Voluntary return and the limits of individual responsibility in the EU Returns Directive
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Proposed guidelines on individual responsibility for voluntary return in the context of the EU Returns Directive

Preamble

The notion of voluntary return in EU Directive 2008/115 (the Returns Directive), through the imposition of an obligation to return and the issuing of a voluntary departure period, allocates primary responsibility for the return process to third-country nationals found to be illegally staying in EU member states.

The guidelines below serve to assist EU member states in implementing the Directive's provisions in relation to the obligation to return and the voluntary departure period in a fair and transparent manner, as resulting from the text and objectives of the Directives, the case law of the CJEU, EU fundamental rights and the requirement of consistency with international law provisions governing the external dimension of return and readmission.

This implementation is premised, inter alia, on the following general principles:

a) Voluntary return has elements of international movement more generally, but must also be recognised as a form of expulsion, meaning that the legal obligations of the EU member state, including in regard of the prohibition of *refoulement*, remain fully in force despite the 'voluntary' nature of return;

b) No obligations may be imposed on third-country nationals that would entail the violation of the obligations of the EU member state or the country of return, and responsibility for such violations may not be shifted to the individual;

c) Actions required of third-country nationals to ensure return must be limited to those that are necessary for the return process and compatible with their fundamental rights;

d) Provisions on the voluntary departure period must be interpreted in such a way that they are able, in law and practice, to give effect to the priority of voluntary return as established in the Directive;

e) While both third-country nationals and EU member states have obligations in the return process, reciprocal cooperation between these two

actors should be stimulated and should be seen as an essential precondition for the fair and effective achievement of voluntary return;

f) In line with the general principles of EU law, and as confirmed in the Directive, EU member states' decisions in relation to all parts of the return procedure, including voluntary return, must be proportionate, including by ensuring such decisions are taken on a case-by-case basis, taking into account all relevant circumstances, which should go beyond the mere fact of illegal stay.

Definitions

In relation to the following terms, which are used in the Directive but not defined, the following interpretations should be applied:

a) *Country of origin* – the country or countries of nationality of a third-country national or, for stateless persons, the country of former habitual residence;

b) *Transit country* – a country through which a third-country national has travelled on his or her way to the EU member state where he or she is eventually found to be illegally staying, subject to any limitations on specific types of transit set out in the applicable agreements or arrangements on which return would be based;

c) *Absconding* – the act of disappearing from the control of the member states' authorities responsible for return procedures, making the enforcement of the return decision impossible;

d) *Appropriate* (in the context of the length of the voluntary departure period) – sufficient to provide, in the individual case, a realistic opportunity to meet the obligation to return voluntarilyto for third-country nationals acting with due diligence;

e) *Necessary* (in the context of the extension of the voluntary departure period) – the situation in which the third-country national's interest in an opportunity for voluntary return continues to outweigh the member state's interest in enforcing the return decision.

Additionally, the guidelines below will use the term *obligatory destinations*, which is not part of the Directive itself, to denote those countries to which, under the definition of return provided in the Directive, third-country nationals can be required to make efforts to return, and against which efforts (or lack thereof) their compliance with the obligation to return can be assessed.

Part I – Obligatory destinations of return

1 – General principles on obligatory destinations

Third-country nationals can only be expected to seek to return to countries that can be considered obligatory under the Directive. When this is the case, member states may hold third-country nationals responsible for their efforts to return to such countries (or lack thereof).

2 – The country of origin as an obligatory destination

a. The country of nationality of third-country nationals is an obligatory destination as it constitutes a country of origin within the meaning of the Directive. In case of multiple countries of nationality, third-country nationals can be held responsible for their return efforts (or lack thereof) in relation to each of these countries.
b. A country of habitual residence is an obligatory destination for stateless persons, and they can be held responsible for their return efforts (or lack thereof) in relation to such a country, subject to the limitations of applicable readmission frameworks. When third-country nationals have a country of nationality, countries of habitual residence do not constitute a country of origin within the meaning of the Directive and are thus obligatory only if they can be considered a transit country.

3 – Transit countries as obligatory destinations

a. Only countries through which third-country nationals have passed as part of their migration journey to the EU member state, with which specific agreements or arrangements regulating return and readmission are in place, and which meet the requirements below, can be considered obligatory destinations.
b. For agreements or arrangements to be able to make a transit country an obligatory destination, they should not exclude the way third-country nationals transited such countries, and ensure accessibility and legal certainty, including by:
   - setting out clear provisions on the conditions for readmission and procedures to be followed;
   - indicating clear consent on the part of the transit country to readmit non-nationals in case this is not already covered by legally binding provisions;
   - being set out in writing and publicly available. This excludes arrangements only based on practice, as well as agreements and arrangements that remain secret.

4 – Return to another third country

a. Other third countries are not obligatory destinations and third-country nationals' return efforts (or lack thereof) in relation to such countries fall outside the scope of their responsibility.
b. Member states should ensure that third-country nationals have the option of seeking return to other third countries, provided they are accepted there. Member states are precluded from imposing too stringent conditions, such as in relation to the duration of residence rights in the prospective destination country, before allowing third-country nationals to depart to such a country.

Part II – Return and readmission to a country of origin

5 – Obligations in relation to readmission to the country of nationality

a. When making readmission applications to their country of nationality, member states may require third-country nationals to provide, accurately and in good faith, documentary evidence and other information in relation to nationality and identity, and to assist the country of origin in investigations to establish eligibility for readmission.
b. The responsibility of third-country nationals when providing evidence of eligibility of readmission only extends to those elements necessary to trigger the country of origin's readmission obligations. In the case of countries of nationality, this excludes meeting any demands not directly connected to establishing nationality and identity, or to necessary administrative procedures, such as apologies or payment of sums of money not connected to readmission.

6 – Obligations in relation to readmission to stateless persons' countries of habitual residence

a. Member states may expect stateless persons to provide to their country of habitual residence, accurately and in good faith, documentary evidence or other information relating to their former nationality of, or (expired or current) residence rights in, that country. Where necessary to meet the requirements for readmission, EU member states should provide additional information or declarations as to the status of individuals on their territories.
b. In determining whether stateless persons have met their responsibilities in relation to countries of habitual residence, member states should take into account the inherent limitations in the readmission duties of such countries, as well specific difficulties that stateless persons might experience in obtaining and presenting documentary evidence of former nationality, (prior) residence rights, or other elements necessary for readmission.

7 – Ineffective inter-state frameworks and the individual's right to return

When inter-state readmission frameworks are ineffective, member states cannot require third-country nationals to put their individual right to return at the service of the member state's objective of effective return, including by making declarations of willingness to return, as this constitutes an unlawful interference with their fundamental rights.

Part III – Return and readmission to a transit country

8 – Readmission to a transit country under a readmission agreement

a. When readmission agreements with transit countries exist, and they are effective without further intervention by the EU member state, third-country nationals can be expected to make use of these.
b. When action by an EU member state is necessary to make readmission based on such an agreement possible, it may take such action without the consent of the third-country national concerned. When member states do not take such action, and this is not due to non-cooperation by the individual concerned, no responsibility arises for third-country nationals in relation to return to a transit country.
c. Member states can expect third-country nationals to facilitate readmission requests by providing the necessary information and evidence to the EU member state for this purpose. However, whether failure to provide such information or evidence can be considered non-compliance with the obligation to return will depend, among others, on the elements already at the disposal of the member state and how fatal such non-provision of information and evidence is for the prospect of readmission.

9 – Readmission based on multilateral treaties or non-binding arrangements

a. When the situation of third-country nationals comes within the scope of relevant multilateral treaties, member states can expect third-country nationals to apply for readmission with transit countries where they have, or had, a right of residence, or where they embarked transport to the EU member state.
b. Member states can expect third-country nationals to seek readmission to transit countries with which non-binding arrangements exist only after the member state can show that such an arrangement meets the requirements of guideline 3 above. Third-country nationals can in principle be expected to make efforts to meet specific requirements for readmission, but these cannot be discriminatory or in contradiction with other limits set out elsewhere in these guidelines.

Part IV – Choice and refusal of obligatory destinations

10 – Freedom of choice of destinations and implications for member states

a. Third-country nationals are in principle free to choose to which destination they seek to return. Member states should refrain from interfering with this choice unless they can adequately justify this, in particular in relation to the fact that attempts to return to the individual's preferred destination cannot lead to timely, effective return.
b. No interferences should be made with attempts of third-country nationals to return to any country that could be considered their 'own' within the meaning of Article 12(4) ICCPR, including their country of nationality.
c. When third-country nationals prefer to return to a transit country, and this can only be realised by the submission of an application by the EU member state, the latter can be expected to make such a submission, unless it can duly justify not doing so as not being in the interest of the return procedure.
d. The freedom to pursue return to their preferred destination does not negate the fact that third-country nationals, at the end of the voluntary departure period, can be held responsible in relation to *all* destinations that are obligatory in their specific case.

11 – Prevention of return to unsafe destinations or via unsafe travel routes

a. Third-country nationals cannot be required to pursue return to any country where they would face the risk of persecution, torture or inhuman or degrading treatment, or to their lives, regardless of the specific origin of such a risk. The fact that third-country nationals are responsible for their own (voluntary) return does not negate the responsibility of the member state to ensure that its expulsion decision does not expose individuals to such risks.
b. In order to prevent returns to unsafe destinations or via unsafe travel routes, in violation of the principle of non-*refoulement*, member states should work constructively with third-country nationals in the avoidance of unsafe returns, including by:
   - actively engaging with the third-country national and jointly identifying all relevant destinations and routes in the individual case;
   - assessing each of these destinations and routes in light of the prohibition of *refoulement*;
   - verifying whether third-country nationals can effectively use alternative, safe destinations and routes;
   - avoiding exerting undue pressure on third-country nationals to return voluntarily.

Part V – Obtaining travel documents

12 – The obligation to request replacement travel documents

a. The obligation to apply for replacement travel documents with authorities competent to issue them is an integral part of the obligation to return for all third-country nationals who do not already possess such documents, or for whom clear possibilities to return without them do not exist. Failure to make such an application constitutes prima facie non-compliance with the obligation to return. Which authorities are competent will differ according to the circumstances of the case, but for persons with who are not stateless this will at least encompass the consular authorities of their country of nationality.
b. These obligations are subject to third-country nationals being able to exercise them without risk of persecution or serious harm to themselves or others, such as family members, as provided for in EU asylum legislation. They should not imply any obligation to engage in contacts with the authorities of the country where the individual fears persecution or serious harm if this is not yet the subject of a final decision on his or her asylum application in this regard.

13 – Access to consular authorities

Third-country nationals' efforts to access consular authorities should be free from interference by the member state. When this is necessary to ensure effective access, third-country nationals may expect member states to take positive action, which may include the temporary lifting of measures to prevent absconding, facilitating interviews with consular authorities in the place where third-country nationals are staying, or – in case consular authorities are located on the territory of another member state – to cooperate with that member state to make arrangements for access.

14 – Type of documents to obtain

Third-country nationals are free to choose which document they seek to obtain, as long as it can be used for return. Member states should not normally interfere with efforts of third-country nationals to obtain a passport or other travel document providing the widest possibilities for travel. However, this does not negate third-country nationals' obligations to ensure timely departure if this could have been done more quickly on the basis of a *laissez-passer*. Member states may set limits on the extent to which they facilitate obtaining a passport through financial support or the extension of the voluntary departure period.

15 – Limits on meeting demands by the consular authorities

a. The obligation to obtain travel documents includes the payment of fees and meeting administrative requirements. However, it excludes the payment of fees disproportionate to the costs of the administrative process and those not set out in law.
b. Under no circumstance may the responsibility of third-country nationals be interpreted as requiring them to acquiesce to the payment of bribes, or other favours that could be qualified as corruption or abuse of power.
c. Under no circumstance may the responsibility of third-country nationals be interpreted as requiring them to obtain travel documents through processes or channels that risk producing false or fraudulent documents. Member states cannot encourage third-country nationals, explicitly or tacitly, to fulfil their obligation to return through the use of such documents.

Part VI – Arrangements for leaving the EU member state

16 – Meeting exit requirements and other obligations for departure

a. Third-country nationals are responsible for meeting all necessary exit requirements, including under the Schengen Borders Code, and cannot circumvent these, or be expected to do so, to meet their obligation to return.
b. Third-country nationals are responsible for meeting any outstanding obligations, to the EU member state or other persons, that would prevent their lawful departure before the end of the voluntary departure period. However, the (im)possibilities of doing this in a timely manner should be a consideration regarding the extension of the voluntary departure period.

17 – Return assistance

a. Third-country nationals do not have an unambiguous right to return assistance under the Directive. However, where such programmes exist, they must be accessible in a non-discriminatory manner, with exclusion of certain categories of third-country nationals being objectively justified.
b. When return is otherwise effectively impossible, member states should provide return assistance also to third-country nationals who are normally excluded from this. However, this may be limited to only to those types of assistance that are clearly connected to the facilitation of de facto return, in particular the facilitation of transport to the country of return.
c. In cases of non-return, third-country nationals cannot be held responsible for their failure or refusal to seek return assistance, unless it can be established that effective return could only be achieved with such assistance.

Part VII – The entitlement to a voluntary departure period and possibilities for denial

18 – General principles on the voluntary departure period

a. Third-country nationals have a clear right under the Directive to be accorded a voluntary departure period. As a limitation of that right, denial of a voluntary departure period may only take place if:
   - on the basis of objective criteria, which must go beyond the mere fact of illegal stay and otherwise meet the requirements set out in guidelines 19 to 21, it is established that one of the grounds enumerated in Article 7(4) is applicable; and
   - such a denial would be considered proportionate in the specific circumstances of the individual case, in view of factors including but not limited to the best interests of the child, family life or the health of the persons involved;
   - the appropriateness of issuing a voluntary departure period shorter than seven days instead of outright denial has been considered and rejected with due justification.
b. No denial may take place automatically only on the basis that one of the grounds in Article 7(4) applies in an individual case.

19 – Denial of a voluntary departure period because of a risk to public policy, public security or national security

a. Denial of a voluntary departure period because of a risk to public policy, public security or national security must not merely be based on past conduct of third-country nationals, but requires an individualised, contextualised and forward-looking approach which shows the existence of a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society.
b. Any factual or legal matter that can shed light on the existence of such a threat, including the seriousness of past conduct, the elapse of time since the conduct, and intentions of leaving the country, must be taken into account.
c. Member states may not use general presumptions, in law or practice, that specific past acts are sufficient to indicate a threat that justifies, in and of itself, a denial of a voluntary departure period.

20 – Denial of a voluntary departure period because of a risk of absconding

a. No denial of a voluntary departure period because of a risk of absconding may take place without the specific criteria for such denial having been clearly set out in law. Such criteria must further:
   - be truly able to indicate a risk of absconding, meaning a risk that third-country nationals disappear from view of the authorities, thus making enforcement of the return decision impossible. Within this meaning, non-cooperation or unwillingness to return, as such, do not indicate a risk of absconding, since they

do not deprive the member state of the possibility to enforce the return decision after the voluntary departure period has ended;

- respect the principle that indicators should not mirror the mere fact of illegal stay. As such, irregular entry, overstaying, or the lack of documents should not be used as general indicators of absconding, unless there are specific circumstances related to such facts that give rise to such a risk;
- not replicate other grounds of Article 7(4), such as those related to criminal proceedings or convictions, especially in such instances where irregular stay or entry are criminalised in the member state.

b. Denial or shortening of a voluntary departure period may furthermore only take place if the member state has considered the possibility of imposing measures in line with Article 7(3) and has found that these cannot sufficiently mitigate the risk of absconding in the individual case.

21 – Denial of a voluntary departure period because of the dismissal of an application for legal stay as manifestly unfounded or fraudulent

a. Denial of a voluntary departure period on the basis that the application of a third-country nationals was dismissed as manifestly unfounded or fraudulent should normally be avoided. Where member states nevertheless resort to denial on this ground, this must be on the basis of self-standing justifications only related to this fact, respecting the prohibition of automaticity, and fully meeting the requirements of proportionality set out in guideline 18.

b. Justifications for denial of a voluntary departure period on this ground cannot be based on considerations that actually form part of one of the other two grounds in Article 7(4), unless the specific requirements for each of these, set out in guidelines 19 and 20 above, are fully met.

Part VIII – The length of the voluntary departure period

22 – The appropriate length of the initial voluntary departure period

a. The initial voluntary departure period granted must be long enough to provide an effective opportunity to return voluntarily. When member states provide a period shorter than thirty days, this must be duly justified following an assessment of the period that would realistically enable third-country nationals to take all steps necessary to return, provided they act with due diligence. Such an assessment must be based, inter alia:

- on the individual circumstances of third-country nationals, including the possession of evidence for readmission, travel documents, financial constraints, the need for assistance, health, age and dependence on others, to the extent that they have duly

provided this information after having been given an effective opportunity to do so by the member state;
- information collected with due diligence by the member states from relevant actors and sources to establish a picture of how long it may realistically take to return;
- an assumption that periods close to the minimum of seven days are generally insufficient unless this can be rebutted in the light of the specific circumstances of the individual.

b. Decisions on the length of the voluntary departure period must not be based merely on the prior legal status of the third-country national in the member state.

23 – The necessity of extending a voluntary departure period

An extension of the initial voluntary departure period should be granted when the interests of the third-country national in having an opportunity to return voluntarily continue to outweigh the interests of the member state in enforcing the return decision, which is the case at least when:

- there is no evidence that non-return is due to the failure of the third-country national to take all steps to achieve return during that initial period in line with parts I-VI above;
- there is evidence that the third-country national has not fully complied with the obligation to take these steps, but voluntary return could still be achieved within a reasonable period, and the individual's past behaviour indicates that it is likely that he or she will take the remaining steps with due diligence;
- there is evidence that the third-country national has not fully complied with the obligation to take these steps, but enforcement would disproportionately harm the fundamental rights of the individual or family members, for example in relation to the education of children, the maintenance of family life, the health of the individual or financial or business interests.

24 – Decisions on the appropriate length of the extension of a voluntary departure period

a. When an extension of the voluntary departure period is necessary, the length of that extension should be decided on the basis of:
   - the principles set out in guideline 22, and additionally
   - other circumstances in the individual case which are not specifically related to the achievement of return, including the length of stay, the existence of children attending school and the existence of other family and social links.

b. Other elements, such as ensuring third-country nationals can leave to their preferred destination, in line with guideline 10, or the facilitation of the possibility of applying for a travel document with the widest possible scope, in line with guideline 14, should also be taken into account where appropriate.

25 – Cutting short a voluntary departure period already granted

a. Member states may only cut short a voluntary departure period already granted if new information emerges or circumstances change in a way that indicates, in full observance of guidelines 19 and 20, that a risk of absconding or a risk to public policy, public security or national security has emerged.
b. The lack of due diligence of, or cooperation by, third-country nationals to achieve return during the voluntary departure period is not a valid reason for cutting short a voluntary departure period, and the threat of this may not be used to compel them to cooperate with the authorities, unless this is in relation to measures to prevent absconding, provided this is proportionate.
c. When concerns arise about a risk of absconding during the voluntary departure period, and measures to prevent this have not yet been imposed, the member state should first consider whether such measures can be applied effectively before deciding to cut short the voluntary departure period.