, construes the role of voluntary return in the Directive. The role of voluntary return as such a proportionality mechanism is an important element in the interpretation of specific exceptions to the rule that a voluntary departure period should be granted.[81]

12.3.1.2 Denial of a voluntary departure period for reasons of public policy, public security or national security

The denial of a voluntary departure period for reasons of public policy is the only part of the Directive's provisions on voluntary return with which the CJEU has engaged in detail, in the above-mentioned *Zh. and O.* case. However, its findings in this regard have wider implications, not just to cases where a risk to public security or national security arises, but also to the application of the other grounds for denial of a voluntary departure period. In relation to public policy, the CJEU finds, inter alia, that member states essentially retain freedom to determine the requirements of public policy in accordance with national needs, and that these may vary. But that this cannot be determined unilaterally by each member state. In particular, it points to the Directive's principles that decisions must be adopted on a case-by-case basis, on objective criteria, and going beyond the mere fact of illegal stay, as ways to safeguard the proportionality of such decisions. On the circumstances that could lead to a risk to public policy, it finds that this may include suspicions of or convictions for criminal offences, but that this must be taken in connection to other circumstances.[82] Such other circumstances include the severity of or type of offence, the time elapsed since the offence and the intention of the person concerned. This must

79 See 10.2.1.2.
80 See 10.2.2.1.
81 See 10.2.2.2.
82 See 10.3.2.1.

furthermore amount to a genuine, present and sufficiently serious threat to one of the fundamental interests of society, before it can justify denial of a voluntary departure period. But the denial of a voluntary departure period cannot be automatic when such a threat exists. It requires an individualised assessment of the appropriateness in the individual case, including from the perspective of the impact on the individual's fundamental rights.[83] The notion of such a threat particularly implies a forward-looking approach, and past behaviour, while being relevant, cannot simply be extrapolated to the future. Similar principles apply to a risk to public security and national security as well, especially the need to establish that the individual poses a genuine and present threat in relation to those interests.[84]

This implies, more broadly, that any decision on the denial of a voluntary departure period (based on any of the grounds in Article 7(4)) should be individualised, fully contextualised – taking into account any factual or legal matter related to the situation of the individual – and thus properly weighed against the third-country nationals interests, including but not limited to the best interests of children involved, family life and the state of health of the person involved.[85]

12.3.1.3 Denial of a voluntary departure period because of a risk of absconding

Of the three grounds for denial, the risk of absconding could particularly be subject to wide-ranging interpretations by member states, which makes circumscribing its use all the more important. This is despite the fact that it is the only element of Article 7(4) that is further defined, namely as "the existence of reasons in an individual case which are based on objective criteria defined by law to believe that a third-country national who is the subject to return procedures may abscond."[86] Each of the component parts of this definition was examined further.

As regards the objective criteria defined by law, CJEU case law in relation to the Dublin III Regulation, which includes the same concept, must lead to the conclusion that, in the absence of binding provisions of general application in domestic law setting out such criteria, the ground of a risk of absconding may not be used to deny a period for voluntary departure. This, however, still leaves member states with significant leeway to set out such criteria. Usually, a combination of criteria would have to be applied to justify the existence of a risk of absconding, which at any rate needs to be determined on the basis of an overall assessment of the specific circumstances of the individual case. The possibility of incorporating wide-

83 See 10.3.2.2.
84 See 10.3.3.1.
85 See 10.3.3.2.
86 RD Article 3(7).

ranging criteria in national law notwithstanding, the definition of the risk of absconding in the Directive nonetheless implies certain limitations on their legitimacy and use.[87]

Perhaps the most important limitation in this respect is that these criteria must indeed be able to indicate a risk of absconding. This raises questions, since this risk absconding is only defined in the Directive in a cyclical manner: a risk of absconding exists because there are reasons to believe a person may abscond. Absconding is appropriately understood in line with its usual meaning in everyday language. And such a usual meaning would indicate an attempt to evade capture or otherwise circumvent control by the authorities, which is also confirmed in different language versions of the Directive. This interpretation is further bolstered by the CJEU's case law in relation to the risk of absconding in the Dublin III Regulation, which plays a similar role as in the Directive. The CJEU interpreted it as the intent to escape or evade the reach of the competent authorities. Similarly, the proposal for a recast of the Reception Conditions Directive relates absconding to a person not remaining available to the competent authorities. All this points to a meaning of absconding in the Returns Directive as involving third-country nationals disappearing from the view of the authorities and making enforcement of the return decision impossible.[88]

In view of such a definition of absconding, certain criteria applied by member states are particularly problematic. This is especially the case for criteria focused on the (expected) non-cooperation in the return procedure and eventual non-return of third-country nationals. Neither non-cooperation nor non-return are listed in the Directive's as grounds for denial of a voluntary departure period, and the matter of cooperation is only mentioned in the provisions relevant to the enforcement stage. This is in line with the fact that a risk of absconding relates to remaining available for removal when the third-country national does not comply with the obligation to return him or herself. However, unwillingness to cooperate with the return procedure, or not taking action to return during the voluntary departure period, does not inevitably mean that such removal will be impossible. Even in such circumstances, third-country nationals may remain on the radar of member states. Statements by third-country nationals that they do not intend to return likewise cannot indicate, in isolation, that the person will abscond. Even when unwilling to return, there may be reasons why they do not abscond, for example as to continue to have access to certain services, including government-provided accommodation. Additionally, the attitudes of third-country nationals as regards compliance with the obligation to return may not be static. As the likelihood of enforcement increases, they may still be spurred into action to return voluntarily. While a person

87 See 10.4.2.
88 See 10.4.3.1.

who indicates that he or she does not intend to return or to cooperate in efforts to effect that return may also have an intention to abscond, this is not a necessary correlation, and therefore such criteria cannot be self-standing indicators of a risk of absconding. Rather, member states would have to show specific circumstances related to such (presumed) intentions of the third-country national that lead them to believe that the person may try to evade the enforcement of the return decision. While this may leave member states with a measure of uncertainty over whether the granting of a voluntary departure period actually results in effective return, this uncertainty is part and parcel of the procedure set out in the Directive.[89]

Another important limitation of the criteria for absconding is that these, according to the definition provided in the Directive, should go beyond the mere fact of illegal stay. This is a logical consequence of the Directive's architecture since illegal stay is a determinative factor whether a third-country national comes within its scope. If the fact of illegal stay could indicate a risk of absconding, and thus provide a basis for denying a voluntary departure period, this exception could be applied in all cases. And it would thus cease to be exceptional. Despite this, many criteria used by member states, and proposed by the Commission, skirt uncomfortably close to the mere fact of illegal stay. Perhaps the most obvious case in this respect is when irregular entry into the member state is used as an indicator for absconding. Such irregular entry is in fact a reason for a third-country national's illegal stay, and as such, part of the 'mere fact' condition excluded from the scope of legitimate criteria. While specific circumstances of the irregular entry could theoretically provide some indication of a risk of absconding, it would be for the member state to put such circumstances forward and justify them, which should go beyond just the establishment of irregular entry or stay. Other criteria also overlap with, or largely replicate, the mere fact of illegal stay. The lack of documents, for example, is often constitutive of illegal stay, and therefore this lack alone is insufficient as an indicator of a risk of absconding. Again, a nuanced approach to the way in which such circumstances could indeed indicate that a person could reasonably be expected to disappear from view and evade enforcement is needed. Overall, to truly ensure that several commonly used criteria do not just replicate the mere fact of illegal stay, a fundamental reconsideration of their application would be required.[90]

Finally, as regards these criteria, others, particularly those related to ongoing criminal procedures or convictions, also raise questions as to their suitability. Specifically, the inclusion of such criteria could lead to the circumvention of the conditions for denial of a voluntary departure period on the grounds of a risk to public policy, public security or national security. Such issues become even more pressing when member states apply criminal

89 See 10.4.3.2.
90 See 10.4.4.

sanctions for irregular entry or stay, since the criminal fact relied upon by member states as a criterion for absconding would arise out of the mere fact of illegal stay.[91]

A last issue in relation to the denial of a voluntary departure period because of a risk of absconding is the role of measures to prevent absconding, provided for by Article 7(3). It lists (non-exhaustively) regular reporting to the authorities, the deposit of an adequate financial guarantee, submission of documents or the obligation to stay at a certain place as measures that third-country nationals could be subjected to for the duration of the period for voluntary departure. The imposition of such measures is not simply a matter of discretion for member states. On the one hand, many of these measures constitute interferences with fundamental rights, and must therefore be justified as necessary and proportionate in the individual case. However, as a matter of their obligations under the Directive, member states can also be considered to be compelled to impose such measures if this is the only way to prevent absconding and thus the undermining of the possibility of eventual enforcement of the return decision. On the other hand, the same obligation to ensure the effectiveness of the Directive also extends to safeguarding the priority of voluntary return. As such, if member states have substantiated concerns about the risk of absconding in the individual case, but these risks can be sufficiently mitigated by the imposition of measures under Article 7(3), member states must use these measures to ensure that the third-country national can still enjoy his or her right to a voluntary departure period.[92]

12.3.1.4 Denial of a voluntary departure period in case of manifestly unfounded or fraudulent applications

The third and final ground for denial of a voluntary departure period is when an application for legal stay is dismissed as manifestly unfounded or fraudulent. The possibility for dismissing applications as manifestly unfounded, as well as rejecting them in case of fraud, are provided for in several EU directives. However, dismissals in such terms on the basis of national law would also be sufficient to be applicable to this ground for denial. Furthermore, annulment or revocation of a residence permit or visa would arguably be so too. This third ground for denying a voluntary departure period is different in nature from the other two, since it does not require an assessment of a future threat, but merely the establishment of a historical fact. This also raises questions about the consideration member states must make. Either an application has been dismissed as manifestly unfounded or it has not, and this does not seem to give much opportunity for further consideration of individual circumstances. From this perspective, the inclusion of this ground for denial in the Directive sits

91 See 10.4.5.
92 See 10.4.6.

particularly awkwardly with the principle of proportionality. To ensure that this principle is observed, further justification of the need to deny a voluntary departure period, beyond the fact of the dismissal of the application, remains necessary. However, such justifications may be difficult to put forward without veering into the territory of the other grounds for denial, especially the risk of absconding. This would then require justification in view of the conditions discussed in relation to *that* particular ground, rather than only because the application was dismissed as manifestly unfounded or fraudulent. Because it is so difficult to consider self-standing justifications which do not rely on the other grounds, it is very questionable that denial on the ground of a manifestly unfounded or fraudulent application holds up in view of the general principles of EU law, and, by extension, the appropriate application of the priority of voluntary departure as a means to safeguard fundamental rights. At most, this ground could potentially play a role in decisions to provide a voluntary departure period shorter than seven days, which – at least in the abstract – would leave the opportunity to return voluntarily intact.[93]

12.3.1.5 Considering a voluntary departure period shorter than seven days

When using the possibility contained in Article 7(4) to provide a voluntary departure period shorter than seven days, the principles to be applied to such a decision are generally the same as those discussed in relation to denial, since they pertain to the same provision. As such, a shortened period should only be provided in exceptional circumstances, on the basis of the grounds enumerated in Article 7(4), and when proportionate. The main question in this regard is whether member states, when they consider there are sufficient reasons to apply Article 7(4), should first consider providing a shorter period, rather than denying that period outright immediately. Given that member states should resort in each case to the least restrictive measure available, and in view of the role of the voluntary departure period as a proportionality mechanism to safeguard fundamental rights, this should indeed be the case.[94]

12.3.1.6 Incompatibility of certain provisions and proposals with fundamental rights

Some elements of the denial of a voluntary departure period, both currently in the Directive and part of the recast proposal, raise issues as to their compatibility with primary EU law. In this respect, the denial of a voluntary departure period purely on the basis of an application having been dismissed as manifestly unfounded or fraudulent can be

93 See 10.5.

94 Which may often not be the case because such short periods will be unlikely to provide for an effective opportunity to return voluntarily, see 12.3.2.1 below.

characterised as teetering on the brink of prima facie incompatibility, for the reasons discussed above. This prospect of incompatibility, in view of the lack of proportionality, must also be considered for the Commission's proposal to make denial of a voluntary departure mandatory in regard of all three grounds set out in Article 7(4), especially in combination with other proposed changes, such as the wide-ranging criteria for a risk of absconding, which could require member states to deny a voluntary departure in the vast majority of cases. The recognition by the CJEU of the priority of voluntary return as a mechanism to safeguard fundamental rights ties it to EU primary law rather than just the provisions laid down in the Directive. This makes it quite possible that a finding of incompatibility with primary law, as well as the Directive's own objectives, would eventually have to be made if the Commission's proposal were to be adopted.[95]

12.3.2 The appropriate length of the voluntary departure period *(research question 2b)*

As noted above, the length of the voluntary departure period is an important determinant whether the right to voluntary return can be enjoyed effectively. Several issues in this respect were examined in Chapter 11, namely the appropriate length of the initial voluntary departure period, including how to establish this; the extension of this period, including when this is necessary and on what basis this needs to be assessed; and the possibilities for cutting short a period already granted.

12.3.2.1 The initial voluntary departure period

When no grounds for denial of a voluntary departure period exist, such a period should be granted, with its length between seven and thirty days. However, this does not leave member states complete discretion to decide on this length. Rather, such a length must be 'appropriate.' The reference to an appropriate period in Article 7(1) must be given specific meaning, which would be related to the achievement of the Directive's objectives, particularly the safeguarding of fundamental rights by ensuring the priority of voluntary return is upheld. This means that not just any period falling within the range of seven to thirty days is legitimate. Rather, only a period that, in the individual case, gives a realistic opportunity to return voluntarily can be considered appropriate within the meaning of the Directive. Member states thus have to justify as appropriate any period shorter than the maximum of thirty days provided for in Article 7(1).[96]

This raises the additional question which circumstances should be considered in deciding on the appropriate length of a voluntary departure period. In this respect, one important factor in whether voluntary return

95 See 10.7.
96 See 11.2.1.

can be achieved within the period relates to the individual's actions and inactions. From this perspective, decisions can be made on the basis that the time accorded to third-country nationals needs to be sufficient to return if they act with due diligence. However, this general starting point does not mean that member states can simply use their expectations of the extent to which third-country nationals, in the individual case, might cooperate with the return process and comply with the obligation to return. The voluntary departure period is aimed at providing third-country nationals with an opportunity to comply voluntarily, but it is part and parcel of the return procedure that they might not use this opportunity, which is clear from the inclusion of an enforcement stage. Furthermore, while the Directive aims to ensure effective return, its structure suggests that this does not always have to be the quickest return. The priority of voluntary return implies that some delay in return is acceptable to ensure better protection of fundamental rights. Furthermore, whether the expectations of non-return or non-compliance play out as member states expect is highly unpredictable, since individuals may change their attitudes and intentions during the voluntary departure period.[97]

In contrast to expectations about cooperation, a large range of factors do play a role in establishing what period would provide for a realistic opportunity to return voluntarily. These factors may be on the side of the individual, the country of return or the member state. To assess these various factors properly, it is first necessary for third-country nationals to provide relevant information about, for example, any evidence they have for readmission or obtaining travel documents, means at their disposal to organise return, but also other relevant issues such as those relating to their health, age, specific needs or any other matters that may intervene in the return process. Not providing such information, or doing so only partially, will impact on the ability of member states to make a good assessment of the appropriate length of the voluntary departure period. This may justify granting a relatively short period, but this must be weighed against all the circumstances of the case. Member states, for their part, must enable third-country nationals to put forward such information.[98]

Beyond this, given it is their responsibility to ensure a voluntary departure period is appropriate, member states must also act with due diligence to gather other relevant information, beyond that made available by the individual, that would help them make a decision about the length of that period. They can be expected to draw upon their own experiences of the length of return procedures with specific countries of origin, including taking account of time frames set out in the applicable legal frameworks such as readmission agreements, provided these are observed in practice. They can also draw on experiences of return assistance providers, such as IOM, about typical times needed to organise returns to certain countries, in

97 See 11.2.2.
98 See 11.2.3.1.

specific situations. While incorporating such information does not provide certainty that the length of the voluntary departure period will be sufficient for return, since many factors intervene, member states should make their best efforts to conduct a well-informed assessment. In this way, ensuring that the voluntary departure period is indeed appropriate requires joint efforts by the third-country national and the EU member state.[99] Furthermore, these efforts will in many instances mainly be focused on making assessments of the external dimension, namely how long it may take for the country of return to decide on readmission or issue travel documents. In this respect, further interaction with that country of return, if this is necessary to obtain information on such time frames, may also be necessary, both by the EU member state and the individual.

While the Directive in principle allows for voluntary departure periods of only seven days, or close to it, this raises questions of compatibility with the appropriateness criterion, and thus with the *effet utile* of the priority of voluntary return. While not prima facie incompatible with the text of the Directive, the analysis found many indications that such short periods, in most cases, will be insufficient to allow a realistic period for voluntary return, and that member states should act on a strong assumption that seven-day periods are not appropriate. The shorter the period they grant, the stronger their justification that this is still appropriate must be. From this perspective, the Commission's proposal to scrap the lower limit of seven days, allowing member states to provide shorter periods even in the absence of grounds set out in Article 7(4) raises particular concerns about compatibility with the priority of voluntary return.[100] Similarly, any suggestion that member states should aim, as much as possible, to provide short periods, and to tie any longer periods to the cooperation of the individual, would be incompatible with the Directive.[101] The practice of making distinctions as to the length of the voluntary departure period only on the basis past legal status of third-country nationals, such as whether they had previously applied for asylum, does not find support in the Directive. Its rules apply to all third-country nationals who are found to be irregularly staying, and they must thus, as a general starting point, be subject to the same rules and the same opportunity to return voluntarily.[102]

12.3.2.2 Extension of the voluntary departure period

Article 7(2) of the Directive provides that a period for voluntary departure should be extended "where necessary," again for an appropriate period, and taking into account the specific circumstances in the individual case, such as the length of stay, the existence of children attending school, or family

99 See 11.2.3.2.
100 See 11.2.4.1.
101 See 11.2.4.2.
102 See 11.2.5.

or social links. The necessity of extension arises whenever the interests of the individual in having an opportunity to return voluntarily continue to outweigh the interests of the member state to enforce the return decision. Prima facie, this is the case if no finding can be made by the member state, at the end of the initial voluntary departure period, that the third-country national failed to take the appropriate steps to achieve return in a timely manner. This cannot be based on the simple assertion that he or she is still in the member state. After all, even when all required actions are taken by the individual, return also depends on the external dimension. As such, the necessity of extension requires assessing compliance with the obligation to return in line with the scope and limits discussed in section 12.2 above. However, even if a finding can be made that the third-country national did not take all action necessary for return with due diligence, the principle of proportionality still requires further consideration, including in relation to the individual circumstances, particularly also whether he or she can still be expected to take such necessary steps in the near future. In this respect, extension may still be required, even if there have been indications of non-compliance during the initial voluntary departure period.[103]

As regards the requirement that decisions on extension of a voluntary departure period take into account individual circumstances, the interests listed in the Directive may indicate a wider obligation to consider the impact of non-extension on the fundamental rights of third-country nationals. This includes the right to education and, as acknowledged explicitly in the Directive, the best interests of the child, as well as the right to private or family life. Additional circumstances could also include the financial interests of third-country nationals such as disposing of possessions, wrapping up business interests, or collecting outstanding wages. Such circumstances should be given consideration both in relation to the question whether it is necessary to extend the voluntary departure period, and in relation to the length of that extension. The latter would again have to be in line with the elements of appropriateness already discussed in regard of the initial period.[104] At any rate, decision-making about the initial period and extension should be seen as communicating vessels: a less well-informed and accurate assessment of the appropriate length of the initial voluntary departure period will strengthen the presumption that extension is necessary, and vice versa. Although this does not flow clearly from the text of the Directive, the provisions on extension could sometimes be used to provide for an initial period longer than the maximum of thirty days set out in Article 7(1).[105]

103 See 11.3.1.
104 See 11.3.2.
105 See 11.3.3.

12.3.2.3 Cutting short a voluntary departure period

A final element in relation to the length of the voluntary departure period is cutting such a period short (in effect, rescinding it) after it was already granted. Such a possibility arises out of Article 8(2) of the Directive, which allows enforcement of the return decision only after the voluntary departure period lapses, unless a risk as referred to in Article 7(4) arises. The previous dismissal of an application as manifestly unfounded or fraudulent will normally no longer be relevant, and cutting short can thus only happen on the basis of a risk to public policy, public security or national security that has arisen during the voluntary departure period, or if new indications of a risk of absconding have emerged. However, to cut short a period for voluntary departure already granted on these grounds requires full observance of the limits and safeguards identified in relation to research question 2a. The fact that the third-country national has not been active enough during the voluntary departure period to achieve return cannot be a basis for rescinding that period. However, non-compliance with measures to prevent absconding, if reasonable excuses for this cannot be forward by the individual, may provide a basis for cutting short a voluntary departure period if objective indications of a risk of absconding persist, taking into account the overall proportionality of such a decision.[106]

12.4 Responsibility for voluntary return: towards a more nuanced understanding and application

Having set out the detailed findings in regard of the specific research questions, this final section zooms out a bit by looking at the overarching notion of responsibility inherent in voluntary return, and its role in the Directive more generally. This dissertation started with the recognition that the notion of voluntary return, and the responsibility allocated to third-country nationals, lacked clarity. While not exclusively, this is due to a very significant part to the fact that the obligation to return is only vaguely defined, making it a particularly nebulous concept. And this leaves what third-country nationals can be held responsible for potentially open-ended. Furthermore, the provisions on the voluntary departure period in the Directive, if not clarified further, would give member states considerable leeway in denying or limiting the voluntary departure period. This would then risk leaving third-country nationals in a double bind: on the one hand, they could be held responsible for non-return in almost all circumstances, even if they were not actually to blame for this. And on the other, they might not be provided a fair opportunity to meet this responsibility in the first place.

106 See 11.4.

However, the discussion in the previous chapters, as summarised above, shows that this cannot be the case. Rather, the notion of individual responsibility is constrained on multiple sides. These constraints arise out of different factors, including the text and objectives of the Directive itself, including as interpreted by the CJEU, further interpretations in line with international instruments that have effect in EU law, and, especially, the fundamental rights of the individual, which are particularly affected by open-ended notions of responsibility. But these constraints also arise out of the fact that return depends not only on the individual, but on all actors in this process, especially the country of return. The following paragraphs provide some further reflections on these relationships. First, as regards the importance of the external dimension (12.4.1). And second, in view of the specific interaction between the individual and the member state during the voluntary departure stage (12.4.2).

12.4.1 The importance of the external dimension

The triangle model proposed in Chapter 1 aimed to make the crucial role of the country of return more visible, while at the same time providing a basis for ensuring that the provisions of the Directive would be applied in a manner consistent with the external dimension.[107] While EU rules can in principle be defined in isolation, consistency is necessary, first of all, as a touchstone for the actions which third-country nationals can and cannot be expected to take, as well as for what is a realistic voluntary departure period. From the perspective of the return procedure, bringing the role of the country of return into focus also helps identify potential mismatches between the internal rules of the Directive and the external dimension. Such mismatches may occur, for example, in the definition of obligatory destinations on the one hand, and their readmission obligations of destination countries on the other. Especially as regards stateless persons, it is easy to say that they should seek to return to their country of origin, but if that country has no, or only very limited, obligations to readmit such persons, this leaves a gap in the implementation of the Directive. Recognising these and other restrictions arising out of the external dimension is important to ensure that individual responsibility is not translated into an assumption that non-return at the end of the voluntary departure period is automatically the fault of the third-country national.

Keeping the responsibilities of the country of return firmly in view may also play an essential part in ensuring the overall fairness of the voluntary return procedure and the demands placed on third-country nationals by the EU member state. The return procedure is full of dilemmas, several of which have been sketched in the preceding chapters. While these dilemmas may result from the actions and omissions of the individual, the role of the

107 See figure 1 on p. 27.

country of return must not be discounted. As noted, this role may include outright failures to meet obligations, but also more subtle ways of intervening, such as obfuscation in decision-making about readmission or the issuance of travel documents. Furthermore, countries of return may make illegitimate demands of third-country nationals. When the return process runs into difficulties, the possibilities of EU member states to ensure that countries of return act in line with their international obligations may be limited. While increasing attention is paid to the use of carrots and sticks in the cooperation with countries of return, this is a slow, uncertain, and often diplomatically sensitive process. As such, the temptation to transform this from a problem of the country of return's responsibility to one of the third-country national's responsibility may be too great. Again, several examples of this were provided, which appear to result from a one-dimensional view of the obligation of the individual to do "whatever it takes" to return. Instead, the triangle model helps locate responsibilities where they belong, including by ensuring that third-country nationals are not required to repair failures by countries of origin to comply with their obligations. This ensures that the responsibility of the individual is not overstretched, to the detriment of his or her fundamental rights, and that the EU member state itself does not impose demands that would bring it into conflict with its own obligations.

While the actions of countries of return are outside the immediate control of EU member states, a more consistent and fair application of the notion of individual responsibility, and ensuring realistic opportunities for voluntary return, may well have a positive impact on cooperation with such countries. As noted in Chapter 2, voluntary return plays a potentially important, and arguably increasingly prominent, role in managing the relationship between the EU and destination countries. Perhaps the most extreme example of this is found when countries of return refuse to cooperate in removals, and only allow voluntary returns. Furthermore, the fact that EU law specifically gives priority to voluntary return may also impact on expectations of countries of return, including that their citizens are indeed provided a fair chance to enjoy this possibility, which may further influence their attitudes towards readmission cooperation.[108] While this was not the focus of this analysis, a more clearly circumscribed notion of responsibility, leading to a better mutual understanding and certainty, may have a positive influence on the efforts of the EU and member states in regard of the external dimension of return policy.

108 Although this goes beyond the scope of this analysis, it may even be wondered whether, in the long term, expectations of countries of return that EU member states give their citizens a fair chance at returning voluntarily may also impact on their views on the applicability of their customary obligation to readmit persons who are removed without having had such an opportunity. Furthermore, it has been suggested that the provision of return assistance may be leading to a more quid pro quo approach to return and readmission may eventually reshape state practice and *opinio juris*. See, in this respect, 5.2.3.

12.4.2 The individual and the member state: voluntary return as shared responsibility

While the external dimension played an important role in the analysis, the results outlined above specifically pertain to the relationship between the individual and the EU member state. After all, it is this relationship that is governed by the Directive, as transposed to member states' domestic laws. In regard of this relationship, it should first be emphasised that, while limits on the responsibility of the individual have been established, the discussion above should leave no doubt that such limits must be seen in view of the fact that the third-country national *must* return. In other words, such limits do not justify, in principle, an interpretation that would allow third-country nationals to evade the obligation to return. This also reiterates the essentially compulsory nature of voluntary return: there is no free choice whether or not to return, and the obligation to return thus requires third-country nationals to exercise their autonomy within these constraints.[109] This obligation is only overridden when there are insurmountable obstacles of a legal (such as the prohibition of *refoulement*) or practical nature (such as non-readmission by the country of return).

This does not mean that it will be easy to assess when third-country nationals have indeed met their responsibility. While the question of how to assess compliance is outside the scope of this analysis, it is clear that member states may be faced with considerable difficulties in this respect. Even a basic requirement for establishing compliance, such as assessing what information or evidence the individual may be reasonably expected to present, may be more a matter of informed opinion than of certainty. Difficulties in establishing compliance by the third-country national in regard of his or her actions towards the country of return may be even greater.[110] The actual interaction between the authorities of the country of return and the third-country national, and the decision-making that follows on readmission or the issuance of travel documents, may particularly be a black

109 See Cleton & Chauvin 2019, p. 299, in their analysis of the way voluntary return is presented in the Netherlands, note that individuals thus have to "forcibly perform" their autonomy. While this term is used by them from a socio-political, rather than a legal perspective, it does provide an insightful way of characterising the difficult balance between coercion and choice, that was identified as a tension inherent in the concept of voluntary return in 2.10.1.4.

110 For example, even the relatively straightforward question whether a third-country national has made an application for readmission or travel documents with the authorities of a country of return may result in dilemmas. For example, in 2013, the Dutch State Secretary for Justice and Security noted he had received signals that third-country nationals sometimes showed evidence of having sent readmission requests to embassies by registered mail, but that embassies subsequently complained about having received empty envelopes. Parliamentary year 2013-2014, document 19 637-1747.

box from the perspective of the member state.[111] Nevertheless, clarification of the scope and limits of the obligation to return is a necessary precondition for a fair assessment of compliance, and as such the findings above represent at least one step towards closing this important gap in return procedures.

While the responsibility of the individual has been the central focus, to understand a complex concept like voluntary return the role of the member state's responsibilities must not be obscured. Notwithstanding that voluntary return allocates primary responsibility to the individual, the responsibility of member states is not residual, but remains in force simultaneously. And, as discussed at various point in this analysis, these responsibilities will often interact. In this respect, further attention should be devoted to the use of so-called 'cooperation obligations,' which are frequently relied upon by member states, despite not being explicitly provided for in the Directive's voluntary return provisions.[112] While framed in terms of 'cooperation,' these are in fact mainly unilateral obligations imposed on the individual. At various points in the analysis, it has indeed been suggested that such obligations need to be read into the overall obligation to return to make it effective. However, this has been done in order to make those specific obligations visible and more concrete. By contrast, broad references to an obligation to 'cooperate' may simply add another level of vagueness, as the concept is often used in a way that is just as open-ended as the notion of responsibility. This is particularly important when vague notions of 'non-cooperation' lead to sanctions or other adverse consequences which are not strictly connected to non-compliance with the obligation to return.[113] So while third-country nationals have certain obligations to provide information to the authorities of EU member states, to reach out to consular authorities of the country of return, or comply with certain measures to prevent absconding, using broad and largely undefined notions of 'cooperation' in the context of return procedures may not be particularly helpful.

The notion of cooperation as a set of unilateral obligations on third-country nationals also misses the point that cooperation is normally better understood not simply as following instructions, but as jointly achieving objectives. This is shown, first of all, in the fact that the effective implementation of the provisions of the Directive will often require member states to take an active role and exercise their own due diligence. Furthermore,

111 See, for example, ACVZ 2013, pp. 27-28, describing the lengths to which the Dutch Repatriation and Departure Service goes to accompany third-country nationals to interviews with consular authorities to ascertain that they cooperate. But also highlighting the multiple barriers that nevertheless remain, which prevent the Service from having full certainty in all situations that accurate and truthful information was provided by the individual.

112 Although the Commission seeks to introduce these in its recast proposal, see 1.2.3 and 10.4.3.2.

113 For critiques of the incorporation of a broad duty to cooperate in the Commission's recast proposal, see Amnesty EIO 2018, p. 3; ECRE 2018, pp. 9-10; FRA 2019, pp. 33-35.

various ways in which the modalities of voluntary return should be 'negotiated' between the individual and the member state, such as in identifying viable return destinations and in coming to a realistic period for voluntary departure, have been highlighted. Such issues of cooperation were also discussed in the context of using readmission agreements for voluntary returns. While both the need for due diligence of the member state and of proper, reciprocal cooperation between the individual and member state implicitly flow from the Directive's notion of voluntary return, the fact that these are not explicitly acknowledged, even at the level of general principles, presents an important missing link in the Directive.

Making such reciprocal cooperation possible also requires a measure of trust between these two actors. This issue of trust has not been part of the analysis, since it brings us outside the realm of legal provisions in a strict sense. However, it is worth noting that the existence of trust, or lack thereof, may have an important impact on the interactions between the individual and the member state, and thus on the effective operation of the obligation to return in practice. In return procedures, such mutual trust may be highly elusive. It is difficult, for example, for third-country nationals to put their trust in a member state which, in their view, may have decided wrongfully that they should return, and at any rate can use far-reaching coercive measures to enforce this. In this way, there cannot be a relationship of equals, which also shows in the fact that non-observance of the rules in the Directive has immediate and clear impact on the individual, including interferences with his or her fundamental rights, while member states may at most be faced with a judicial slap on the wrist. Conversely, from the perspective of the member state, it is also difficult to put trust in third-country nationals who may have an interest in subverting and avoiding the obligation to return. This also shows the limits of the law in some respects, which does not lend itself very well to guaranteeing trust. However, vaguely defined provisions, which undermine legal certainty and lead to perceptions of unfairness, may well be particularly damaging for the establishment of at least the minimum necessary level of trust, and thus for the effective achievement of the Directive's objectives. As such, while it is not possible to legislate for trust, the transparency and fairness of legal provisions on return do have an important role in providing at least the basic preconditions to allow such trust to exist, and if lacking, may have serious negative effects on it.

The importance of transparency and fairness in the rules on voluntary return also particularly extends to the protection of fundamental rights and ensuring that returns under the Directive are humane and dignified. As noted in the introductory chapter and in later chapters, whatever other benefits it may bring, *this* is the key role of voluntary return in the Directive. However, voluntary return and the allocation of responsibility to the individual are not a magic bullet. Neither the fact that the individual gets to make certain decisions about his or her return, nor the provision of assistance in that respect, make voluntary return prima facie a 'humane

and dignified' option. In fact, several examples were presented in which the notion of responsibility inherent in voluntary return was used in such a way by member states that they could circumvent fundamental rights safeguards. Again, to act as an appropriate safeguard, the responsibility allocated to the individual must be subjected to clear boundaries, as set out in this analysis. While dignified return may to some extent still be a subjective matter, on which each individual has different perspectives,[114] the elaboration of a clear scope of both the obligation to return and the entitlement and length of the voluntary departure period act as essential preconditions for voluntary return to exercise its function as a fundamental rights protection mechanism.

12.4.3 A fair and transparent application of responsibility for voluntary return: proposed guidelines

The discussion above about the external and internal dimensions of voluntary return highlights not only the importance of a better understanding of the boundaries of individual responsibility in voluntary return proceedings, but also of the practical implementation, in a fair and transparent manner, of the Directive's provisions on the obligation to return and the voluntary departure period. As the closing part of this dissertation, therefore, the next pages propose a set of 25 guidelines which aim to assist this implementation. They mirror the findings discussed in sections 12.2 and 12.3 above, but try to set these out in a more accessible and practically usable manner for the purpose of further legislation, the drafting of policy documents, decision-making in individual cases, and judicial scrutiny of such decisions or of the general compatibility of member states' legal provisions with EU law.[115]

In respect of the research questions, it should be noted that Parts I-VI correspond to the issue of the actions that third-country nationals can and cannot be expected to take when returning voluntarily (*research questions 1a and 1b*). More specifically, Parts I-IV deal with various issues arising in relation to the obligation to seek readmission to appropriate destinations (*return element (i)*); Part V deals with the obligation to obtain travel documents (*return element (ii)*); and Part VI deals with the obligation to making practical arrangements and leaving the EU member state (*return element (iii)*). Parts VII and VIII deal with the application of the voluntary departure period, with the former focusing on the entitlement to a voluntary departure period

114 See, for example, the discussion of situations where third-country nationals might consider it more dignified to be removed than to take up voluntary return in 10.4.3.2.

115 In this respect, it should also be noted that, as described in the various chapters, other attempts to provide such guidance, such as in the Return Handbook, have often been too limited or even contradictory in regard of voluntary return. The approach also takes inspiration from the fact that a need for such voluntary return-specific guidelines has been acknowledged in the past, for example as a companion to the Council of Europe's Twenty Guidelines on Forced Return, but were in the end not elaborated.

(*research question 2a*) and the latter with the appropriate length of such a period (*research question 2b*).

While grey areas will undoubtedly remain in relation to the meaning and application of individual responsibility, these guidelines will hopefully help move it from an open-ended concept, with all the associated risks, to one that is more strictly circumscribed. And this should provide member states and third-country nationals alike with a clearer understanding of their mutual rights and obligations when faced with the complex questions arising in the context of voluntary return.