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RETURN DIRECTIVE DIALOGUE – REDIAL

European Synthesis Report on the Termination of Illegal Stay (Articles 7 to 11 of Directive 2008/115/EC)

**Philippe De Bruycker
Madalina Moraru
Géraldine Renaudiere**

REDIAL Research Report 2016/01



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REDIAL
REturn Directive DIALogue

Research Report

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(Articles 7 to 11 of Directive 2008/115/EC)**

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REDIAL – REturn Directive DIALogue

The project REDIAL (**REturn Directive DIALogue**) is co-funded by the European Union within the framework of the European Return Fund. REDIAL is implemented by the **Migration Policy Centre** (RSCAS, EUI) in partnership with the **Odysseus Network** (ULB – Université Libre de Bruxelles) and the **Centre for Judicial Cooperation** (EUI).

Its main purpose is to enhance the effective implementation of the Return Directive (2008/115/EC) through judicial cooperation among courts from all EU Member States. The starting premise of the Project is that judicial cooperation contributes not only to cross-fertilization of relevant national and European case-law, but also to an increase in legitimacy of judicial review of return decisions. In order to achieve its objective, the REDIAL team of experts will analyse and compare the judicial implementation of the EU Return Directive in the Member States. REDIAL is expected to become an important instrument to assist national judges and legal practitioners in the application of the Return Directive.

Results of the above activities are available for public consultation through the website of the project: <http://euredial.eu>.

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1. Article 7 – Voluntary Departure¹

Directive 2008/115,² also known as the Return Directive (RD), sets out the procedure to be followed by Member States when returning illegally staying third-country nationals (TCNs), including the order in which the various, successive stages of that procedure should take place.³ According to Article 6(1) RD, the return procedure starts with an obligation for the Member States to issue a return decision against any irregular TCN. This return decision should contain a period ranging between seven and thirty days during which the irregular TCNs can independently organise their departure (Articles 7(1) RD). Member States have an obligation to grant this period for voluntary departure (VD) before taking any measure to carry out forced return.

The initial period for voluntary departure can be extended, where necessary, by taking individual cases into account, such as: ‘the length of stay, the existence of children attending school and the existence of other family and social links.’ (Article 7(2) RD) According to paragraphs three and four of Article 7, the right of an irregular TCN to depart voluntarily to his/her target country can be limited only in precise circumstances, which have to be strictly interpreted. In the case of ‘risk of absconding’, the Member States may, first, require the addressee of a return decision to fulfil one or more of the following obligations: report regularly to the authorities, deposit an adequate financial guarantee, submit documents or stay at a certain place (Article 7(3) RD). As a last resort, the irregular TCN can receive a period shorter than seven days for voluntary departure or even be refused the period altogether in limited circumstances (Article 7(4) RD). Shortening the voluntary departure period or not offering that option can be taken by the Member States if: there is a risk of absconding, there have been abusive applications by the TCN (i.e. an application for a legal stay has been dismissed as manifestly unfounded or fraudulent); if the TCN poses societal risks, that is he represents a threat to public policy, public security or national security.

The aim of this section is to offer a comparative overview of the national jurisprudence dealing with issues related to the interpretation and application of Article 7 RD. The present synthesis is based primarily on jurisprudence originating from eleven Member States,⁴ which have been selected on the basis of the number and complexity of cases dealing with Articles 7-11 RD.

The section unfolds in four parts following the four paragraph structure of Article 7 RD, and also the rationale of the Directive as highlighted by the CJEU, namely of the gradual unfolding of return measures,⁵ ranging from the least restrictive to the TCNs freedom (voluntary departure) to the last resort return measures (refusal of VD in the case of Article 7 RD, or detention for the overall return procedure).

1.1 European and national jurisprudence

Most of the national Reports highlighted that, in practice, very few return decisions/removal orders reach national courts for judicial review of their lawfulness regarding voluntary departure. The REDIAL database includes, to date, 66 national judgments on the interpretation and application of Article 7 RD from seventeen Member States.⁶ These judgments come from national courts of different levels of jurisdictions, ranging from first instance to highest national courts, dealing mostly with the lawfulness,

¹ This chapter (Article 7 RD) was drafted by Dr. Madalina Moraru.

² Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third country nationals, OJ L 348/98, 24.12.2008.

³ On the same view, see CJEU judgment in *El Dridi*, para. 34.

⁴ Austria, Belgium, Bulgaria, Czech Republic, Cyprus, Germany, France, Hungary, Italy, Netherlands, and Spain, available on: <http://euredial.eu/publications/national-synthesis-reports/>.

⁵ See the CJEU judgment in the *El Dridi* case.

⁶ Lithuania, Poland, Hungary, Bulgaria, Greece, Italy, Croatia, Austria, Czech Republic, Germany, Belgium, Netherlands, France, Slovenia, Malta, Croatia and Spain.

soundness and/or proportionality of the refusal to grant voluntary departure, requests of prolongation of voluntary departure and alternatives to refusal to grant voluntary departure, and detention. Detained TCNs often argue that the administrative authority failed to adequately assess the possibility of imposing available alternatives prior to ordering detention. Administrative courts then focus on assessing whether the imposition of certain obligations might have resulted in obstructing of the return decision (for instance by way of the TCN abscond from the return and public authorities).

Issues related to VD can also be found in the judgments uploaded under Article 8 VD, due to the fact that some of the Member States have a one-step return procedure, whereby return and removal decisions are merged into one single decision. TCNs usually challenge the order to leave the territory of the Member State (removal) and not just the VD (e.g. Belgium).

The jurisprudence of the CJEU and the ECtHR has, so far, not particularly dealt with the issue of the nature and the procedure of the voluntary departure of irregular TCNs. Only recently, the CJEU was asked to clarify certain key concepts related to the VD measure, such as: the mandatory nature of the voluntary departure when none of the exceptions provided in Article 7(3) and (4) apply (*Zaizoune*)⁷ and the definition of the concept of a ‘risk to public policy’, as grounds for refusing voluntary departure (*Z.Zh. And O.*)⁸ The implications of these recent judgments of the CJEU on the application of Article 7 RD will be discussed in detail in the following sections.

1.2 Paragraph 1⁹ – Voluntary departure – nature, procedure and period

1.2.1 *The position of voluntary departure in the return procedure*

According to Article 6(1) of the Return Directive (RD) and the CJEU jurisprudence,¹⁰ the return of the irregular TCN should begin with a return decision. According to the structure of the Directive and the settled CJEU case law,¹¹ Member States should give priority to the voluntary departure of irregular TCNs against removal or other forced/coercive return measures. As held by the CJEU and its Advocates Generals, the entire return procedure should be governed by the EU principle of proportionality. To that end, as a rule, national authorities are obliged to consider conferring the TCN the option of voluntary departure to his country of origin. Only if voluntary departure is not possible or if it is unsuccessful, can the national authorities order the removal, i.e. the enforcement of the obligations to return by physical transportation out of the Member State. In practice the issue of the return decision is closely linked to the conferral of voluntary departure. This is so, because according to the Directive definition of voluntary departure (VD),¹² the obligation to voluntarily depart within a time limit is fixed in the return decision. Therefore, VD does not have an independent procedural

⁷ C-38/14, ECLI:EU:C:2015:260, case commented in the REDIAL blog, <http://euredial.eu/blog/>.

⁸ C-554/13, ECLI:EU:C:2015:377, case commented in the REDIAL blog, <http://euredial.eu/blog/>.

⁹ Article 7(1) of the Return Directive reads as follows: ‘A return decision shall provide for an appropriate period for voluntary departure of between seven and thirty days, without prejudice to the exceptions referred to in paragraphs 2 and 4. Member States may provide in their national legislation that such a period shall be granted only following an application by the third-country national concerned. In such a case, Member States shall inform the third-country nationals concerned of the possibility of submitting such an application. The time period provided for in the first subparagraph shall not exclude the possibility for the third-country nationals concerned to leave earlier.’

¹⁰ *Zaizoune*, C-38/14, ECLI:EU:C:2015:260.

¹¹ See in particular, *El Dridi* (C-61/11 PPU) ECLI:EU:C:2011:268; *Achughbabian* (C-329/11) ECLI:EU:C:2011:807; *Sagor* (C-430/11) ECLI:EU:C:2012:777; *Case Zh. and O.* (C-554/13) ECLI:EU:C:2015:377; *Case Zaizoune* (C-38/14) ECLI:EU:C:2015:260.

¹² Article 3(6) RD.

status, but it forms an integral part of the return decision or the removal order.¹³ Consequently, TCNs' complaints regarding VD usually imply challenging the return decision or the removal order.

This ancillary nature of the VD has, in practice, created problems. This is due to the Member States specific implementing legislative frameworks or the specific judicial interpretation of the administrative practices.

For instance, in **Spain**, the concept of a return decision as such does not exist. The return procedure for irregular TCNs breaks down into two: the ordinary procedure (*procedimiento ordinario*), and the urgent procedure (*procedimiento preferente*). Voluntary departure is a possibility for a TCN to return to his country of origin only in the case of the first procedure.¹⁴ Until recently, the main problem of the Spanish legal and jurisprudential framework has been the insufficient transposition of the Return Directive, due to the fact that the general sanction applied to a TCN staying irregularly on Spanish territory was a fine or, when other negative factors were concurrent, expulsion, and not primarily the return decision.¹⁵ Between 2005 and 2008, the Spanish Supreme Court established a specific interpretation of Article 57(1) of the Spanish Immigration Act 4/2000 (on sanctions for illegally staying TCNs). This interpretation meant that a fine is to be the main sanction in these cases, and that only when there are other negative factors to the mere illegal stay – and taking into account the principle of proportionality – should removal (*expulsión*) be the appropriate sanction. Though the Immigration Act 4/2000 has been modified several times, the provision on the general character of the fine has not been changed. The position of the Supreme Court on the so-called 'doctrine of the fine' has not changed until 2013.

According to the current Spanish legislation, every denial of residence permit includes the demand that the TCN depart within fifteen days. Therefore illegally staying TCNs are not issued a return decision as such. Instead the refusal to grant or prolong a residence permit includes an obligation to voluntary depart within fifteen days.¹⁶ A TCN identified for the first time as being irregularly staying in the country for the first time, with no other negative circumstances being identified in relation to its irregular stay, was issued a financial sanction. This fine sanction was commonly applied instead of the expulsion order until the *Zaizoune* judgment of the CJEU. If a TCN was identified as being irregular for the first time and if there were other negative facts, he or she would have been expelled.¹⁷ This particular legislative framework has led, in practice, to the jurisprudential 'doctrine of fine',¹⁸ whereby the non-compliance of the TCN with the obligation to voluntary depart within fifteen days was punished with a fine alone.

The national legal framework and jurisprudence created confusion as regards the existence or not, in the Spanish law, of a 'return decision'. There was also confusion as to whether a 'voluntary departure' measure could be implied to exist from the administrative decision refusing a TCN residence or an extension of the residence permit. The conformity of the particular 'doctrine of fine' with the RD came up before the Spanish Supreme Court with the occasion of a direct appeal by a number of NGOs. They

¹³ For those Member States that have a one-step procedure, voluntary departure can be part of the removal order. More details on the difference between one-step and two-step procedures, and the Member States that choose one or another of these return procedure, see the section dedicated to Article 8 – Removal.

¹⁴ See, [REDIAL National Report for Spain](#), p. 2.

¹⁵ The Supreme Court has broadly repeated that: '[...] *illegal stay of TCN is to be sanctioned with a fine, and only when other negative factors are concurrent, will the appropriate sanction be the expulsion from national territory.*' (see, *inter alia*, Supreme Court decisions from 28 November 2008, Rec. 9581/2003; 9 January 2008, Rec. 5245/2004 and 19 July 2007, Rec. 1815/2004. For more details, please see the [Spanish Report](#), p. 3.

¹⁶ See Art. 57(1) of the Spanish Immigration Act 4/2000 and Article 24, 1 and 2 of Royal Decree 557/2011.

¹⁷ For instance, the TCN had not paid the fine sanction.

¹⁸ Supreme Court 30 June 2006; 31 October 2006, 29 March 2007); on grounds of having being detained for participation in a crime (see, Supreme Court, 19 December 2006) ; when not proving accommodation and family roots in Spain (Supreme Court, 28 February 2007) and having an entry ban in the Schengen Area (Supreme Court, 4 October 2007). See more details, in the [Spanish Report](#), p. 4-5.

were challenging several provisions of the Royal Decree 557/2011 as being contrary to the Return Directive.¹⁹ The Spanish Supreme Court found these provisions to be incompatible with the RD, and required national courts to follow the EU return procedure which strictly required the Member States to sanction the TCNs illegally present in the country with a return decision.

This ground-breaking judgment of the Spanish Supreme Court, setting aside the particular domestic legal model of sanctioning irregular TCNs in favour of the EU model of returning irregular TCNs, was not followed by all national courts. In the context of divergent jurisprudential opinions, a regional court (the High Court of the Basque county) sought to put an end to the jurisprudential debate, by sending a preliminary reference to the CJEU. The referring national court essentially asked the CJEU to decide whether Articles 4, 6(1) and 8(1) of the RD preclude Spanish legislation and the case law interpreting it (also known as ‘the doctrine of fine’) which make irregular TCNs subject to either a fine, or depending on the circumstances, a removal order.²⁰

It has to be noted that the legal interpretation of the Spanish provisions given by the referring Court would later be challenged by the Spanish Bar Association as being erroneous, while the preliminary reference was pending before the CJEU.²¹ The Association argued that the referring Court did not accurately describe the Spanish legal context. It argues that the Spanish legislation can be interpreted as implicitly including an equivalent return decision and a voluntary departure measure based on the obligations attached to the decisions refusing conferral or prolongation of the residence permit. This raises the issue of the extent of detail that national courts have to give as regards the national legal context, in their preliminary reference. This case shows that it might prove useful to provide to the CJEU not only the description of national legislation, but also the different domestic jurisprudential views or conflicts, so that the Court of Justice can take an informed decision on the appropriate interpretation of EU law provisions within a particular national context. This is not least to ensure that the preliminary reference of the CJEU will be subsequently followed by the national courts.

Recalling *El Dridi* and *Achugbabian*, the CJEU held that Article 6(1) RD provides for an obligation to issue a return decision against any TCN illegally staying in a Member State. Exceptions from this obligation are permitted only in the strict circumstances laid down by Article 6(2) to (5) RD. It has to be noted that, until the *Zaizoune* judgment, the CJEU ruled only in cases where national legislation imposed stricter rules than those provided by the RD (*El Dridi*, *Sagor*), holding them to be incompatible with the RD. The CJEU decided to follow the same strict interpretation of the RD also in regard to the Spanish legislation which, as described by the referring court, provided for more favourable situations for the TCNs. Following the *Zaizoune* judgment, it is clear that Member States are prohibited from having legal provisions which hinder the principle of the effective application of the Directive, regardless of whether the national legal provisions impose stricter or more favourable conditions to the TCN illegally staying in a Member State.²²

It has to be noted that in the *Zaizoune* case, the preliminary reference was used as an instrument to end a national jurisprudential debate. Interestingly, the result sought for was not achieved. The national jurisprudential and legal debate seems to persist, due to alleged erroneous or incomplete interpretation of the relevant Spanish law given by the referring court in the submitted preliminary questions. Therefore, some of the national courts continued to apply the ‘doctrine of fine’ on grounds of the non-retroactivity of the CJEU. This was arguably done on the basis of the ECtHR judgment in the *Del Rio Prada v Spain* case, whereby preference should be given to the legal interpretation more

¹⁹ [Supreme Court, judgment of 13 March 2013, STS 988/2013.](#)

²⁰ *Zaizoune*, C-38/14, ECLI:EU:C:2015:260; the request for the preliminary ruling is available on: <http://euredial.eu/national-caselaw/#/>.

²¹ According to the [Spanish Report](#), see pp. 8 and 9.

²² For a detailed comment of the *Zaizoune* judgment of the CJEU, see the Redial blog comment of this judgment by Cristina J. Gortázar Rotaecche, Nuria Ferré Trad, (available on: <http://euredial.eu/blog/a-fine-or-removal-the-impact-of-the-ecjs-zaizoune-judgment-on-the-spanish-doctrine/>).

favourable to the sanctioned person. However, according to the settled CJEU case law, national courts cannot limit the temporal application of the CJEU judgments, which have retroactive application.²³ Only the Court of Justice can limit the temporal application on the basis of precise requirements,²⁴ either in the actual judgment ruling upon the sought interpretation²⁵ or in a new preliminary ruling which assesses the effects of its previous judgment.²⁶ Should the national courts encounter difficulties in understanding or enforcing the preliminary ruling, they can refer new preliminary questions to the Court, asking it to clarify its judgments based on new elements that may prompt the Court to give a different answer to a question already referred.²⁷

A possible solution to the alleged incompatibility of the Spanish legislation with the RD was put forward by Cristina J. Gortázar Rotaèche in her [report](#). She proposes that Article 57(1) of the Immigration Act 4/2000 – which determines that a fine is the main sanction in cases of irregular TCNs – should be read jointly with Articles 24, 1 and 2 of Royal Decree 557/2011. These Articles establish compulsory departure within a period of a maximum of fifteen days.

Spain is not the only jurisdiction where voluntary departure is problematic from the perspective of not being part of an administrative act that is formally a return decision challengeable as such before courts. In **Cyprus**, the administrative decision offering the possibility of voluntary departure is not considered an administrative act. It is a mere request that cannot be subjected to judicial review. In a judgment of 2013,²⁸ the Cypriot Supreme Court found that ‘the standard letter which the immigration authorities customarily send to all TCNs in an irregular situation requesting them to depart by themselves does not constitute an executive administrative act but a mere request of no legal consequence and as such it cannot be subjected to judicial review or be suspended through an interim order. In essence, this means that the Court did not recognise the practice of the immigration authorities to request the applicant to depart as a voluntary departure decision within the meaning of the Return Directive.’²⁹

1.2.2 Conferral of voluntary departure – automatic or individual application procedure

Article 7 RD establishes a scale of measures ranging from the least restrictive of the TCNs freedom (para. 1), to the most intrusive – refusal of the voluntary departure period (para. 4). The general rule is that voluntary departure should be given priority in front of all other measures provided by the RD.³⁰ The only margin of discretion permitted to Member States over the TCNs right to voluntary departure is to make that right subject to an individual application instead of automatic consideration by the administration.

Some of the Member States made use of the option to grant VD solely by way of individual application (HU and IT). In cases where the Member State opted for a VD period granted by way of the TCN application, Article 7 of the RD imposes only one condition upon the Member State: namely to inform the TCN concerned of the possibility of submitting such an application. The timeframe for

²³ See *Amministrazione delle Finanze dello Stato v SpA San Giorgio*, C-199/82, ECLI:EU:C:1983:318; *Hauser*, C-13/08, ECLI:EU:C:2008:774.

²⁴ According to the *Nisipeanu* judgment, C-263/10, ECLI:EU:C:2011:466, ‘33. [...] it is only by exception, in application of the general principle of judicial security, [...] that the Court may be determined to limit the possibility to invoke a provision it has interpreted. In order to impose such a limitation, two essential criteria must be met, i.e. good faith of the interested parties and the risk of serious disruption.’

²⁵ See, *Herrero*, C-294/04, ECLI:EU:C:2006:109; *Maruko*, C-267/06, ECLI:EU:C:2008:179.

²⁶ See, *Gerardus Cornelis Ten Oever*, ECLI:EU:C:1993:833.

²⁷ *Pretore di Salò*, ECLI:EU:C:1987:275.

²⁸ *Tatsiana Balashevich v. Republic*, Case No. 5635/2013, judgement delivered on 10 July 2013.

²⁹ See the [Cypriot National Report](#), p. 5.

³⁰ See *El Dridi*, para. 36.

the application, the criteria for granting and rejecting an application for VD, and the TCNs possibility of appealing this decision is left to the discretion of the Member States. There are certain general procedural constraints which Member States have to followed as laid down in Chapter III of the RD. Additionally, Member States have to ensure the respect of the TCNs fundamental rights as enshrined in the EU Charter and the general principles of EU law³¹ when implementing or derogating from EU law. The rights to be heard, fair trial, effective remedies and family life have to be respected by the administrative authorities and national courts within the procedure of VD, regardless of whether the VD is conferred automatically or by way of individual application.³²

Italy is one of the countries that took advantage of the ‘VD by application’ option permitted by the RD. In order to obtain the VD, the TCN must prove that they have ‘enough economic resources deriving from legal sources proportionate to the term granted (from one to three times the amount of the monthly welfare check, i.e. the monthly welfare check amounts to Euro 448, 50 in 2015).’ One or more of the following obligations can be applied: a) submission of the passport or other equivalent document in course of validity, which will be given back at the moment of departure; b) the obligation to stay in a place previously identified, where the foreigner can be easily traced; c) daily attendance at the police office until the day of departure. The precise obligations are decided by the *Questore* in a written document, including the reasons for conferral, which have to be translated into a language that the concerned TCN understands. In practice all the information is provided on pre-stamped forms that TCNs have to sign before the adoption of a return decision.³³ They are frequently not available in the mother tongue of the TCN. Similar problems regarding language translation of the return decision exist in other Member States. For instance, in Bulgaria the issue of adequate translation is even more vital, since Bulgaria has a one-step return procedure. Here it should be remembered that the Court of Justice emphasised that ‘Member States should ensure that the ending of the illegal stay of third-country nationals is carried out through a fair and transparent procedure.’³⁴

The legality of using a widely-spoken language instead of the TCNs mother tongue for the translation of the administrative decision on voluntary departure has recently been raised before the Italian Supreme Court. With regard to the use of multilingual information sheets, the Italian Corte di Cassazione³⁵ recalled the principles already affirmed with regard to the removal order: it is ‘impossible’ to translate the removal order in a given language and consequently use one of the most widely spoken languages (e.g. English, French, etc.) ‘when the administration declares, and the judge considers it plausible, that a text in the foreigner’s mother language is not available (because particularly rare) or the inadequacy of this text in order to communicate the decision adopted in that case (because of its diversity from the other decisions normally adopted) and it is acknowledged that a translator is not available in that circumstance.’³⁶

The EU norm establishing the procedural safeguards in case of VD by individual application are to be found in the Commission *Return Handbook*, and they can be deduced from the *Boudjlida* judgment of the CJEU. According to the *Return Handbook*, general information sheets are not sufficient, and should always be complemented with individualised information.³⁷ Following the CJEU’s *Boudjlida* judgment, it is clear that the Member States have to respect the TCNs right to be heard even before the adoption of a return decision, as well as during the entire return procedure, even when this possibility

³¹ *Chakroun*, C-578/08, ECLI:EU:C:2010:117; *ERT*, C-260/89, ECLI:EU:C:1991:254; *Pfleger*, C-390/12, *Åkerberg Fransson*, C-617/10, EU:C:2013:105, para. 21; *Commission v Lisrestal and Others*, C-32/95 P, EU:C:1996:402, para. 30, and *Sopropé*, C-349/07, EU:C:2008:746, para. 26.

³² *Boudjlida*, C-249/13, ECLI:EU:C:2014:2431.

³³ EC, [Matrix Study on the Evaluation on the application of the Return Directive 2008/115/EC](#), p. 83.

³⁴ *Mahdi*, C-146/14 PPU, ECLI:EU:C:2014:1320, para. 40.

³⁵ See [Corte di Cassazione, decision no. 1809/2014](#).

³⁶ See the [Italian National Report](#), p. 8.

³⁷ See *Return Handbook*, p. 35.

is not provided expressly by national legislation. The right to be heard confers on the TCN concerned the right to express his or her view on the legality of their stay. The national administration has also to examine carefully and impartially all relevant aspects of the individual case, and they must give a detailed statement of reasons for their decision. These have to be sufficiently specific and concrete to allow the TCN to understand why their application was rejected.³⁸

In addition to the limitation on the TCNs right to information regarding the VD application, Italian legislation automatically conditions the conferral of VD upon proving of possession of enough legal economic resources (i.e. 1,300 EUR). Additionally, the TCN has to fulfil one to three obligations, depending on the decision of the *Questore*, which are automatically attached to the VD measure. Of these, the daily attendance at the police office until the day of departure significantly limits the freedom of the TCN. Non-compliance with one of the imposed obligations can lead to immediate expulsion and a criminal fine ranging from 3,000 to 18,000 Euros. The automatic attachment of obligation(s) and the stringent requirements imposed by the Italian legislation on TCNs for the purpose of receiving a VD period do not seem to be compatible with the RD. It should be noted here that the RD does not impose a financial pre-requisite for the conferral of VD, nor does it make the VD dependent upon fulfillment of substantial conditions. Member States can impose such stringent obligations during the VD only in the precise circumstances set out in Article 7(3) RD.

So far, the conformity of the Italian legislation with Article 7 RD has not been raised before the national courts. One possible reason might be the fact that until 2014, voluntary departure was considered only part of the execution phase of the return decision. Therefore, an assessment of its legality could have been performed solely within the framework of an assessment of the validity of the order of accompanying the TCN to the border or detention in a CIE. Following the [Italian Corte di Cassazione judgment no. 437/2014](#), the refusal to grant voluntary departure, the period for VD, as well as other aspects of this measure can be challenged in an appeal against the return decision. Secondly, it seems that conferral of voluntary departure has become a pre-requisite for the assessment of the return decision's legality.³⁹

1.2.3 Period of voluntary departure

The moment when the period of voluntary departure starts to run and the precise VD period within which the TCN should return to his country of origin are not set out by the RD. Article 7(1) provides only for a mandatory timeframe, which starts with a minimum of 7 days and ends with a maximum of 30 days. Most of the Member States transposed exactly this precise timeframe of between 7 and 30 days into their national legislation, leaving the establishment of the precise period to the administration. Few Member States have implemented a different timeframe. Some Member States provide for a shorter period than the maximum one provided by the RD, such as: 14 days (Austria), 20 days (Portugal), and 28 days (Netherlands). In Austria the 14 days' timeframe is fixed, with no margin of discretion being left to the administration on this issue. Other Member States seem to have more favourable provisions for the TCN, by establishing a higher minimum VD period than that set out by the RD: 10 days (Portugal) or higher than the maximum period (Czech Republic – 60 days).⁴⁰

³⁸ *Boudjlida*, para. 38.

³⁹ According to the [Italian Report](#), p. 7.

⁴⁰ For a table including the implemented timeframe for VD by all 28 MSs, see the *Evaluation on the application of the Return Directive (2008/115/EC)*, Final Report of the European Commission of 22 October 2013 (hereinafter *2013 European Commission Evaluation Report*), p. 83, available on: <http://ec.europa.eu/smart-regulation/evaluation/search/download.do?documentId=10737855>.

Period for VD	MSs
Exact transposition of the timeframe⁴¹	DE, DK, EE, EL, FI, FR, HU, IT, LT, LU, LV, MT, PL, RO, SE, SI, SK
Max exceeding 30 days	CZ – 60 days
Max lower than 30 days	AT – 14 days ES – 15 days PT – 20 days NL – 28 days
Min higher than 7 days	PT – 10 days

There is little national jurisprudence reviewing the period of VD. The reason for the limited national jurisprudence is the fact that in most Member States, this issue falls under the jurisdiction of the administrative judge, who is not competent to replace the administrative decision with his own decision. Therefore the VD period is, in practice, subject to judicial review only to the extent of whether the period was or was not conferred, while the precise timeframe is left to the discretion of the administration. Based on the information provided by the eleven national Reports, it seems that, in practice, the administrative authorities commonly establish a period close to the maximum one allowed by the national law.

Reviewing the adequacy of the national authority's assessment of the length of the period for voluntary departure is usually done by national courts. Such reviews normally take place only in as much as there has been a manifest error committed by the administration (CZ, FR). Some of the national Reports mentioned that, occasionally, national courts will assess the authority's decision for the VD period, when the maximum period was not conferred. In this circumstance, several factors will be taken into account. These include the existence of previous return/removal attempts; the existence of family relatives; the duration of the period of stay of the TCN; and Article 8 ECHR related aspects (e.g. Netherlands). The cost of the flight ticket and frequency of the flights is considered irrelevant (Czech Republic). Family related aspects which would fall under the scope of Article 8 ECHR are not usually considered as reasons for establishing the VD period, since the authorities commonly grant the maximum period. Aspects related to the family life are more often considered in the context of paragraph 2: extension of the VD period.⁴²

A common issue regarding the VD period in national jurisprudence is the establishment of the precise moment when the VD period should start to run. The National Reports mention the moment when the return decision/removal order becomes final and enforceable as the moment when VD period starts to run. Additionally, national courts have clarified that the moment of VD should start to run when the TCN is free to make the necessary return arrangements: thus the period of detention for other criminal acts should not be included. The Czech legislation provides that should the VD period start to run during the detention of the third-country national, its application will be postponed for after the

⁴¹ Croatia is within the category of Member States that have chosen to transpose the precise timeframe of 7 to 30 days provided by Article 7(1) RD.

⁴² As rightly pointed out by the [Dutch National Report](#), this point of view may raise concerns as regards its conformity with Article 5 RD, in light of the CJEU judgment in *Boudjlida*, (ECLI:EU:C:2014:2431, para. 49) whereby: 'It follows that, when the competent national authority is contemplating the adoption of a return decision, that authority must necessarily observe the obligations imposed by Article 5 of Directive 2008/115 and hear the person concerned on that subject.' This opinion seems to be shared also by the Commission, see *Return Handbook*, p. 35.

termination of the detention.⁴³ Similarly, if the third-country national is detained during the VD period, this period shall be suspended until end of the detention period.⁴⁴

National courts seem to commonly consider the VD period as starting, when the TCN is free of criminal sanctions which restrict his or her liberty. The CAA of Paris in a judgment of 2013⁴⁵ quashed an administrative decision which did not take into account the existence of criminal sanctions to which the TCN was subject to establish the start of the period of VD.

1.3 Paragraph (2)⁴⁶ – extension of the voluntary departure period

According to Article 7(2) RD, Member States have an obligation to extend the period for VD beyond the maximum 30 days when certain specific circumstances of the individual case are met. The paragraph sets out a non-exhaustive list of three such circumstances, such as: as the length of stay; the existence of children attending school; and the existence of other family and social links. The majority of Member States provide for the possibility of extending the VD, which in most jurisdictions has to be made by way of individual application, and exceptionally can be considered by the public authorities automatically. There are a few exceptions where this possibility is not provided for in the national legislation (e.g. the Czech Republic). However, according to a survey of national practices, these Member States have committed themselves to amending their legislation accordingly.⁴⁷

In some Member States prolongation is possible only through an application (e.g. Cyprus, Italy and the Netherlands).

An aspect of Article 7(2) – on which national courts have significantly contributed in clarifying the meaning of the RD and limiting the previous discretion of the administration – is the nature of the ‘specific circumstances of the individual case’. Administrative authorities in **Austria** used to interpret the RD as referring only to circumstances in the Member State which issued the return decision. Austrian courts disagreed and held that also circumstances in the target country may lead to a prolongation and create the necessity to prolong the period. Former Austrian High Administrative Court stated that, primarily, reasons in Austria play a role but also – as mentioned – circumstances in the country of origin. For instance, the fact that the TCN concerned was not able to return to their country of origin in winter, because there was no place there to live with (adequate) heating was taken into account; as was the fact that their son was born in Austria and was not registered in Byelorussia. Therefore the VD period was subsequently extended.⁴⁸ This particular interpretation of the concept of the ‘specific circumstances of the individual case’ given by the Austrian High Administrative Court has been endorsed also by the Commission in its *Return Handbook*. This indicates that ‘the term ‘where necessary’ refers to circumstances both in the sphere of the returnee and in the sphere of the returning State.’⁴⁹

The circumstances expressly mentioned by the RD as legitimate grounds for the prolongation of the VD period are the following: length of stay; children attending school; and family links. According to the Commission Handbook on the application of the Return Directive, the three circumstances

⁴³ Art. 118(3) ALA, the third sentence.

⁴⁴ Art. 118(3) ALA, the fourth sentence.

⁴⁵ CAA Paris, 22/03/2013, no. 12PA03710, see more in the [French Report](#).

⁴⁶ Article 7(2) RD reads as follows: ‘Member States shall, where necessary, extend the period for voluntary departure by an appropriate period, taking into account the specific circumstances of the individual case, such as the length of stay, the existence of children attending school and the existence of other family and social links.’

⁴⁷ According to 2013 [European Commission Evaluation Report](#), Czech Republic, Denmark, France and Malta committed to amend their legislation. According to the Czech Report, the national legislation has still not been brought in line with the requirements of Article 7(2) RD.

⁴⁸ [High Administrative Court, 2012/21/0072, 16.5.2013](#).

⁴⁹ *Return Handbook*, p. 36.

mentioned in Article 7(2) must be expressly included in the national implementing legislation, and they must be respected by the administrative and jurisprudential practice. Not all Member States expressly refer to these circumstances in their legislation. For example, Austrian legislation does not provide for any, while the **Czech Republic** and **Germany** do not include TCN children attending school among the circumstances justifying extension. However, even if some of the Member States have not implemented the specific circumstances for the extension of the VD period, national courts do take some of them into consideration (e.g. Austria).⁵⁰

According to the 2013 Commission Evaluation Report, the grounds, which in practice, appear to be most used for justifying the prolongation of VD period are the following: health issues and children of the TCN attending school (cited in 11 countries).⁵¹ The list of circumstances provided in Article 7(2) is not exhaustive; Member States can add other relevant factors.⁵² Health reasons and organisation of travel documentation is among the most common additional circumstances considered in practice, as legitimate ground for the prolongation of the VD period. The pregnancy of the wife of the concerned TCN is commonly taken into consideration by national courts among family and social circumstance (e.g. Austria, Belgium, and France). On the other hand, ongoing divorce procedure is not considered a valid reason (France, [CAA Nantes, 26/02/2015](#)). Organising travel documentation is taken into consideration in a few jurisdictions, however on a case by case basis not generally. When considering the legitimacy of the invoked grounds for the prolongation of the VD period, certain national courts pay due attention to the issue of whether the application submitted by the TCN is abusive or not (DE). For instance, according to the German jurisprudence uploaded in the REDIAL database, national courts take into consideration whether the request for prolongation is truly aimed at arranging return, or whether rather it is to legalise the claimant's stay (e.g. return of the wife/partner with children).⁵³

One of the main problems concerning the extension of the VD period is that, unlike the first paragraph of Article 7, the second paragraph does not set out a fixed timeframe for the extension of the period for VD, which thus leaves a considerable margin of discretion to the Member States on establishing the extension period. As a general rule, this period should be set by the authorities on a case by case basis. On this specific issue, the Commission's Handbook provides that extensions of up to one year in cases of TCNs having children attending school are covered by the RD.⁵⁴ In practice, the period of prolongation varies from one year in cases of TCNs having children attending school, to the period covering pregnancy plus eight weeks after birth,⁵⁵ to a suitable period for post-surgery recuperation.

In several Member States, national courts limit themselves to assessing whether the administrative authority has committed a manifest error of interpretation in refusing to prolong the VD period: this is the case, for example, in France⁵⁶ and Hungary.⁵⁷ However, other national courts have showed a more intrusive role and have assessed the arguments and evidence submitted by the administration. Courts have established new circumstances among the common factors justifying extension of the VD period

⁵⁰ According to the [Austrian Report](#), p. 3, 'the Government Proposal (legislative document) § 55 (3) Aliens Police Act transposes Art. 7(2) RD. The Government proposal also refers to examples. These are the previous length of stay of the third country national, the necessity that a child completes a semester at an Austrian school.'

⁵¹ *Ibid.*, p. 88.

⁵² For a detailed table on the Member States' legislation regarding circumstances granting an extension of the period for voluntary departure, see Table 25 in the 2013 *European Commission Evaluation Report*, p. 86.

⁵³ See [Higher Administrative Court of Northrhine-Westfalia, 18 B 779/15](#).

⁵⁴ *Return Handbook*, p. 35.

⁵⁵ Federal Administrative Court, G307 2013610-1, 24.2.2015, see the [Austrian Report](#).

⁵⁶ See, [CAA Lyon, judgment of 29/08/2013](#).

⁵⁷ See the [Hungarian Report](#).

or quashed an administrative decision refusing an extension when not sufficiently supported by evidence (Austria).⁵⁸

1.4 Paragraph (3)⁵⁹ – obligations pending voluntary departure

Article 7(3) RD provides for certain obligations which should minimize the risk of absconding during voluntary departure. These obligations include: 1) regular reporting to the authorities; 2) the deposit of an adequate financial guarantee; and/or 3) submission of documents or the obligation to stay at a certain place. They can be imposed only in the specific circumstance of ‘avoiding the risk of absconding’. This particular circumstance justifies the application of more stringent conditions to be followed by the TCN within the VD period. The purpose of imposing additional obligations pending voluntary departure is to allow a period of voluntary departure in cases which would not normally otherwise qualify for such treatment.⁶⁰ Preserving the VD measure, while requiring the TCN to fulfil certain obligations during this period, is a compromise between ensuring the fulfilment of the RD objective – effective removal – and the principle of ‘voluntarism’ and proportionality which govern the return procedure. Requiring certain obligations to be fulfilled by the TCN concerned is an alternative to the more stringent decision of shortening the VD period to less than seven days or even refraining from granting such a period and imposing instead the removal of the TCN. According to the CJEU, this gradualism should be followed by national authorities and courts when a risk of absconding is identified.⁶¹

The option of imposing additional obligations, aimed at avoiding the risk of absconding of the TCN during the voluntary departure period has been transposed by most of the Member States.⁶²

1.4.1 Risk of absconding – definition and application

According to the RD, the risk of absconding can be grounds for: attaching certain obligations to be complied with by the TCN during the voluntary departure (Article 7(3)); shortening the VD period or refusing to confer voluntary departure (Article 7(4)); and as a last resort measure – detention (Article 15)). The definition of this concept does not vary under EU law depending on the measure to be taken within the return procedure. The ‘risk of absconding’ is generally defined by Article 3(7) RD. The principles of ‘voluntarism’, ‘gradualism’ and proportionality determine the precise return measure to be taken when the authorities identify a risk of absconding.⁶³

⁵⁸ See, *inter alia*, [High Administrative Court, 2012/21/0072, 16.5.2013](#) and [Federal Administrative Court, W196 2015947-1, 28.1.2015](#).

⁵⁹ Article 7(3) RD reads as follows: ‘Certain obligations aimed at avoiding the risk of absconding, such as regular reporting to the authorities, deposit of an adequate financial guarantee, submission of documents or the obligation to stay at a certain place may be imposed for the duration of the period for voluntary departure.’

⁶⁰ See *Return Handbook*, p. 36.

⁶¹ *El Dridi*, para. 41.

⁶² Except of Hungary, Luxembourg, and Sweden. As for the Czech Republic, the possibility was introduced but not in cases of risk of absconding, but threat to public policy and national security, since the national legislation implementing the Return Directive does not refer to the ‘risk of absconding’.

⁶³ See *El Dridi*, paras. 37-39: ‘It follows from Article 7(3) and (4) of that directive that it is only in particular circumstances, such as where there is a risk of absconding, that Member States may, first, require the addressee of a return decision to report regularly to the authorities, deposit an adequate financial guarantee, submit documents or stay at a certain place or, second, grant a period shorter than seven days for voluntary departure or even refrain from granting such a period. 38 In the latter situation, but also where the obligation to return has not been complied with within the period for voluntary departure, Article 8(1) and (4) of Directive 2008/115 provides that, in order to ensure effective return procedures, those provisions require the Member State which has issued a return decision against an illegally staying third-country national to carry out the removal by taking all necessary measures including, where appropriate, coercive measures, in a proportionate manner and with due respect for, *inter alia*, fundamental rights. 39 In that regard, it follows from recital 16 in the preamble to that directive and from the wording of Article 15(1) that the Member States must carry out the removal using the least coercive measures possible. It is only where, in the light of an assessment of each specific situation, the

According to Article 3(7) RD, ‘Member States must base their assessment of whether there is or not a risk of absconding on objective criteria fixed in national legislation.’⁶⁴ Most Member States have transposed the possibility of imposing obligations aimed at avoiding the risk of absconding.⁶⁵ However, according to the 2013 Commission Evaluation Survey, only three Member States have defined the risk of absconding in the context of voluntary departure, namely Luxemburg, Latvia and Slovenia.⁶⁶ The rest of the Member States usually apply the obligations set out in Article 7(3) RD in the context of alternatives to detention.

The RD does not provide a detailed definition of the precise grounds that can justify the establishment of a ‘risk of absconding’. It only establishes general criteria that national authorities have to fulfil when choosing certain factors: criteria must be objective and fixed in national legislation. Based on the eleven national Reports and the information collected by the CONTENTION Synthesis Report⁶⁷ and Commission Handbook,⁶⁸ it seems that the following grounds are among the ones most referred to national legislation: lack of documentation; absence of cooperation to determinate identity; lack of residence; use of false documentation or the deliberate destruction of existing documents; failing repeatedly to report to the relevant authorities; explicit expression of intent of non-compliance; existence of conviction for criminal offence; non-compliance with existing entry ban; and the violation of a return decision. In certain Member States, the list of objective indicators for a risk of absconding is not exhaustively provided by the national legislation (e.g. Bulgaria).

Dutch legislation offers the most detailed criteria, providing for fifteen grounds for finding of a ‘risk of absconding’. These criteria have been divided by the legislation itself, into substantial⁶⁹ and non-substantial⁷⁰ grounds. In the case of substantial grounds, the authorities do not need to provide further justification in order to prove the risk exists in an individual case.⁷¹ If two or more substantial grounds are applicable, the period for VD is refused. Non-substantial grounds may not, in themselves, lead to the conclusion that there is such a risk. Instead authorities are required to provide further justifications.⁷² This broadly defined ‘objective criteria’ often leads, in practice, to the automatic

enforcement of the return decision in the form of removal risks being compromised by the conduct of the person concerned that the Member States may deprive that person of his liberty and detains him.’

⁶⁴ See *Return Handbook*, p. 11.

⁶⁵ With few exceptions, such as Hungary, where the existence of a risk of absconding leads only to situations such as those envisaged by Article 7(4) or 15 RD. Czech legislation implementing the Return Directive does not refer at all to the risk of absconding. The concept is defined only in the context of the Return Directive, see more details in the Czech Report.

⁶⁶ According to the *2013 Commission Evaluation Report*, p. 91.

⁶⁷ The CONTENTION Synthesis Report is freely available on: http://contention.eu/docs/Synthesis_Report.pdf.

⁶⁸ According to *Return Handbook*, p. 36.

⁶⁹ According to Article 5.1b Aliens Decree: ‘The third-country national has not entered the country lawfully, or has tried to do so; he has evaded supervision for some time; he has received in the past any notification, obliging him to leave the country before the end of a specified period, and has not done so voluntarily; He does not cooperate in assessing his identity or nationality; he has, with reference to his application for permission to stay in the country, given false or contradictory statements regarding his identity, nationality or his journey to the Netherlands or any other Member State; he has gotten rid of travel- or identifying documents, without any need to do so; he has made use of false or falsified documents in the Netherlands; he has been declared an undesired alien according to Dutch Law, or an entry ban has been issued against him according to the law; he has declared that he will not fulfil his obligation to return (as defined in the Return Directive) or his departure to the Member State that is responsible for his application for asylum (according to the Dublin regulation).’

⁷⁰ According to Article 5.1b Aliens Decree: ‘The third-country national does not fulfil one or more obligations, laid down in chapter 4 of the Aliens Act (i.e. the obligation to report to the authorities on a regular basis); he has unsuccessfully applied more than once for a residence permit; he has no permanent residence; he has no sufficient resources; he is suspected of or convicted for a crime; he has worked although he was not allowed to do so according to the Law.’

⁷¹ [Council of State 27 February 2014, 201303624/1/V3](#), see also Aliens Circulaire A3/3. See [Dutch Report](#), p. 3.

⁷² Information provided by the G. Cornelisse and J. Bouwman, [National Report for Netherlands](#).

decisions of the administration establishing a risk of absconding. According to the [Dutch Report](#), these objective criteria seem not to go beyond the mere fact of illegal stay.⁷³

Any automaticity in proving the existence of a risk of absconding raises concerns as regards the conformity of the Dutch legislation and practice with the RD. For instance the automatic conclusion of the existence of a ‘risk of absconding’ solely on the basis of an illegal entry reverses the burden of proof from the national authorities to the TCN. This, of course, is contrary to Article 7(3) RD and contradicts the principles of case by case analysis and proportionality which govern the return procedure.⁷⁴ Reasoned opinions and individual assessment of each case should be preferred against automatic decisions.⁷⁵

In practice objective criteria should be taken into account ‘as an element in the overall assessment of the individual situation, but it cannot be the sole basis for assuming automatically a “risk of absconding”’.⁷⁶

Some Member States refer in addition to the risk of absconding to the existence of threats to public order or security, thus extending the special circumstances provided by Article 7(3) RD. For example, the **Austrian** legislation seems to provide for more favourable provisions for the TCN since its legislation requires the presence of a ‘risk of absconding’, and not a ‘future risk of absconding’,⁷⁷ as the Directive seems to suggest. The Austrian Federal Administrative Court established that it is not sufficient to make general statements, such as, ‘there is no integration in Austrian society or legal order’,⁷⁸ in order to justify the existence of a risk of absconding.

Italy is among the countries with the highest level of automaticity in establishing a risk of absconding. According to the Italian legislation and practice, any TCN benefiting of a VD period will have to comply with at least one obligation.⁷⁹ According to the [Italian Report](#), it seems that national authorities do not need to prove a ‘risk of absconding’, since the risk is presumed *ab initio* when VD is conferred.

A positive evolution in the application of the principle of gradualism has recently been registered in certain national jurisdictions. National courts scrutinise the failure of the administrative authorities to adequately assess the possibility of imposing one or multiple obligations as an alternative prior to a coercive removal order. The lack of adequate reasons given by the authorities for refusing to first impose VD with attached obligations prior to giving a removal order is interpreted by national courts as a legitimate grounds for quashing the administrative order for removal (CZ).⁸⁰

1.4.2 Obligations to be fulfilled pending VD

The most common obligations imposed by the Member States, when there is a risk of absconding, are regular reporting to the authorities followed by staying in a certain place, submission of documents

⁷³ [Dutch National Report](#), p. 4.

⁷⁴ See recitals 13 and 16 of the RD, *El Dridi, ibid.*, para. 41, and Opinion of AG in *Celaj* case, C-290/14, ECLI:EU:C:2015:285, para. 29 and 49.

⁷⁵ See, for a similar opinion, *Return Handbook*, p. 12.

⁷⁶ *Ibid.*

⁷⁷ Article 7(3) RD refers to ‘avoiding a risk of absconding’, implying thus that only a mere future risk of absconding is sufficient to justifying the establishment of obligations during the VD period.

⁷⁸ See Federal Administrative Court, G307 2009115-1/2E, 28.7.2014, see the [Austrian Report](#).

⁷⁹ The obligations provided by the Italian legislation are the following: a) submission of the passport or other equivalent document in course of validity, which will be given back at the moment of departure; b) the obligation to stay in a place previously identified, where the foreigner can be easily traced; c) daily attendance at the police office until the day of departure.

⁸⁰ For more details, see the [Czech Report](#).

and then the deposit of an adequate financial guarantee.⁸¹ These obligations can be cumulatively imposed. Some Member States, such as **Italy** and **Netherlands**, impose all the above mentioned obligations pending voluntary departure. In **Italy**, the amount of the deposit ranges from one to three times the amount of the monthly welfare check: note that the monthly welfare check amounts to Euro 448,50 in 2015). Member States foresee amounts varying from around 200 Euro to 5,000 Euro.⁸² In addition to a cumbersome financial burden, Italian legislation has transposed the obligation of regular reporting as an obligation of to go daily to the police office to be registered until the day of departure.⁸³ The effects of these intrusive obligations automatically attached by the Italian legislation to the VD measure are capable of denying the voluntary character of the measure, bringing voluntary departure closer to a coercive measure.

Obligations to be fulfilled pending VD are usually set at the moment of adopting the return decision, and not during the period for VD. Challenging the decision of fulfilling certain obligations thus means challenging the return decision itself.

Based on the information provided by the national academics it seems that the most common problems in the application of Article 7(3) RD, that courts have to deal with, result mostly from the definition of the ‘risk of absconding’. National legislations define too loosely the ‘risk of absconding’ and also permit a wide power to the administration in finding such a risk. National courts have thus to fill the gap left by the national legislation and scrutinise the administration discretion, while enjoying a limited jurisdiction to review the administrative decisions. Recently, there seems to be an ascending jurisprudential trend whereby courts no longer accept as justified the automatic finding of a risk of absconding (see, in particular, the **Austrian**, **Czech** and **French** courts). Furthermore, national courts pay closer attention to the principle of proportionality when deciding the effects of the risk of absconding: these include, establishing VD with attached obligations; limiting the VD period; refusing VD; and adopting a removal order, or detention (in particular, AT, BG, and CZ).⁸⁴

There seems to be a lack of uniform interpretation of the effects attached to the objective criteria justifying the establishment of a ‘risk of absconding’. It is interesting to notice that lack of passport or residence permit for a TCN is considered by several Member States as an objective justifying the existence of a risk of absconding. However, while in certain Member States this situation alone is commonly considered to be enough to establish certain obligations to be fulfilled during the VD period (NL), in other Member States it was considered sufficient by the administration and courts to justify detention (!). In the case of *Re. Rita Kumah*,⁸⁵ a **Cypriot** court found ‘that detention is necessary for as long as there is a risk of absconding and there is a risk of absconding in this case because the applicant did not have a passport or a residence permit.’⁸⁶

Should the TCN fail to fulfil the obligations established during the VD period, and should he or she fail to cooperate to ensure assisted voluntary departure or should there be a higher risk of absconding, which cannot be effectively minimised by way of imposing certain obligations, the national authorities can shorten or refuse the VD under the last paragraph of Article 7 RD.

⁸¹ According to the data provided by the *2013 Commission Evaluation Report* and REDIAL national reports, available on: <http://euredial.eu/publications/national-synthesis-reports/>.

⁸² See *Return Handbook*, p. 36.

⁸³ It has to be noticed that Italian legislation is among the most stringent legislative frameworks, the obligation of regular reporting is commonly transposed as an obligation of weekly reporting (e.g. BG, FR, LT). Recently several member States have relaxed their rules on the obligation of regular reporting (see Matrix Survey 2013).

⁸⁴ [Judgement of the SAC of 30 September 2014, No. 9 Azs 192/2014](#), § 22.

⁸⁵ *Re the application of Rita Kumah*, Supreme Court, Civil application No. 198/2013, 29 November 2013. Available on: http://www.cylaw.org/cgi-bin/open.pl?file=apofaseis/aad/meros_1/2013/1-201311-198-13.htm&qstring=%E1%F0%E5%EB%E1%F3%2A.

⁸⁶ See the [Cypriot Report](#), p. 6.

1.5 Paragraph 4⁸⁷ – shortening the VD period or refusal of VD

Pursuant to Article 7(4) RD, Member States may, under certain circumstances, grant a period shorter than seven days or refuse to grant a period for voluntary departure. The specific circumstances when Member States may derogate from the general obligation of granting a VD period are exhaustively set out by the provision, namely if there is a risk of absconding, if an application for a legal stay has been dismissed as manifestly unfounded or fraudulent, or if the TCN concerned poses a risk to public policy, public security or national security. The majority of the Member States have transposed ad verbatim this paragraph. However, there are also exceptions, such as in Bulgaria. Article 39b (4) of the Bulgarian Law on Foreign Nationals provides that a period for voluntary departure **shall not** be granted when the foreign national ‘**poses a threat to the national security or the public order**’. The Bulgarian law has not transposed the rest of the grounds for refraining from granting a period for voluntary leave under Article 7 (4) of the Return Directive such as, for example, the risk of absconding.⁸⁸

1.5.1 Guidelines offered by the Directive and CJEU jurisprudence on the definition of the risk of absconding and grounds for refusing VD

Article 3(7) RD defines the risk of absconding 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 of return procedures may abscond.’ This means that Member States have to include in their national legislation the objective criteria which justify the existence of a risk that a TCN, subject of return procedures, may abscond. The Directive does not enumerate those objective criteria, leaving it to the Member States to define them. Member States have to respect certain general principles when choosing the criteria on the basis of which a risk of absconding is presumed. These include: respect of fundamental rights; legal certainty (the national legislation has to provide a definition of the risk of absconding based on objective factors); legality (the objective criteria have to be provided in the national legislation); and individual examination (‘the existence of reasons in an individual case’).

Although the Court of Justice of the EU has not set out the precise objective criteria justifying the presumption of risk of absconding, it has offered certain guidelines that need to be followed by national authorities. The CJEU emphasised the necessity of individual examination of law based objective criteria.⁸⁹

The CJEU has clarified that voluntary departure is a mandatory measure, a right of all TCNs subject to a return decision or equivalent decision. Derogations from this right are expressly provided in paragraph four of Article 7, and should be strictly interpreted.⁹⁰ It can thus be implied from the Court

⁸⁷ Article 7(4) RD reads as follows: ‘If there is a risk of absconding, or if an application for a legal stay has been dismissed as manifestly unfounded or fraudulent, or if the person concerned poses a risk to public policy, public security or national security, Member States may refrain from granting a period for voluntary departure, or may grant a period shorter than seven days.’

⁸⁸ See similarly the Czech Republic.

⁸⁹ See *Sagor*, para. 41.

⁹⁰ See, the *El Dridi* judgment of the CJEU, paras. 36-38: ‘As part of that initial stage of the return procedure, priority is to be given, except where otherwise provided for, to voluntary compliance with the obligation resulting from that return decision, with Article 7(1) of Directive 2008/115 providing that the decision must provide for an appropriate period for voluntary departure of between seven and thirty days. 37 It follows from Article 7(3) and (4) of that directive that it is only in particular circumstances, such as where there is a risk of absconding, that Member States may, first, require the addressee of a return decision to report regularly to the authorities, deposit an adequate financial guarantee, submit documents or stay at a certain place or, second, grant a period shorter than seven days for voluntary departure or even refrain from granting such a period. 38 In the latter situation, but also where the obligation to return has not been complied with within the period for voluntary departure, Article 8(1) and (4) of Directive 2008/115 provides that, in order to ensure effective return procedures, those provisions require the Member State which has issued a return decision against an illegally staying third-country national to carry out the removal by taking all necessary measures including, where appropriate, coercive measures, in a proportionate manner and with due respect for, inter alia, fundamental rights.’

statement that the three circumstances provided by Article 7(4) as grounds for shortening or refusing VD are exhaustive, precluding the Member States from providing additional criteria. Consequently, the VD period can be shortened to a period of less than 7 days, or refused altogether if one of the following three circumstances exists: risk of absconding; abusive applications for legal stay (an application for a legal stay has been dismissed as manifestly unfounded or fraudulent); and societal risk (public policy, public security, national security). Recently the CJEU offered guidelines on the interpretation of ‘the risk to public policy’ concept as a ground for justifying the refusal of the VD measure.

In a judgment delivered by the CJEU 11 of June 2015,⁹¹ the Court clarified the meaning of the ‘**risk to public policy**’, which, unlike the ‘risk of absconding’ is not defined by Article 3 or other Articles of the RD. First and foremost, the risk of public policy is a different concept from the risk of absconding. Member States are precluded from relying on general practices or assumptions in order to determine the existence of such a risk.⁹² Instead they are required to assess, on a case-by-case basis, whether the personal conduct of a given TCN poses a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society, in addition to the perturbation of the social order which any infringement of the law involves.⁹³ Suspicion that the TCN has committed a criminal offence or an established criminal offence cannot, in themselves, ‘justify a finding that that national poses a risk to public policy within the meaning of Article 7(4) of Directive 2008/115.’⁹⁴ Other factors, such as the nature and seriousness of that act, the time which has elapsed since it was committed and any matter which relates to the reliability of the suspicion that the TCN committed a criminal offence is also relevant for a case-by-case assessment, which needs to be carried out.⁹⁵

1.5.2 National jurisprudence

The RD list of three circumstances when the VD can be reduced or refused altogether have not been transposed by all the Member States. For instance, **Hungary** has its own list of circumstances,⁹⁶ while the Bulgarian implementing legislation does not include the risk to absconding, but only ‘threat to the national security or the public order’.⁹⁷ In the *Dorofeev* case,⁹⁸ the **Bulgarian** Supreme Administrative Court dealt with the difference between Article 7 (4) of the Return Directive and the Bulgarian transposition law, and found it compatible with the Directive. ‘Since the national lawmaker provided as a basis for the non-conferral of the period for voluntary departure only the danger for the national security or public order, the Court found, that precisely these circumstances, if pointed out and duly proven, would be a basis for the non-conferral of the period for voluntary compliance with the measure.’ In light of the CJEU definition of the ‘risk/threat to public policy’, the latter requires more stringent conditions than the risk of absconding as defined by Article 3(7) RD. It could be argued that Bulgarian law establishes more favourable provisions, falling under the scope of Article 4 RD. However, following the *Zaizoune* judgment, it is not clear whether the characterisation of more

⁹¹ *Z. Zh. and O.*, C-554/13.

⁹² See also Sagor.

⁹³ See paras 50 and 60.

⁹⁴ Para. 60.

⁹⁵ Para. 65.

⁹⁶ Section 42 of Act No II of 2007 provided the following four circumstances ‘a) the third-country national’s right of residence was terminated due to his/her expulsion or exclusion, or for whom an alert has been issued in the SIS for the purpose of refusing entry and the right of residence; b) the third-country national’s application for residence permit was refused by the authority on the grounds referred to in Paragraphs b) and d) of Subsection (1) of Section 18; c) the third-country national has expressly refused to leave the territory of the Member States of the European Union voluntarily, or, based on other substantiated reasons, is not expected to abide by the decision for his/her expulsion; d) the third-country national’s residence in Hungary represents a serious threat to public security, public policy or national security.’

⁹⁷ See, the Law on Foreign Nationals in the Republic of Bulgaria, Article 39b (4).

⁹⁸ [Judgment of the Bulgarian Supreme Administrative Court, 12/12/2011.](#)

favourable provision would be sufficient to ensure the conformity of Bulgarian implementing legislation. This is an aspect which might in the future be clarified by the Court of Justice.

Another problematic legislative framework is the **Spanish** legislation which provides for an urgent expulsion procedure, precluding the conferral of VD. The grounds which justify the urgent procedure are not limited to the three circumstances provided by Article 7(4), but extend to other circumstances.⁹⁹ The additional circumstances of ‘risk of non-appearance’ have often been challenged by TCNs as not proven or insufficient for setting up the urgent procedure and for denying VD.

Based on the information submitted by the eleven national Reports, it seems that the most invoked circumstance of the three provided by Article 7(3) is the risk of absconding. The term is broadly defined by the legislation and administration of these Member States. It includes situations when the TCN cannot justify that he or she has lawfully entered the Member State’s territory, and has not requested the issue of a residence permit (France similar provision in Netherlands); alternatively he is not in possession of a passport or other equivalent document; or the TCN does not have proper documentation proving the availability of a residence where he/she can be easily traced (Belgium, Italy), or has committed a criminal offence. In Cyprus a presumption that there is a high risk of absconding in every case of irregular migrants has led in practice to a standard practice of refusing VD and establishing detention as the standard return measure. According to the National Report, **Cypriot** courts appear unwilling to interfere with this administrative practice.

These situations are likely to exist in relation to most TCNs, without signaling a concrete risk of absconding. National courts in the respective Member States have been quite deferential towards the decision of the administration to refuse VD, establishing a removal order based on these broad understanding of the risk of absconding, without always questioning the existence of a real risk. This practice might raise concerns as regard its conformity with the principle of proportionality required by the RD.¹⁰⁰

Abusive applications for legal stay are often interpreted as falling under the scope of ‘risk of absconding’. Grounds such as criminal convictions or suspicion of criminal conviction are considered as falling under the ‘risk of absconding’ and could lead automatically to refusal of VD (e.g. Cyprus, Belgium, Spain, and Germany).¹⁰¹ In recent years, jurisprudential practice has been changing on whether these grounds, in themselves, are sufficient to refuse VD and trigger a removal order. It is expected that following the *Z. Zh. and O.* judgment, national courts will refuse to accept mere criminal conviction, or suspicion of having committed a criminal offence, as being sufficient in themselves, to refuse VD. Failed attempts of returning the TCN prior to the last return decision, or failure to comply with the obligations attached to the VD measure are often considered a solid and/or sufficient grounds for establishing a risk of absconding.

According to the **Dutch** legislation and practice, if two of the substantial grounds falling under the scope of the risk of absconding¹⁰² are found by the administration, then VD is automatically refused.

⁹⁹ Article 63 (1) of the Immigration Act 4/2000 ‘1) there is a risk of non-appearance; 2) if the third-country national hinders his/her removal; or 3) if the third-country national represents a risk for the public order, public security or national security’.

¹⁰⁰ See, in particular, Conseil Constitutionnel, décision 2011-631 DC, see also the [French Report](#), p. 9.

¹⁰¹ See, [Administrative Court of Augsburg, Au 6 K 12.667, 16-01-2013](#).

¹⁰² To begin with the first, Dutch law defines the following circumstances as substantial grounds for assuming a risk of absconding: The third-country national has not entered the country lawfully, or has tried to do so; He has evaded supervision for some time; He has received in the past any notification, obliging him to leave the country before the end of a specified period, and has not done so voluntarily; He does not cooperate in assessing his identity or nationality; He has, with reference to his application for permission to stay in the country, given false or contradictory statements regarding his identity, nationality or his journey to the Netherlands or any other Member State; He has gotten rid of travel- or identifying documents, without any need to do so; He has made use of false or falsified documents in the Netherlands; He has been declared an undesired alien according to Dutch Law, or an entry ban has been issued against him according to the law; He has declared that he will not fulfil his obligation to return (as defined in the

According to the [Dutch Report](#), following the CJEU judgment in the *Zh. and O* case, the factual reversal of the burden of proof, in cases where the authorities invoke the so-called substantial grounds, might not be in conformity with the strict requirements set by the Court under Article 7(4) RD. According to the author of the Dutch Report,¹⁰³ ‘this is especially so because the Member States, when they refuse to grant a period for voluntary removal, derogate “from an obligation designed to ensure that the fundamental rights of third-country nationals are respected” (C-554/13, *Zh. and O.*). What’s more, when we take into account the content of some of these grounds as laid down in Dutch law, they do not really seem to go beyond the mere fact of illegal stay.’¹⁰⁴

If one of the three circumstances is found to exist, administrative authorities would prefer to refuse VD instead of shortening the VD period. There is no reported case law where national courts changed the refusal of VD to shortening the VD period based on the principle of proportionality and the *effet utile* of the Directive.

The majority of the cases heard by national courts on Article 7(4) RD relate to the lack of evidence proving an alleged risk of absconding, thus justifying a refusal of VD, and claims asking for an alternative to coercive removal or detention. The TCNs concerned often argued that the administration failed to adequately assess the possibility of imposing VD or other alternatives to detention prior to ordering detention. National courts’ attempts at assessing the reasons given by the administration for finding a risk of absconding are often limited to establish whether the administration has committed a manifest error of interpretation (FR). In this case, if the administration does not give the reasons or grounds for refusing to confer VD, or if it does not provide the period during which the TCN should voluntarily depart, courts will readily quash the administration’s decisions.¹⁰⁵

It seems that following the CJEU judgment in the *El Dridi* case, courts are readier to assess the evidence given by the administration and to balance the risk with the established measures. They also more often take into consideration whether less intrusive alternatives might be established based on the principle of proportionality. For instance, the Administration Court of Appeal of Nantes¹⁰⁶ found that a TCN not having lawfully entered **French** territory and having failed to obtain a residence permit was not sufficient evidence to establish a risk of absconding that would require a refusal of VD. The fact that the TCN concerned had been married to a French national with whom she continued to live, during which time she lost her passport, but aimed to regularise her stay in France, was sufficient evidence for the Court to find that the administration committed a manifest error of assessment. It consequently annulled the decision and decided to confer VD with residence assigned at the place where she was staying with her husband.

1.6 Conclusions – the status quo of the judicial implementation of Article 7 RD

Although all Member States have implemented Article 7 RD into their national legislation,¹⁰⁷ and thus require the public authorities to confer a period of voluntary departure of a certain time frame, in

Return Directive) or his departure to the Member State that is responsible for his application for asylum (according to the Dublin regulation). Non-substantial grounds are: The third-country national does not fulfil one or more obligations, laid down in chapter 4 of the Aliens Act (i.e. the obligation to report to the authorities on a regular basis); He has unsuccessfully applied more than once for a residence permit; He has no permanent residence; He has no sufficient resources; He is suspected of or convicted for a crime; He has worked although he was not allowed to do so according to the Law. See more details in the [Dutch National Report](#).

¹⁰³ Galina Cornelisse.

¹⁰⁴ See the [Dutch National Report](#), p. 4.

¹⁰⁵ See, in particular, the judgments of the Bulgarian Supreme Administrative Court in [Dorofeev](#), 12/12/2011, and [Hamada](#) judgment of the same court, 07/03/2012. See also Austrian Federal Administrative Court, G307 2009115-1/2E, 28.7.2014 and [Belgian Council for Alien Law Litigation \(CALL\), case 97.083](#) of 13 February 2013.

¹⁰⁶ [Judgment of 31st of May 2012, n° 11NT03061](#).

¹⁰⁷ However Article 7(2) RD is one of the paragraphs that has been less transposed than the other paragraphs, see for instance the case of the Czech Republic.

practice, several Member States have an established administrative practice whereby no period of VD is granted.¹⁰⁸ This practice is furthermore concerning due to the fact that it occurs also in Member States having a one-step procedure, whereby TCNs receive only one decision on the basis of which the removal is carried out if the TCN has not previously voluntarily departed. This regrettable administrative practice has not, surprisingly, given rise to many challenges before national courts. The possible reasons for this limited national jurisprudence can be the TCN lack of information of their rights due to lack of translation of the return decision/removal order in a language they understand, which can lead to unawareness of their right to a voluntary departure period or expiration of the time period for appealing the return decision/removal order. Another reason is the fact that in certain Member States (e.g. Cyprus) VD is not considered by national courts as an administrative act that can be subjected to judicial review.¹⁰⁹

The CJEU's gives clear indications of the principles of 'gradualism' and 'voluntarism' in the enforcement of the return procedure. These would require national authorities to give precedence to the VD measure as a first step in enforcing the return decision. However the VD seems to be the exception rather than the rule. In general national courts do not replace the decision of the administration with their own. They very often limit themselves to requiring the public authorities to provide justified reasons for their refusal to offer VD where they are lacking. Following the *El Dridi* judgment of the CJEU, it seems that national courts are slowly accepting the idea of extending their judicial review beyond the mere manifest error(s) committed by the national authorities. They are prepared to assess, too, whether the principles of gradualism, individualism and proportionality have been respected by the authorities. Significant changes have occurred in the practice of the supreme courts of **Bulgaria, Italy** and **Spain**, as they align themselves and their interpretation of the RD with that established by the CJEU. The national authorities' decision granting VD has been considered, since 2014, by the **Italian** 'Corte di Cassazione' to be an integral part of the RD which is subject to full judicial review.¹¹⁰ The **Spanish Supreme Court** changed in 2013 the long established doctrine of fine requiring that public authorities follow the Directive as regards the precise steps in the return procedure.¹¹¹ The **Bulgarian Supreme Administrative Court** more readily assesses the conformity of national legislation and administrative decisions with the RD and the CJEU jurisprudence.¹¹² In two cases it quashed the administration's decision refusing a VD period on the basis of inadequate or insufficient proof establishing that the TCN represents a danger to national security or public order. National courts, in general, more often assessing whether the national administration has taken the VD measure into consideration before ordering the removal, provided objective reasons for refusing VD, and considered the alternative of imposing obligations during the VD period before ordering pre-removal detention. If grounds are not given, administrative decisions will be quashed. Contrary to the '*acte du gouvernement*' doctrine which has so far governed the relations between the judiciary and the administration, courts carried out a more intrusive review of the evidence given by the administration. They went beyond simply checking whether reasons were given at all justifying an exception from Article 7(1). It is to be recalled here that the CJEU emphasised, in the *Mahdi* judgment, that national courts have the authority to take into account the stated facts and evidence adduced by the administrative authority, as well as any observations that the third-country national may submit.¹¹³

¹⁰⁸ See for instance, Bulgaria and Belgium.

¹⁰⁹ *Tatsiana Balashevich v. Republic of Cyprus* through 1. The Interior Minister, 2. The Director of the Archives for population and immigration, Supreme Court Case No. 5635/2013, dated 10.07.2013. The claimant's application for suspension of the execution of a return decision was rejected on the ground that the decision of the authorities was not an administrative act but merely a non-binding request to leave Cyprus the soonest. See more details in the [Cypriot Report](#).

¹¹⁰ [Judgment no. 437/2014](#).

¹¹¹ Spanish Supreme Court, [Roj: STS 988/2013](#).

¹¹² [Dorofeev, Court Decision no. 12/12/2011](#); [Hamada](#), Court Decision no. 07/03/2012.

¹¹³ *Mahdi*, paras 60-64.

However, there are also less fortunate examples of jurisprudential practice. In these, not only do the national courts show increased deference to the decisions taken by the national authorities, but they interpret the administrative act conferring VD as not being subject to judicial review. For instance, the **Cypriot** Supreme court¹¹⁴ found that ‘the standard letter which the immigration authorities customarily send to all TCNs in an irregular situation requesting them to depart by themselves does not constitute an executive administrative act but a mere request of no legal consequence and as such it cannot be subjected to judicial review or be suspended through an interim order.’

The entry into force of the RD and the CJEU’s interpretation of the Directive have led to changes in national legislation and jurisprudence of the Member States. But there is still extensive national practice preferring removal to voluntary departure, as the administration appears reluctant to allow TCNs to organise their own return for fear of absconding and the courts appear unwilling to interfere with this practice (see, in particular, CY and HU).

In spite of positive jurisprudential trends, the National Reports indicate a lack of uniform national jurisprudence as regards conformity with the RD and CJEU jurisprudence. There is also only limited intervention of the national courts as regards the decisions taken by the administration, often limited to assessing manifest errors, without engaging in an assessment of the administration’s compliance with the principle of gradualism, individual assessment and proportionality.

There remains the national practice of automatic imposition of cumbersome obligations to the VD measure (IT). This might, at first, seem to respect the voluntarism and gradualism principles essential to the return procedure, but, in fact, it establishes disguised coercive measures.

¹¹⁴ *Tatsiana Balashevich v. Republic*, Case No. 5635/2013, judgement delivered on 10 July 2013.

2. Article 8 – Removal¹¹⁵

In order to terminate the illegal stay of third-country nationals in their territories, Member States ‘shall issue a return decision’ in accordance with Article 6 RD.¹¹⁶ Although voluntary return should remain the preferred option, when the third country national (TCN) does not comply with his obligation(s), or when ‘no period for voluntary departure has been granted’, Article 8 RD requires the national authorities to take all necessary measures to enforce the obligation to return. Article 8 RD establishes the principles and general steps that should be followed by Member States in the enforcement of the obligation to return, namely physical transportation out of the Member State. At the very core of the Directive, this provision has been much debated and redrafted during the legislative process. Its current structure, which differs from the Commission’s initial proposal, can be divided as follows: paragraphs one to three address the circumstances in which Member States enforce the return decision by ordering the removal, possibly with a separate administrative act or judicial decision;¹¹⁷ and paragraphs four to six deal with the concrete measures used to carry out the physical transportation of the TCN out of the Member State, while respecting the Directive’s requirements.¹¹⁸ Through this process, an effective forced-return monitoring system must be put in place at national level, the modalities being left to Member State discretion.

So far, **59 judgments** relevant for the application and interpretation of Article 8 RD have been collected by a dozen Member States and uploaded on the REDIAL database of national case-law.¹¹⁹ Most of these decisions, issued by the highest national courts, deal with the proportionality of the measures, pre-removal detention and possible criminalisation of migration-related offences under domestic law.

After having pointed out national particularities in terms of legal implementation, this first section will recall the circumstances in which the TCN can be (forcibly) removed from the Member States’ territory. Subsequently, the ‘necessary measures’ adopted according to Article 8(1) and (4) RD will be specifically addressed: first, with regard to their very purpose of (effectively) returning the person, which differs from criminal law measures aimed at punishing and deterring infringing behaviour; second, with regard to the proportionality assessment, required by the Return Directive at any stage of the return procedure. According to this principle, both administrative and judicial authorities should always consider and prefer the least coercive measure available in each individual case, not least during the removal process.¹²⁰

2.1 Return/removal: conceptual and procedural differences

The eleven national reports show that Article 8 RD has been transposed in all these jurisdictions (AT, BE, BG, CZ, FR, DE, HU, IT, NL, ES, CY). A clear comparison between these legal systems is

¹¹⁵ The chapters on Articles 8, 9(2) and 10(2) were drafted by Géraldine Renaudiere.

¹¹⁶ Without prejudice to exceptions referred to in paragraphs 2 to 5 of Article 6 RD.

¹¹⁷ The Commission’s proposal provided initially for a true ‘two-step’ procedure whereby Member States should first be obliged to issue a return decision which would then be executed by means of a removal order in cases where the person concerned had not returned voluntarily or where there was a risk of absconding. However, within the Council, several Member States expressed concern that this two-step approach would be too bureaucratic and lead to serious procedural delays. As a consequence, this approach was abandoned and it was left up to Member States to decide whether a single or separate procedure(s) should be applied for returning third-country nationals in irregular stay. See F. Lutz, *The Negotiations on the Return Directive*, p. 49.

¹¹⁸ Member States are also encouraged to take into account the Common guidelines on security provisions for joint removals by air annexed to Decision 2004/573/EC.

¹¹⁹ See REDIAL website, [national case-law database](#), Article 8 RD.

¹²⁰ Article 8(4) should be read in conjunction with Recitals 6 and 10 of the Directive.

yet difficult because the concepts used to define a ‘physical transportation out of the Member States’, corresponding to the ‘removal’ within the meaning of the Return Directive, vary from country to country. In **Austria** for instance the term ‘*Abschiebung*’, referring to the enforcement of the return decision in the meaning of § 46 of the Aliens Police Act, means ‘deportation.’ **Italian** and **Spanish** implementing legislation use, meanwhile, the term ‘expulsion.’ In Spain, however ‘deportation’ covers not only the return decision but also the removal order. Similarly, in **Bulgaria**, return decisions and removal orders are both contained in a single act called ‘order for coercive taking to the border.’¹²¹ In practice, most EU countries have opted for a one-step procedure in which the return decision and the removal decision are issued in a single (administrative) act¹²² (BE,¹²³ BG, ES, FR etc.). Others (AT, IT), meanwhile, chose two different acts and/or decisions, in a ‘two-step procedure’.¹²⁴ Yet such distinctions are not always easy to make as they depend on national procedural systems: in **Italy**, the legislator made use of the faculty provided for in Article 8(3) RD, opting for separate decisions for the return and the removal order, subject to different legal requirements and distinct judicial reviews.¹²⁵ By contrast, in **Austria**, ‘deportation’ enforcing the return decision, does not constitute a formal decision. It is still announced by a separate ‘act’ likely to be appealed before an independent administrative court.¹²⁶ The choice of procedure, therefore, belongs to Member States, provided that procedural safeguards available under Chapter III of the Directive and under other relevant provisions of Community and national law are respected. Regardless of whether the Member States adopted the ‘one-step’ or ‘two step’ return procedure in domestic law, the removal, as set forth in Article 8 RD, can only take place when the obligation to return within the period for voluntary departure has not been complied with.¹²⁷

2.2 Borderline between ‘voluntary departure’ and ‘removal’

It clearly appears from both the Directive¹²⁸ and the CJEU’s case law that a ‘gradation’ of measures has to be respected when applying the return procedure, ‘going from measures allowing the person concerned the most liberty, namely granting a period for his voluntary departure, to measures which restrict that liberty the most, namely pre-removal detention’.¹²⁹ Therefore, it is not surprising that

¹²¹ By comparison, in **Hungary**, the term ‘return’ does not have a settled meaning in national law: in the context of ‘decision’ it means expulsion, while in the context of an ‘obligation’, the term means ‘going-back/return’. See in this regard, N. Boldizsár, [Hungarian Report on the first package of the Return Directive](#), p. 1-2.

¹²² As provided for in Article 6(6) RD.

¹²³ In **Belgium**, Article 8 RD is implemented by Art. 74/15 of the Law of 15 December 1980. However, there is no distinct decision determining how the order to leave the territory must be enforced. That enforcement is merely suspended during the period for voluntary departure. Likewise, in **German** law, the removal order obliges the TCN to leave the territory in between seven and 30 days: in case of non-compliance, deportation is considered as an ‘executive action’ implementing the removal order, but not as a distinct decision (Sec. 59 of the German Residence Act).

¹²⁴ See in this regard, [EC, evaluation on the application of the Return Directive \(2008/115/EC\), 2013](#).

¹²⁵ First, an administrative expulsion order is issued by the Prefect, on a case-by-case basis when (1) the foreigner is considered as dangerous because of ‘his membership to certain specific categories’ or (2) the foreigner has entered or resides in Italy in breach of immigration rules. Then the *Questore* (police commissioner) in charge of the execution of the order adopts a removal order which, since accompaniment to the border implies a restriction on personal freedom, is checked and validated by the Justice of the Peace within 48 hours. On this occasion, the judge performs a check on the merits, verifying the existence of all conditions of form and substance required for the adoption of both the administrative expulsion (decision N. 1) and its enforcement (decision N. 2). See Article 13, para. 5-bis of the consolidated text and [A. Di Pascale, Italian report of the first package of the Return Directive, pp. 3-4](#)

¹²⁶ Indeed, according to the AT synthesis report on the first package of the Return Directive, ‘the Jurisprudence confirms that complaints may not only be filed against return decisions but also against the practical enforcement of the return decisions by deportation (Maßnahmenbeschwerde).’ See also EC, [Evaluation on the application of the Return Directive \(2008/115/EC\)](#), p. 174.

¹²⁷ In those cases in which such a period is granted.

¹²⁸ E.g. the very order in which provisions are presented in the Directive, from voluntary departure (Art. 7) to removal (Art. 8).

¹²⁹ See C-61/11 PPU, *El Dridi*, ECLI:EU:C:2011:268, paras. 36-41.

Article 8(1) RD calls upon Member States to enforce the return decision in two specific circumstances, namely:

- *if no period for voluntary departure has been granted in accordance with Article 7(4);*
- *if the obligation to return has not been complied with within the period for voluntary departure granted in accordance with Article 7.*

As to Article 8(2) RD, it prevents Member States from enforcing the return decision as long as the period for voluntary departure is still ‘running’: unless a risk as referred to in Article 7(4) RD arises during that period.

In the **Czech Republic**, a period for voluntary departure is granted ‘*in every return case*’ so that the first scenario envisaged by the Directive is not likely to occur. In **Spain**, Article 64(1) of the Immigration Act 4/2000 distinguishes between the ordinary procedure (*procedimiento ordinario*) and the urgent procedure (*procedimiento preferente*). It states that if the TCN has not left the territory within the period for voluntary departure or if the urgent procedure applies (in which no period for voluntary departure is granted), the TCN is forcibly removed from Spanish territory in less than 72 hours.¹³⁰ By contrast, **Austrian** law properly implements Article 8(1) and (2) RD, read in conjunction with Article 7(4): it provides indeed for the deportation of the TCN, who did not leave the territory within the time limit granted for voluntary departure. It also provides for deportation when there are ‘certain indications’ that the person does not intend to leave the country, or when the supervised departure is deemed necessary due to considerations of public security and public order.¹³¹

2.3 Necessary measures to enforce the return decision

Article 8(1) RD requires Member States to take ‘all necessary measures’ in order to enforce the return decision. This should be read in conjunction with paragraph 4 of the said provision (namely the use, as a last resort, of ‘coercive measures’ to carry out the removal of third-country nationals who resist removal). Here ‘measures’ and ‘coercive measures’ have been duly defined by the CJEU as any intervention which leads, in an effective and proportionate manner, to the return of the person concerned.¹³² The concrete modalities, (the ‘how’), are left up to Member State legislation and administrative practice.

2.3.1 Excluding criminal law measures for infringements of migration-related legal norms

The Return Directive does not preclude EU Member States from having competence in criminal matters in the area of illegal immigration and illegal stays.¹³³ In principle, national authorities are free to lay down penal sanctions in relation to infringements of migration rules and to define in domestic law which types of infringements of migration rules are ‘criminalised’.¹³⁴ This is aimed, *inter alia*, at dissuading TCNs from remaining illegally on the Member State territory. The CJEU recalled, however, that such sanctions ‘do not contribute to the carrying through of the removal which that

¹³⁰ Unless ‘removal’ cannot be enforced due to specific circumstances.

¹³¹ In case of illegal entry, a deportation can take place immediately (within 72 hours) after the TCNs apprehension at the border. See [U. Brandl, Austrian Report on the first package of the Return Directive](#), p. 6.

¹³² C-329/11, *Achughbajian*, ECLI:EU:C: 2011:807, para. 36.

¹³³ C-61/11 PPU, *El Dridi*, para. 54

¹³⁴ In this regard, criminal law measures for migration related offences should not be confused with ‘common’ criminal law and extradition cases, for which Member States may decide not to apply the Directive to certain categories of third country nationals. In accordance with Article 2(2)(b)RD, such derogation must be made clear in advance in the national legislation implementing the Directive, otherwise developing no legal effects. Unlike ‘migration-related offences’, the criminal law cases envisaged by this provision are those typically considered as crimes in the national legal orders of the Member States; such as conviction for drug trafficking, offences against the provisions of the national law on narcotics (*Filev and Osmani*, C-292/14), murder etc.

procedure is intended to achieve [...] and do not therefore constitute a ‘measure’ or a ‘coercive measure’ within the meaning of Article 8 of Directive 2008/115.¹³⁵ They are not as such incompatible with the objectives of the Return Directive, as long as they do not compromise its application and do not prevent a return decision from being made and implemented in full compliance with the conditions set out in the Directive.¹³⁶

In practice, migration-related offences are quite often criminalised by Member State legislation, punishable either by a fine (IT, ES), a prison sentence (NL, CZ, CY) or even immediate expulsion (IT). Whereas some particular issues have been referred to the CJEU in the context of preliminary rulings, uncertainties remain at national level with regard to some of the Court’s findings. This has led to diverging interpretations from judicial authorities among surveyed Member States.

First, as regards the possibility of ordering *finis* and *house arrests*, the Court has ruled that a (proportionate) financial penalty for illegal stay under criminal law was compatible with the Directive, if it does not impede return. Likewise a home detention order was not declared incompatible, provided that it, too, does not impede return and so long as it comes to an end as soon as the physical transportation of the individual concerned out of the Member State is made possible.¹³⁷

This is notably illustrated by the ‘security package’ adopted in Italy in the years 2008 and 2009, strengthening the criminal law framework against migrants in irregular stay and punishing by a fine the offence of the ‘irregular entry and stay’ of third-country nationals. Not invalidated *per se* by the CJEU in *Sagor*, this legislation has yet to be read alongside the Return Directive and must not contravene its application and deprive it of its effectiveness.¹³⁸

This situation must however be distinguished from the current practice applicable in **Spain** where, pursuant to Article 53(1) (a) of Immigration Act 4/2000, an ‘illegal stay’ on Spanish territory is punishable by a criminal sanction. With regard to the principle of proportionality and when aggravating circumstances exist (as defined by Spanish case law), expulsion can be resorted to *instead of* a financial penalty. According to the Spanish report, the fine remains the sentence most often used in cases of illegal stay, unless ‘negative factors’ (such as the lack of documentation or previous criminal detentions or non-compliance with a previous return decision) can be observed in an individual case.¹³⁹ This practice, developed between 2005 and 2008 did not change until 2013, despite several legislative modifications. It has, however, been recently challenged in *Zaizoune*, in which the CJEU declared such legislation incompatible with Article 6 RD¹⁴⁰ as it provides, in the event of third-country nationals illegally staying in the territory, for, depending on circumstances, either a fine or removal, since the two measures are mutually exclusive.¹⁴¹ While the CJEU recognised in *Sagor* that Member States might impose financial sanctions, as criminal measures, to irregular TCNs during the course of the return procedure, it did not acknowledge such penalties as a ‘substitute’ for return or expulsion; the national legislation which foresees, in the event of illegal stay, for either a fine or removal, is, indeed, incompatible with the Return Directive since it undermines its effectiveness. The question as to whether such financial penalties could be considered as ‘more favourable national provisions’, in the meaning of Article 4(3) RD, has also been addressed by the Court in *Zaizoune*,

¹³⁵ C-329/11, *Achughbajian*, para. 37

¹³⁶ C-430/11, *Sagor*, ECLI:EU:C:2012:777, para. 36.

¹³⁷ C-430/11, *Sagor*, para. 43-47.

¹³⁸ Yet in light of this Judgment, Italian Law n. 67/2014 turned criminal offences into administrative measures as with irregular first entry into the territory, but it maintained the criminal nature of individual acts violating administrative measures and/or hampering the return process.

¹³⁹ [C. Gortazar Rotaeche, Spanish report on the first package of the Return Directive](#), p. 4

¹⁴⁰ Read in conjunction with Article 8(1) and Article 4(2) and (3) RD

¹⁴¹ Which was not the case of the Spanish ‘doctrine of the fine’, See C-38/14, *Zaizoune*, 23 April 2015, ECLI:EU:C:2015:260, para. 41.

which answered in the negative. The Court recalled in this regard the need for such provisions to be compatible with the Directive and its objectives.¹⁴²

Second, Member States may also resort to *imprisonment* under their domestic law to sanction a migration-related offence committed by TCNs. But here again the application of the Return Directive needs to be taken into account, especially its practical implementation. In *El Dridi*, the CJEU stated that the Directive precludes Member States from imposing imprisonment under national criminal law on the sole grounds of illegal stay ‘before or during carrying out return procedures’, since this would delay return. Concretely, due to its conditions and methods of application, a custodial sentence would, according to the Court, run the risk to ‘jeopardizing the attainment of the objective pursued by the directive, namely the establishment of an effective policy of removal and repatriation of illegally staying third country nationals’.¹⁴³ Consequently, the only permitted deprivation of liberty in the return context is, in the Court’s view, ‘detention’ for the purpose of removal under Article 15 RD.

The **French** legal system has been amended¹⁴⁴ in order to comply with the CJEU’s case-law on criminal imprisonment: irregular stays have been ‘decriminalised’ and the previous system of police custody (*garde à vue*) has been replaced by an administrative ‘*retenue*’ for a maximum of sixteen hours in order to verify the nature of the person’s stay.¹⁴⁵ The **Czech** Supreme Court, meanwhile, ruled in 2014, that a *suspended* two-year prison sentence imposed on a TCN who did not comply with the return decision¹⁴⁶ was compatible with the Return Directive and corresponding European case-law. Referring notably to *El Dridi*, the Supreme Court considered that the use of criminal law is admitted when (less coercive) administrative measures, such as the issuance of a return decision accompanied by a two-year entry ban, have failed in forcing a foreign national to leave the country. Moreover, from the Court’s point of view, the fact that the prison sentence was suspended was likely to dissuade the TCN from staying illegally on Czech territory, while allowing him to comply with the return decision by leaving the country in short order.¹⁴⁷

In **Cyprus** illegal entry or illegal stays in the country are not punishable by imprisonment. However, Article 12 and 19 of Cypriot law provides for prison sentences against ‘prohibited immigrants’, ranging from twelve months to three years, in specific circumstances: if the TCN does not enter or leave Cyprus through an approved port; if the TCN enters by sea without the Chief Immigration Officer’s (CIO) permission; or if the TCN enters by air without immediately reporting to the nearest authority; makes a false statement as regards the purpose of his/her stay; has forged documents or issues false certificate; refuses to answer or deliberately lies to the authorities etc. According to these provisions, prison sentences for these immigration-related offences might apply to TCNs covered by the Return Directive only when: (1) the maximum period of detention provided by Article 15RD has expired and there is no more reasonable prospect of removal due to the lack of a country of destination; (2) the TCN re-enters the Republic of Cyprus unlawfully after having being obliged to leave by return proceedings. In practice, however, **Cypriot** administrative bodies and tribunals tend to limit the scope and ambit of the CJEU’s landmark judgments regarding the

¹⁴² C-38/14, *Zaizoune*, ECLI:EU:C:2015:260, para. 38: ‘[...] Given the objective pursued by that directive, as recalled in paragraph 30 above, and also the Member States’ obligations which are evident from Articles 6(1) and 8(1) of that directive, there is no such compatibility where national legislation provides for a mechanism such as that set out in paragraph 37 above’.

¹⁴³ C-61/11 PPU, *El Dridi*, para. 59

¹⁴⁴ French Law n. 2012-1560 of 31 December 2012 (See [H. LABAYLE, M. GARCIA, French report on the first package of the Return Directive](#)).

¹⁴⁵ During the TCNs deprivation of liberty, French immigration authorities have yet to comply with procedural safeguards and the fundamental rights of the person concerned (right to a prompt information, assistance by a lawyer and interpreter if needed, medical examination, contacts with family members etc.).

¹⁴⁶ Indeed, according to Article 337(1) (b) of the **Czech** Criminal Code, ‘obstructing the enforcement of an administrative decision’ is a criminal offence likely to lead to up to two years in prison.

¹⁴⁷ [Czech Supreme Court \(highest judicial authority in civil and criminal matters\), case n. 7, 500/2014, 7 May 2014.](#)

criminalisation of irregular stay: indeed, they usually distinguish, on the basis of the Aliens and Immigration Law, among the TCNs staying in the country irregularly. There are those who benefit from the protection granted by the Return Directive and there are those who are ‘prohibited immigrants’, *i.e.* TCNs who had been previously convicted of murder or criminal offence, no matter how minor the crime or how long the prison sentence issued against them. Relying on the principle of separation of powers and the discretionary power of administrative authorities, national courts are usually reluctant to interfere with immigration authorities’ discretion when regulating the entry and stay of third-country nationals. Therefore, referring to Article 2(2) (b) of the Return Directive, judicial courts frequently accept the argument according to which an applicant subject to a return order, as a result of criminal law sanctions, is not entitled to avail himself of the protection conferred by the Directive.

Finally, as regards the criminal measures imposed *later on*,¹⁴⁸ the CJEU has recently been called upon to clarify its case-law on the circumstances in which a return procedure is deemed ‘achieved’ or ‘applied’. In accordance with the second indent of the *Achughbabian* Judgment, the Court is indeed expected to better define the moment in which Member States are free to impose imprisonment on TCNs illegally present in their territory, without there being any justified grounds for non-return.¹⁴⁹

In two cases involving the same foreign national,¹⁵⁰ the **Czech** Supreme Court had to deal with this crucial issue. It was obliged to assess in what circumstances the enforcement of the return decision had to be considered as practically impossible. In both cases, the claimant was found guilty of non-compliance with the return procedure, yet only one of the lower courts sentenced him to ten months imprisonment. The person repeatedly failed to respect the period for voluntary departure; indeed, he remained in the Czech Republic despite successive return decisions, several detention measures and a ten-year entry-ban. The Supreme Court concluded that, in those circumstances, the return procedure could be considered applied, as everything had been done by the authorities to remove the TCN, though the measures had failed. In accordance with its previous case law, the Supreme Court stated that Czech law clearly indicated that the failure to respect a decision on administrative expulsion could be sanctioned by criminal law. Here, as the foreign national repeatedly failed to respect administrative measures and previous criminal penalties, the Supreme Court considered that the sentence of imprisonment could apply as a dissuasive measure, without infringing the Return Directive. However, in the present case, the foreign national was considered ‘stateless’ since the authorities of his country of origin (Georgia) refused to consider him as a Georgian citizen and to provide him with travel documents. The Supreme Court concluded that a ‘dissuasive’ criminal sanction was not suitable because the applicant was not personally responsible for the situation, and that, due to the lack of recognition and travel documents, his return to Georgia was practically impossible. By comparison, the **Dutch** Supreme Court seems to provide a stricter interpretation of the moment from which it can be resorted to national criminal sanctions. In that sense, it formulated three cumulative conditions according to which the criminal code might apply to irregular stays: (a) when the TCN does not have a valid reason for his non-return; (b) when all steps of the procedure as foreseen in the Return Directive have been applied; (c) when the judgment provides a well-argued motivation for the full application of the return decision in the individual case. As an example, it was ruled that a TCN who was interviewed eleven times, followed by seven attempts to present him to the Iranian Embassy, subject to repeated detention, and who showed uncooperative conduct as regards IOM assistance, might stand as a fully achieved return procedure.¹⁵¹

¹⁴⁸ In theory, *after* the application of the return procedure in the meaning of the Return Directive

¹⁴⁹ C-329/11, *Achughbabian*, ECLI:EU:C: 2011:807, para. 48-51

¹⁵⁰ [Case No. 8 Tdo 230/2014 of 26 March 2014](#) and [case No. 4Tdo 354/2014](#). See [D. KOSAR, Czech Report on the first package of the Return Directive](#), pp. 8-9.

¹⁵¹ See [Dutch Supreme Court, case n. 12/05522, 3 December 2013](#). [G. Cornelisse, in cooperation with J. Bouwman, Dutch Report on the first package of the Return Directive](#).

Until recently, it was unclear whether Member States could resort to national criminal law measures in the event that a person left the territory, but re-entered *later* in violation of a valid entry-ban. According to the **Dutch** Supreme Court, backed by other Member States,¹⁵² this situation differs from the situation of first illegal entry as the former does not require the competent authorities to check whether the return procedure has been fully applied in the first place. In the case of re-entry to the Netherlands, a prison sentence can be applied, under the supervision of a criminal judge: in fact, a criminal judge is the only competent authority to rule on the criminal consequences of the violation of an entry-ban; the administrative judge has control over the lawfulness of the decision imposing the entry ban. Unlike the Advocate General in *Celaj*, who emphasised the irrelevance of any difference between ‘the various situations in which a foreign national might find himself, according to whether his presence in national territory is the result of unlawful entry or re-entry following an earlier removal decision’,¹⁵³ the Dutch interpretation has been endorsed by the CJEU. In fact, the Court recently stated in the same case that Directive 2008/115 does not exclude such criminal law sanctions against illegally staying third-country nationals ‘for whom the application of the procedure established by that directive resulted in their being returned and *who then re-enter* the territory of a Member State in breach of an entry ban, provided that such ban complies with the conditions provided in Article 11 RD [...] a matter which is for the referring court to determine.’¹⁵⁴

2.3.2 ‘Gradation’ and proportionality: from the least to the most intrusive measures

The CJEU highlighted in *El Dridi* that a gradation of measures has to be kept in mind by national authorities when enforcing the return decision: these should match the stages of the return procedure in the Return Directive. ‘Going from the measure which allows the person concerned the most liberty, namely granting a period for his voluntary departure, to measures which restrict that liberty the most, namely detention in a specialised facility’, such a gradation of measures must always be assessed in the terms of the principle of proportionality.¹⁵⁵

Although a forced return by national authorities necessarily implies elements of coercion,¹⁵⁶ the principle of proportionality, as embodied by the CJEU, concretely obliges Member State to use the least intrusive measure at all stages of the procedure. Resorting to detention prior to removal *is only one of the possible measures* which may be used by Member States to enforce a return decision. Repeatedly considered as a measure of last resort by the Return Directive, pre-removal detention of irregular TCNs only applies in situations in which its use is the only way to make sure that the return process can be prepared and the removal process carried out. Additionally, according to Article 15

¹⁵² Requesting for a CJEU preliminary ruling, the Tribunal of Florence (Italy) considered the situation of re-entering to be in breach of previous entry ban as a permitted derogation from the RD, and not prohibited by the CJEU, since the factual situation was distinct from the judgments in *El Dridi* (C-61/11 PPU, EU:C:2011:268) and *Achughbabian* (C-329/11, EU:C:2011:807), see the *Celaj* case.

¹⁵³ C-290/14, *Celaj*, AG opinion rendered on 28 April 2015. In paras. 44 and 56, the AG refers to Article 2(a) RD according to which Member States may decide not to apply the Directive to those ‘or who are apprehended or intercepted by the competent authorities in connection with the irregular crossing by land, sea or air of the external border of a Member State’. By doing so, he seems to suggest that his reasoning applies, without exception, to all cases in which the person illegally *stays after being re-entered* in breach of a valid entry ban. However, it might not be the same for every re-entry into Member States’ territories, leading to immediate interception at the borders, when Article 2(a) RD has been interpreted/implemented at national level as precluding the application of the Return Directive in such cases.

¹⁵⁴ C-290/14, *Celaj*, ECLI:EU:C:2015:640, para. 30. In this regard the Court distinguished the circumstances of the case in the main proceedings from those in the cases that led to the judgments in *El Dridi* (C-61/11 PPU, EU:C:2011:268) and *Achughbabian* (C-329/11, EU:C:2011:807) in which illegally staying third-country nationals of the third countries concerned were subject to a first return procedure in the Member State in question (para. 28)

¹⁵⁵ C-61/11, *El Dridi*, para. 41

¹⁵⁶ This statement is shared by several participating Member States, as indicated in the FR, HU and NL synthesis reports. Within this context, the Dutch Council of State has ruled that the concept of removal in the meaning of the Dutch Aliens Act encompasses all these cases in which coercion is used to remove the third country national from the Netherlands. In that sense, the return of a TCN with the assistance of the IOM cannot be covered by such definition.

RD, any detention shall be for as short a period as possible and only maintained as long as removal arrangements are in progress and executed with due diligence.

Yet in practice, pre-removal detention remains a coercive measure frequently used by EU Member States when enforcing the return decision and preparing removal. As an example, Article 124(1) of the **Czech** ALA entitles the Aliens police to detain prior to removal a foreign national who: did not leave Czech territory within the period set by the return decision; or who has *seriously* violated the obligation arising from the imposition of special measures. It does not appear from the report whether additional assessment is made by the Czech authorities as regards potential alternative measures to be applied, despite these circumstances. In **Hungarian** law, detention based on Article 54 of the amended Act II of 2007 can be ordered, *inter alia*, to ‘implement removal of those who have refused to ‘leave the country’. In **French**, **German** and **Italian** legislation, amendments have been made in order to comply with the Return Directive as regards the adoption of pre-removal coercive measures: Article L. 551-1 of the French CESEDA states that the measure of ‘*assignation à résidence*’ (house arrest) must be preferred over detention when the TCN provides sufficient guarantees that he or she will appear.¹⁵⁷ A new statutory rule is about to modify the German Residence Act on pre-removal detention in order to better define objective criteria according to which a ‘risk of absconding’ exists in the situation of a third-country national subject to return procedures.¹⁵⁸ In **Italy**, while waiting for the validation of the removal order by the Justice of the Peace, the amended legislative decree provides that the TCN is either detained in a CIE (‘*centro di identificazione ed espulsione*’) or subject to an alternative measure. In practice, however, detention tends to remain the preferred option in all cases where it is not possible to carry out the expulsion immediately. Available case-law suggests that alternative measures are rarely adopted.¹⁵⁹

In **Cyprus**, the Supreme Court condemned, in 2010, the Reviewing Authority’s way of detaining and deporting rejected asylum seekers immediately upon the issuance of the negative decision. Such actions were severely criticized as it denies the applicant the right to a full judicial review of the rejecting decision.¹⁶⁰ However, it seems that this practice continues despite the Court’s judgment.

The Return Directive does not give an exhaustive range of alternatives to be considered by Member States before ordering detention: some of the obligations aimed at avoiding the risk of absconding provided by Article 7(3) RD may, however, be seen as potential – and less intrusive measures – to be adopted in order to enforce the return, even beyond the period for voluntary departure.¹⁶¹

¹⁵⁷ *Code de l’entrée et du séjour des étrangers et du droit d’asile*, recently amended by Law n°2015-925 of 29 July 2015.

¹⁵⁸ German Amendment to the Residence Act, adopted by the Parliament on 2 July 2015, reorganizing the grounds for detention on the basis of previous national case-law. It will notably provide for a list of objective criteria likely to define and to indicate a ‘risk of absconding’ from the TCN staying irregularly on the territory and subject to return procedures: *e.g.* The TCN who deceives the authorities about their identity, violate their obligation to cooperate and to comply with administrative decisions, or who has spent a substantial amount of money to enter the country etc.)

¹⁵⁹ In the meaning of Article 14, para. 1 of the Consolidated Text, in cases where it has not been granted a deadline for voluntary departure and expulsion cannot be immediately enforced, the competent authority shall proceed to detention in a centre for identification and expulsion. The way this provision is drafted marks, therefore, a reversal in comparison to the logic pursued by the Directive: the residual measure (*i.e.* detention) is mentioned in the first rank and only in the subsequent paragraph the instruments to avoid detention are indicated. Being a mere faculty of the administration, subsidiary to the main option of detention, a particular motivation regarding the non-application of alternative measures does not appear to be requested. See A. Di Pascale, [Italian report](#), Article 8 RD and the [Italian country report – CONTENTION](#).

¹⁶⁰ See **CY** Supreme Court, [Leonie Marlyse Yombia Ngassam v. Republic of Cyprus](#), 20 august 2010. There is no officially declared policy as to when the option of voluntary departure/other alternative measure is granted, but it appears that this option is not automatically granted to all TCNs against whom deportation orders have been issued. In fact it is very rarely granted to rejected asylum seekers who do not have children attending school in Cyprus.

¹⁶¹ Examples might include regular reporting to the authorities, deposit of an adequate financial guarantee, submission of documents, obligation to stay at a certain place... See in this regard [CONTENTION synthesis report – Alternatives to detention](#), p. 28

Besides the very gradation of measures, proportionality may also imply, in the light of **Bulgarian** case-law, the obligation for administrative authorities to ‘serve’ the removal order in a reasonable period of time after its issuance. In that sense, the Supreme Administrative Court has ruled that removing the TCN five years after issuing the removal order, without any consideration of changes in the personal situation of the TCN, made the removal unlawful and was in breach of the basic principles of the administrative procedure (lawfulness, rapidity, proportionality, procedural economy...).¹⁶²

2.4 Physical transportation out of Member States

In line with the previous section, when carrying out the removal, Article 8(4) RD explicitly stresses the exceptional nature of coercive measures to be used in the case of resistance from the TCN. In accordance with Recital 13, the use of coercive measures is subject to the principles of proportionality, effectiveness and shall never exceed reasonable force. In addition, such measures shall be implemented as provided for in national legislation, in accordance with fundamental rights and with due respect for the dignity and physical integrity of the TCN.

From a practical point of view, authorities have to bear in mind that the situation of a third country national may evolve over time. The same return procedure can therefore be characterised by both voluntary and coercive elements. For instance, if a returnee, who is subject to removal/detention, changes his or her attitude and shows willingness to cooperate and to depart voluntarily, Member States are encouraged (and entitled) to show flexibility: this might be by considering subsequent voluntary travelling without physical force. In line with the general principles of EU law, all decisions taken under the Return Directive must be decided on a case-by-case basis; Member States are, therefore, encouraged to take personal and individual circumstances into account all through the return procedure.

As far as removal by air is concerned, Article 8(5) RD establishes that Member States shall take into consideration the Common Guidelines on security provisions for joint removals by air laid down in annex to Decision 2004/573/EC. There is, unfortunately, little case law about the transportation of third country nationals out of Member States. In the **Netherlands**, though there is no particular case-law on Article 8(4) RD, requirements of proportionality and ‘reasonable use of force’ were codified in Dutch Law and policy even before the implementation of the Return Directive. In that sense, the *Aliens Circulaire*¹⁶³ pleads for suitable and necessary coercive measures. For instance, if a third country national is forced to board a plane, the captain has to be informed. After the doors of the plane are shut, coercive measures may only be used with the captain’s consent. More generally, on the basis of formal law, coercive measures in the context of removal may only apply if it is required by particular circumstances: on the grounds of a risk of absconding or because there is danger for the safety/life of the third country national, for the person carrying out the removal and escorting him, or for a third person. Coercive measures can also be resorted to when there is a risk of serious disturbance of public order. However, coercive measures can only be used if the health of the third country national will not be harmed. Concerning the use of handcuffs,¹⁶⁴ the Council of State has ruled that it has to be made clear in the administrative report that the use of handcuffs for that purpose was

¹⁶² [Case *Suzana Azatovna Minasyan*, 13 June 2012](#). See V. Ilariva, [Bulgarian Report on the first package of the Return Directive](#), p. 5. Moreover, national courts considered that such ‘late measures’ without a fresh consideration of the personal situation of the third country national concerned were unlawful because they ‘entirely compromise the purpose of the law’ being ‘the guarantee of the observance of the legal order established in the country with regard to the residence of foreign citizens while respecting their rights’.

¹⁶³ Article 23(a) of the *Ambtsinstructie voor de Politie, Ambtenaren van de Koninklijke Marechaussee en andere opsporingsambtenaren*.

¹⁶⁴ Though national case-law here is mainly about displacements from courtrooms to administrative offices.

proportionate.¹⁶⁵ In **Hungary**, on the other hand, case law regarding physical transportation exists but might appear a bit confusing as for the reasons invoked to justify forced return under ‘official escort’. In a given case, a Tanzanian national was denied a period for voluntary departure because of a lack of valid passport, financial resources and travel ticket. However, the removal order issued by immigration authorities was based on different legal grounds, namely Article 65(1) (c) and (2) of Act II of 2007, providing for a forced return for reasons of national security, public security and public policy. The applicant had no criminal record and expressed his willingness to leave EU territory. But the Administrative and Labour Court of Budapest relied on the specific circumstances of the case as showing lack of cooperation of the applicant and a constant disregard of Hungarian laws: the TCN did not take steps to regularise his stay, had no valid passport and entered Hungary ‘illegally’ before being granted an authorisation to stay. Consequently, his unattended travel was found dangerous for the safety of air traffic, justifying his forced return from Hungarian territory.¹⁶⁶

Finally, Article 8(6) RD provides for an effective forced-return monitoring system to be set up by Member States when carrying out removals. Of the eleven national reports, only the **Austrian** report refers to the Aliens Police Act, stipulating that departures have to be systematically monitored and that the practical enforcement of the return decision by deportation is subject to a specific judicial review: deportations are monitored by human rights rapporteurs, who attend the first interview of the TCN and monitor the removal process from, in principle, the ‘information phase’ until the arrival of the person in the country of destination. A report has then to be submitted to the Ombudsperson, up to one week after deportation. In **Cyprus**, no effective forced-return monitoring system has been established so far, though the Ombudsman was initially appointed as a monitoring body for returns by a decision from the Council of Ministers in 2013. However, no specific budget was allocated to this function so that monitoring activities never took place in practice.¹⁶⁷ In 2011, the Commission reported that six European countries did not have a ‘return monitoring’ system in place nor was one planned (including BG, IT, FR, DE). Another five, meanwhile, had initiated legislation (including HU and CY) which would subsequently introduce a system. In seventeen countries, a system was planned or in place as a result of the Directive.¹⁶⁸

¹⁶⁵ [Dutch council of State, 201010863/1/V3 and 201102621/1/V3](#).

¹⁶⁶ See. [K. 31.962/2013/6](#), [N. Boldizsár, Hungarian Report on the first package of the Return Directive](#), p. 8.

¹⁶⁷ See [N. Trimikliniotis, Cypriot report on the first package of the Return Directive](#), p. 3.

¹⁶⁸ See European Commission, Evaluation Report on the application of the Return Directive (2008/115/EC), 2013, p. 97.

In **France**, there is no specific body in charge of monitoring the return process. The same is true of **Spain** where the Spanish Immigration Act contains no reference to the specific establishment of an effective forced-return monitoring system. However, according to Spanish NGO’s ‘*Pueblos Unidos*,’ there is in practice an informal monitoring of the return policy on the part of the Spanish Ombudsman. Finally, in **Germany**, although forced returns are within the competence of the alien authorities of the *Länder*, there is no general practice or judicial review of a monitoring procedure.

3. Article 9(2) RD¹⁶⁹ – Postponement of removal

When proposing this provision, the Commission intended to provide clear examples of circumstances likely to postpone removal,¹⁷⁰ whilst avoiding an exhaustive list of situations which would have certainly led to a narrower interpretation. Despite Parliament's opposition, initial obligations were progressively softened; turning the provision, particularly its second paragraph, into a compilation of non-binding 'may' instead of 'shall' clauses.¹⁷¹ Article 9(1) RD now establishes an obligation to postpone the removal of a third country national which would violate the principle of *non-refoulement* or the suspensory effect of a judicial remedy granted in accordance with Article 13(2) RD. But Member States may decide to postpone removal for other reasons, for an appropriate period of time, taking individual circumstances into account. The Return Directive provides two concrete examples: namely (a) the third-country national's physical state or mental capacity; (b) technical reasons, such as a lack of transport capacity, failure of removal due to a lack of identification.¹⁷² However, this is not an exhaustive list; Article 9 RD encourages Member States to react flexibly to any newly arising or newly discovered circumstances justifying the postponement of removal. In this regard, Member States remain free to provide, both in their national legislation and administrative practice, additional circumstances likely to 'delay' or impede the removal of a third country national. They can also define the concrete modalities of any such postponement.

As for the circumstances of postponement, *physical state and mental capacity* of the person concerned has been largely transposed by the reporting Member States, but either interpreted in a very strict manner or applied at different stages of the return procedure.

According to the **Austrian** Aliens Police Act (§ 46), the physical state and mental capacity of the person are taken into account when determining whether the person should be removed or not. Meanwhile, his or her stay is tolerated on Austrian territory. In the **Czech Republic**, only Article 9(1) has been properly implemented through Articles 169(5) and 179(1) ALA. Foreigners 'who were refused an entry' to the Czech territory are not obliged, pursuant to Article 10 ALA, to leave the country immediately: if there is an immediate threat for their life due to an accident, a sudden illness; if withholding of emergency medical care would cause permanent pathological changes; or when it is necessary to provide emergency medical care, *e.g.* in case of childbirth. It remains, however, unclear whether this category of people is also granted a toleration visa during the postponement period, as is the case when serious reasons prohibit the enforcement of expulsion measures.¹⁷³ In **France**, national legislation prohibits the expulsion of TCNs with serious health problems which need to be treated in order to prevent exceptionally dangerous consequences for the person's health, unless medical care is

¹⁶⁹ Article 9(2) RD reads as follows: 'Member States may postpone removal for an appropriate period taking into account the specific circumstances of the individual case. Member States shall in particular take into account: (a) the third-country national's physical state or mental capacity; (b) technical reasons, such as lack of transport capacity, or failure of the removal due to lack of identification.'

¹⁷⁰ NB: postponement of removal must be distinguished from the period for voluntary departure, as provided for by Article 7 RD: while the latter provision grants a 'period of grace' allowing the TCN to prepare and 'self-manage' his departure from the territory, Article 9 RD relates to those cases in which the obligation to return must be enforced by the State (because voluntary departure is not possible or indicated). That being said, the circumstances likely to extend the period for voluntary departure can be substantially similar or identical to the ones leading to the postponement of removal.

¹⁷¹ F. Lutz, *The Negotiations on the Return Directive*, p. 53.

¹⁷² It must be stressed that this synthesis report, as well as the national case law collected, mainly focus on the second paragraph of Article 9 RD, given the abundant case-law of the European Court of Human rights on the principle of *non-refoulement* and the suspensory effect of judicial remedies, both requiring mandatory postponement. That will be studied more closely under the second package addressing Chapter III and the procedural safeguards. By contrast, according to Article 9(2) RD, Member States are left with wider discretion when appreciating technical and medical capacities justifying postponement of removal, as well as the practical implementation, provided that relevant safeguards and provisions for each individual decision are respected.

¹⁷³ See Article 33(1)(a) ALA.

likely to be provided in the country of destination. In French case law, these conditions are strictly assessed: when challenging the removal decision: the applicant has to demonstrate the exceptional gravity for his or her health and the lack of appropriate treatment in the country of destination.¹⁷⁴ Additionally, an advisory opinion is issued by the Regional Health Agencies when there are sufficient reasons to believe that the health conditions of the TCN would prevent his return, even though this opinion is not binding for the Prefect in charge of the case. In **Italy**, Article 9(2) RD is not properly implemented, but Article 35 TU¹⁷⁵ indirectly states that even foreign nationals who are in a country illegally are entitled to receive urgent and essential care in hospital in the case of illness, accident or pregnancy. Implicitly, the removal can therefore be suspended when the person might suffer irreparable harm. In that sense, the Italian provision covers not only emergency cases, but also continuative treatments; the (un)availability of medicines and health care in the country of origin is also taken into account. In the **Netherlands**, Article 9(2) has been partially implemented by Article 64 of Aliens Act. This article states that medical impediments to removal (*e.g.* the health of the TCN or his family members preventing them from carrying out the removal as the journey would not be safe) lead to a legal stay of the person in the Netherlands, for as long as the medical problem lasts. There must, however, be a medical emergency.¹⁷⁶ Finally, Article 18PA(2) implements in **Cyprus** the second paragraph of Article 9 RD, while leaving the determination of the appropriate period of postponement at the discretion of the Director.

As for *technical difficulties and lack of identification*, the **Italian** legal system does not expressly provide for a postponement of removal. It does, though, consider these situations as ‘objective impediments’ to removal. When such circumstances occur, the person is either detained in a CIE (Centre for identification or expulsion) or is granted the possibility of leaving the country within seven days, following the adoption of an administrative order: this is particularly done in cases in which the alien can be concretely accepted in a country of destination, but when the prospect of enforcing the removal no longer exists. In **Cyprus**, if the returnee has no travel documents or if the immigration authorities wait for the issuance of such documents by a third-country’s Embassy, the removal can be postponed by the Director. Removal is also likely to be postponed when the airline company refuses to transport a person who strongly resists or who is unwilling to cooperate to his or her physical transportation.

As for the postponement period, some of the Member States resorted to the faculty provided by Article 9(3) RD to impose obligations set out in Article 7(3) RD during the postponement period. In **France**, even when the TCN is objectively unable to leave the country or cannot go to his country or to another one, the French authorities may issue a residence arrest (*assignation à résidence*) for a maximum period of six months (renewable). In **Cyprus**, obligations under Article 7(3) RD can only be imposed at the occasion of a facultative postponement in the meaning of Article 9(2) RD, *i.e.* in circumstances other than *non-refoulement* and the suspensory effect of judicial remedies. As regards pre-removal detention, in cases of persistent postponement, the **Czech Supreme Administrative Court** also recalled that the period referred to in Article 15(5) RD (six months) could only be extended when there was a lack of cooperation on the part of the third-country national concerned (regardless of any additional ‘objective’ impediments).¹⁷⁷

¹⁷⁴ See *e.g.* CAA, Lyon, 23 April 2015, [H. Labayle and M. Garcia, French report on the first package of the Return Directive](#).

¹⁷⁵ Distinct national provision.

¹⁷⁶ However, even when a permanent or temporary impediment to removal exists, which would violate the principle of *non-refoulement* or due to a suspensive interim measure has been ordered by the ECtHR, a TCN subject to a *heavy* entry ban (more than ten years) cannot be granted a right to legal stay in the Netherlands. According to the Dutch Council of State, such situations do not prevent the competent authorities from adopting a return decision. They prevent them from ‘exercise[ing] their right of removal’, obliging the TCN to leave the territory for another country of destination. It might become problematic though in the case of non-compliance with the obligation to return, for which a subsequent removal decision could not be issued without indicating a specified country of return.

¹⁷⁷ [CZ. SAC. 9 As 23/2009, 2009](#). Overall, there is a lack of relevant case-law regarding the ‘appropriate period’ of postponement to be defined by immigration authorities.

4. Article 10(2) RD: removal of unaccompanied minors

Considered as ‘vulnerable persons’, whose special needs have to be taken into account,¹⁷⁸ unaccompanied minors (UM) receive particular attention from the Return Directive at various stages of the return procedure.¹⁷⁹ During negotiations, the creation of one single provision entirely dedicated to unaccompanied minors has been actively promoted by the European Parliament.¹⁸⁰ According to Article 10(2) RD,¹⁸¹ before removing an unaccompanied minor from a Member State’s territory, authorities of that Member State shall be satisfied that he or she will be returned: to a member of his or her family; a nominated guardian; or adequate reception facilities in the State of return. The provision is therefore based on the underlying understanding that, in principle, returning and removing an unaccompanied minor is admissible, but subject to specific conditions and guarantees to preserve the best interests of the child, in line with the 1989 United Nations Convention on the Rights of the Child.

Most, but not all participating Member States, provide for the possibility of removing unaccompanied minors. In **France**, Article L 511-4 CESEDA formally prohibits the expulsion of unaccompanied minors. The minor can eventually be detained and subsequently removed when he accompanies an adult, but that requires a strict assessment of their mutual relationship and prior identification. In **Italy**, according to Article 19(2) of the Consolidated Text on Immigration, expulsion is not permitted for unaccompanied minors. These automatically obtain a residence permit.¹⁸²

Among the national legislations dealing with the return and/or removal of unaccompanied minors (AT, BE, CZ, NL, CY), differences can be observed in terms of the ‘guarantee threshold’ and requirements to be satisfied before enforcing any decision.

In **Austria**, the Aliens Police Act provides that, in cases of deportation, authorities have to make sure that the minor will be returned to a family member, a nominated guardian or to adequate reception facilities in the country of return. There is, however, little case law on the practical assessment of these requirements (except one case where the Federal Administrative Court validated the removal of a UM to a home for children in Russia).¹⁸³

In the **Czech Republic**, Article 119(9) ALA prescribes, during the course of the removal procedure, the appointment by the Aliens police of a guardian, a function performed by an authority for the social and legal protection of children. As regards the removal, Article 128(3) ALA states that the police must be sure that the minors will get reception ‘corresponding to their age’ in the country of destination. Unfortunately no relevant case law has been collected on this issue.

¹⁷⁸ See notably Article 3(9) RD.

¹⁷⁹ Articles 10, 14 (1)(c)(d), 17 of the Return Directive.

¹⁸⁰ F. Lutz, *The Negotiations on the Return Directive*, p. 53.

¹⁸¹ At an earlier stage, when deciding to issue a return decision in respect of an UM, *assistance* by appropriate bodies other than the authorities enforcing return shall be granted with due consideration being given to the best interests of the child. This clause must be considered as innovative. It provides for the first time a binding horizontal obligation under EU law to grant assistance to any unaccompanied third country national minor who is subject to a return procedure.

¹⁸² That being said, in order to facilitate family reunion, in the case of unaccompanied minors, a process can be activated to verify whether it is possible to reunite him/her with their family. Only in case of positive result of an inquiry with the family, a procedure of assisted return will be carried out, within the framework of a personal program of reinsertion. This must be seen as a measure of protection of minors. In practice this is a marginal situation. From 2011 to 2014 only twenty minors have been included in a program of assisted return to be reunited with their family. See A. Di Pascale, [Italian report](#), Article 10(2) RD.

¹⁸³ Overall there is no jurisprudence concerning unaccompanied minors, who are to be deported. Some decisions however refer to the situation in Russia, though the facts did not disclose a necessity to do so. The [Federal Administrative Court](#) stated for instance that returned minors who are unaccompanied could be accommodated in a children’s home in Russia. See [U. Brandl, Austrian report on the first package of the Return Directive, Article 10\(2\) RD](#).

Yet the **Dutch** legislation elaborates further on the requirements for the adequate reception of unaccompanied minors in the country of destination. Interpreted as ‘every kind of reception regardless of its form, of which the circumstances are similar to those under which reception is provided to minors that are comparable to the unaccompanied minor who is to be returned’. The adequateness of reception is presumed by national authorities when:

- a family member (up to the fourth degree) is present in the country of destination;
- the spouse with whom the minor is married is present in the country of destination;
- facts and circumstances show that any other family member or any other adult can provide the minor with adequate reception;
- reception is provided by a (private) institution considered as ‘acceptable’ in light of local circumstances;
- country of origin information warrants the conclusion that authorities of such countries take care of reception;
- on the basis of *general information*, it appears that reception in the country of origin is ‘available and adequate’.

From the practical point of view, adequate reception is assumed when children can be provided with shelter, food, clothes, hygiene and if there is access to medical care and education.¹⁸⁴ Note that when family members are present, authorities do not need to conduct further research or investigations. In a case concerning an Afghan UM to be returned to Iran, the Council of State considered for instance that adequate reception could be provided by the mother who, despite previous abuse committed against the child by an uncle who lived with them, had been able to help the minor flee from Iran without the uncle’s knowledge.¹⁸⁵

In **Belgian** Law, the regime established by Article 61 of the Law of 15 December 1980 provides for even further guarantees: when the unaccompanied minor is in irregular stay in Belgium, his/her guardian may request that the Aliens office (AO) grant the UM a residence permit. The AO then proceeds with an interview and an individual examination. ‘Removal’ is considered to be the appropriate ‘lasting solution’ only in certain circumstances. The unaccompanied minor shall be returned to his country of origin or to the country where he is authorised to stay or permitted to stay with reception guarantees and adequate care. These shall depend on his age and degree of autonomy, either by his parents or by other adults (family members or guardian) who will take care of him. Reception can also be ensured, under specific conditions, by governmental or non-governmental structures. This kind of lasting solution has to be proposed by the minor’s guardian and takes into account the best interests of the child. The AO shall then be satisfied when: there is no risk of human trafficking *and* when the family situation is likely to allow the reception of the minor; that return to parents or family members is desirable and ‘timely depending on the family’s ability to assist, educate and protect the child’; *or* when there is an adequate reception facility; and that it is on the best interests of the child to be placed in such centre.¹⁸⁶ The Belgian authorities must, therefore, adopt a positive approach before removing a UM from the territory. They must, also, ensure that the minor will benefit from reception and care guarantees based on the needs identified by his/her age and degree of autonomy.

¹⁸⁴ See Aliens Circulaire B.8/6.1. G. Cornelisse in cooperation with J. Bouwman, [Dutch Report on the first package of the Return Directive](#).

¹⁸⁵ [Dutch Council of State, 201202249/1/V4, 14 August 2013](#).

¹⁸⁶ According to the [Belgian report](#), the first condition has to be combined with one of the two following conditions, depending on the factual circumstances, p. 11.

As illustrated by the case-law of the Council for Aliens law litigation (CALL), though limited to a review of legality, those requirements imply an individual and concrete assessment of the UM's situation. The Council has ruled for instance that assumptions made by the AO are insufficient to determine an appropriate long-lasting solution for the UM. On the contrary, it must appear from the administrative file that active steps have been taken by the authorities: these have to 'inquire about the reception and care guarantees' or check the reality of such guarantees in the country where the minor is returned. In practical terms, family members must be able to welcome the minor. The sole fact that parents are still holders of parental authority and have maintained a 'positive relationship' with the minor does not suffice to formally motivate the choice of an appropriate lasting solution. Neither the fact that the minor is still in contact with his parents, or has parents still alive that are already in charge of his/her brothers and sisters, are considered sufficient to conclude the 'adequateness' of reception and care guarantees. The economic situation of the family or the health conditions of the minor are additional factors to consider when determining an appropriate lasting solution. In another decision, the CALL stressed that the concrete identification of the person responsible for welcoming and ensuring the reception of the minor is also part of the AO's motivation. Finally, it has been stressed that both parties (*e.g.* the guardian and the AO) have to collaborate in this search for an appropriate lasting solution. If the guardian does not explain why the solution adopted by the AO is incorrect, it shows his or her lack of involvement. And this is a valid reason for the CALL to reject a request for annulment of a removal order issued by the AO.

In **Cyprus**, a major role is given to the guardian, in charge of assisting the UM all through the return procedure.¹⁸⁷ Before ordering a concrete removal to the country where the family members of the UM live, the Social Welfare Services asks the equivalent State authority of the country of destination or the international social service (ISS) – linking the various social services in different countries – whether the person welcoming the UM can be seen as a proper (legal) guardian. They also ask whether he or she can 'receive, support and bring up' the child. That being said, it is up to the SWS of the third country to determine whether the UM is placed in an appropriate reception facility upon return. In practice, serious and systematic failures still take place throughout the removal process of unaccompanied minors. In this regard, the Commissioner for rights of the child pointed to several legal and institutional gaps as regards UM's who are neither asylum seekers, nor victims of trafficking. This is because of the lack of a specific legislative framework for children not covered by these categories.¹⁸⁸

Finally, in terms of procedural safeguards, Section 58(1)(a) of the **German** Residence Act provides for a deportation ban 'as long as the immigration authorities have not ensured the concrete fact that a member of the minor's family or another authorized person or institution will receive the minor'. Negative decisions can, however, be challenged by the minor and/or his representative, who may claim, for instance, that dreadful living conditions in the country of destination objectively impede the removal of the applicant.¹⁸⁹

¹⁸⁷ Before deciding to issue a return decision against an unaccompanied minor, the CIO seeks assistance from the Director of the Social Welfare Services (SWS): article 18PB of the Law of **Cyprus** provides that, a State agency taking due consideration of the best interests of the child, assists the unaccompanied minor and provides him or her with general information. While the concrete role assumed by the SWS in case of return is not expressly defined by law, when services consider that it is in the interest of the minor to return to his country of origin, the SWS is entitled to apply for guardianship, after consulting a multi-thematic committee.

¹⁸⁸ *E.g.*, systematic detention, lack of coordination between competent authorities, failure to provide interpreters, legal advisors or even guardians, lack of proper information and documentation etc.

¹⁸⁹ [German Federal Administrative Court, 10 C 13.12, 2013.](#)

5. Article 11 – Entry bans¹⁹⁰

Article 11, §1 of the Return Directive is a case of legislation by reference to another provision, something which makes its interpretation difficult. It, indeed, requires the administration to apply entry bans if the obligation to return has not been complied with (a rather objective criteria) or if ‘no period for voluntary departure has been granted’. This refers to Article 7 (4) foreseeing that the administration may refrain from granting a period for voluntary departure or shorten it in three cases: risk of absconding; manifestly unfounded or fraudulent application for a legal stay; as well as risk to public policy, public security or national security.

This means that the administration must *automatically* issue an entry ban when it refuses to give the third-country national the possibility of leaving the country voluntarily. Despite the fact that the purely automatic character of entry bans can hardly be considered compatible with respect for human rights for instance family and private life, there is no jurisprudence on this automatic character probably because litigation is about the return decision or removal order rather than the entry ban alone. One should notice that the **Dutch** Council of State considers that the administration can impose an entry ban, even if it leaves the third-country national the possibility of departing voluntarily.¹⁹¹

The second indent of Article 11, §1 indicates that the administration has, for the rest, the possibility but not the duty of applying entry bans.

Article 11 of the RD is not the only provision of EU law regarding entry bans that should be taken into consideration. There is also Article 24 of Regulation 1987/2006 on the Schengen Information System II (SIS II) that is about the cases within which Member States may or must issue alerts in the SIS for the purpose of refusal of entry or stay. The link to be established between those provisions is problematic.

5.1 Jurisprudence in general

The Redial database contains **90 cases** on entry bans. One will notice in particular that there is a lot of case law in **Austria**, but none in **Hungary** and **Spain**.

Case law focuses on the issue of the length of entry bans and the control that the judge exercises on the determination of the length of the entry ban by the administration. Those two questions are often mixed and are, therefore, addressed all together by the judge.

It is also interesting to note that Article 11 of the Return Directive has been considered as having a direct effect in Austria.¹⁹²

5.2 Link with a return decision

The **Belgian** Council for Aliens Law Litigation insists that the entry ban differs from the return decision and must, therefore, be the object of a separate motivation.¹⁹³ The illegality of the entry ban does not necessarily entail the illegality of the return decision. The third-country national must also be heard before an entry ban is taken. The absence of this formality, however, will only lead to annulment

¹⁹⁰ This Chapter (Article 11) was drafted by Philippe De Bruycker.

¹⁹¹ [NL, Afdeling bestuursrechtspraak van de Raad van State \(Council of State\), 201302843/1/V3.](#)

¹⁹² See more details on this issue in the [Austrian Report](#).

¹⁹³ [BE, Raad voor Vreemdelingenbetwistingen \(Council for Alien Law Litigation\), 128.272, 27 August 2014.](#)

to the extent that the outcome of the administrative procedure might have been different, following the jurisprudence of the CJEU in the case *G & R*.¹⁹⁴

5.3 Nature of entry bans

The nature of entry bans has been elucidated by the **French** Constitutional Court. This court clearly decided it is about an administrative measure (*'mesure de police'*) and not a criminal sanction. This issue has not been the object of case law in other Member States and does not seem to be controversial.¹⁹⁵

5.4 Type of entry bans

Article 11 of the Return Directive distinguishes between mandatory and optional entry bans. Interestingly, the **Netherlands** made another distinction between what is called in administrative practice 'heavy' and 'light' entry bans. A heavy entry ban relates to the 'dangerousness' of the TCN, while light entry bans are all the other entry bans taken for another reason. This distinction is interesting because it has consequence regarding the power of the administration.

5.5 Length of entry bans

Article 11, paragraph 2 of the Return Directive foresees that 'the length of the entry ban shall not **in principle** exceed five years'. It continues by saying that 'It may however exceed five years if the third-country national represents a **serious** threat to public policy, public security or national security'.

It is striking that there is no case law in **Cyprus** about the length of entry bans. Indeed, it appears that the old practice of imposing entry bans without indication of a time-limit persists.

Some technical issues have been clarified by Courts. First of all, the Federal Administrative Court of **Germany** considered that the entry ban must be taken and its length determined simultaneously with the expulsion decision (meaning a return decision issued for criminal reasons). Following Article 11 of the Return Directive, the entry ban should accompany the return decision. The Supreme Administrative Court of the **Czech Republic** considered that, in absence of specification, the starting point of the entry ban is the date of the legal force of the return (and not the date of the removal) decision. Note that this date was not fixed by the Directive.

Regarding entry bans for reasons of *public policy, public security or national security*, a **German** ruling of the Federal Administrative Court of 18 September 2014 is particularly interesting. It considered that ten years is a maximum for entry bans because it constitutes the time horizon for which a prognosis can realistically be made. This, however, does not mean that an entry ban cannot be renewed or that a new entry ban cannot be taken depending on the circumstances.

There is a doubt that **Dutch** legislation is in line with Article 11 as it allows entry bans up to ten years in cases that are not necessarily covered by the notion of a serious threat to 'public policy, public security or national security'. Case-law does not, however, question its compatibility with Article 11 of the Return Directive.

For the rest, the question of the determination of the length of entry bans by the administration is closely linked to the issue of the depth of judicial control that can be exercised over this decision and it shall, therefore, be dealt with below.

¹⁹⁴ C-383/13 PPU, *G & R*, ECLI:EU:C:2013:533, 10 September 2013.

¹⁹⁵ See H. Labayle, M. Garcia, [French report on the first package of the Return Directive](#).

5.6 Consequences of entry bans

The geographical scope of entry bans should be clarified as it is not always clear that they are valid for the entire Schengen area.

Apart from preventing re-entry in case of border checks, the **Netherlands** and **Italy** consider that re-entry despite an entry ban constitutes a criminal offence, beyond simple illegal entry. The CJEU has considered that such legislation is not contrary to the Return Directive in the Case *Celaj* of 1 October 2015.¹⁹⁶

5.7 Judicial control on entry bans

Article 11, §2 states that ‘the length of the entry ban shall be determined with due regard to all relevant circumstances of the individual case’. This is the usual and general criteria that have to be applied by the administration when it has the power and not the obligation to apply an entry ban. The judge is there to control how the administration makes use of this discretionary power. This raises the classic question of relations between the administration and judicial authorities and the scope of judicial control. The debate on this issue can be intense. It can even lead to the adoption of legislative rules about the power of the administrative judge in reaction to the evolution of the jurisprudence like it has been the case in Germany (see below).

The [French report](#) mentions that this is done by the administrative judge through the control of the motives of the decision in relation to the four criteria foreseen in the French legislation for the imposition of entry bans. The judge will also control the necessity of the entry ban and in particular respect of the right to private and family life. However, the French judge does not give rules about the adequate length of entry bans contrary to what the **German** judge tried to do (see below). In **Spain**, there is interestingly a case where the judge diminished the length of an entry ban.¹⁹⁷

The [German report](#) signals that the Federal Administrative Court ruled on 2 February 2012 that: there is, for third-country nationals, a right to a comprehensive judicial control of the length of time for an entry ban; and that there is no longer administrative discretion here. This provoked the adoption by the German Parliament of a provision confirming the discretionary power of the administration regarding the length of entry bans. This includes the possibility for the administration to connect the determination of the duration of entry bans to substantive conditions like the existence or the absence of a criminal record. It will not lead to an absence of judicial control for administrative discretion, but to a control made on the basis of higher rules than German legislation, like constitutional and European Union law, including the principle of proportionality.

The **German Federal Administrative Court** decided in a judgement of 13 December 2012 that this relies on a two-step reasoning:¹⁹⁸ first, ascertaining the weight of the reasons underlying the expulsion decision; second, evaluating whether the duration of the entry ban is compatible with the right to private and family life which refers to the traditional balancing exercise, including the principle of proportionality. All circumstances of the individual case must be taken into consideration. The **Belgian** case law provides an interesting example with a case where an entry ban was annulled. The administration had not taken into consideration the care provided by the applicant to her ill aunt. Another example is the Austrian jurisprudence giving weight to the length of the stay in the country, say, ten years, even if the person only speaks basic German. Criteria used by administrative courts to determine the length of entry bans are: the attempt of the third-country national to prevent the obligation to return,

¹⁹⁶ C-290/14, *Celaj*, ECLI:EU:C:2015:640. See in this regard the section (*supra*) *Excluding criminal law measures for infringements of migration-related legal norms*, pp. 33-34.

¹⁹⁷ [ES, Tribunal Superior de Justicia de Castilla y León, Valladolid, Sala de lo Contencioso-Administrativo, Sección 3ª nº 966/2015](#).

¹⁹⁸ Case n. 1 C 14.12, Bundesverwaltungsgericht (German Federal Administrative Court), see [REDIAL Database](#).

disregard for previous entry bans – leading to subsequent illegal stay – and the reimbursement of expenses for previous removals that are prescribed by **German** law. Case law in **Belgium** illustrates very well the requirement to take the right to family life and private life into consideration: for instance the integration in Belgium of the applicant and the schooling of his children.

It is interesting to note that the **Dutch** Council of State has ruled that there is no balance of interests to be made by the administration when for a ‘light’ entry ban contrary to ‘heavy’ entry bans (see above regarding this distinction).¹⁹⁹

Judicial control in **Cyprus** raises serious concerns. Any third-country national, who is returned for whatever reason, will be put on a ‘stop list’ that is actually an entry ban. This occurs often without time-limit but, in principle, for a maximum of five years. In a recent case of 25 June 2015 involving a Lebanese businessman challenging the entry ban imposed on him, the judge ruled that placing a person on the stop list is not a judicially reviewable act, save if the applicant can rebut the presumption of initial good faith on behalf of the authorities.²⁰⁰

¹⁹⁹ [NL. Afdeling bestuursrechtspraak van de Raad van State \(Council of State\), 201103520/1/V3.](#)

²⁰⁰ See N. Trimikliniotis, [Cyriot report on the first package of the Return Directive.](#)

RETURN DIRECTIVE: DEFINITION OF CONCEPTS

<i>RETURN</i>	<p>Article 3(3)RD</p> <p><i>the process of a third-country national going back — whether in voluntary compliance with an obligation to return, or enforced — to: — his or her country of origin, or — a country of transit in accordance with Community or bilateral readmission agreements or other arrangements, or another third country, to which the third-country national concerned voluntarily decides to return and in which he or she will be accepted.</i></p>
<i>RETURN DECISION</i>	Article 3(4) RD and Article 6 RD ²⁰¹
<i>VOLUNTARY DEPARTURE</i>	<p>Article 3(8) RD and Article 7 RD</p> <p>compliance with the obligation to return within the time-limit fixed for that purpose in the return decision (Article 3(8))</p> <p>Recital 10: <i>Where there are no reasons to believe that this would undermine the purpose of a return procedure, voluntary departure should be preferred over forced return and a period for voluntary departure should be granted.</i></p>
<i>REMOVAL</i>	<p>Article 3(5) RD and Article 8 RD</p> <p><i>the enforcement of the obligation to return, namely the physical transportation out of the Member State</i></p> <p><i>1. Member States shall take all necessary measures to enforce the return decision if no period for voluntary departure has been granted [...] or if the obligation to return has not been complied with within the period for voluntary departure granted [...].</i></p> <p>Clarification provided by the CJEU in <i>Achughbabian</i>:</p> <p>The expressions ‘measures’ and ‘coercive measures’ contained in Article 8(1) and (4) of Directive 2008/115 refer to any intervention which leads, in an effective and proportionate manner, to the return of the person concerned.</p>
<i>RISK TO PUBLIC POLICY</i>	<p>Article 7(4) RD</p> <p>Clarification provided by the CJEU in <i>Z.Zh. and O.</i> case:</p> <p>Assessment on a case-by-case basis, whether the personal conduct of the TCN national concerned poses a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society, in addition to the perturbation of the social order which any infringement of the law involves. (paras. 50 and 60) Suspicion of having committed a criminal offence, or established criminal offence cannot, in themselves, ‘justify a finding that that national poses a risk to public policy within the meaning of Article 7(4) of Directive 2008/115.’ (para. 60) Other factors, such as the nature and seriousness of that act, the time which has elapsed since it was committed and any matter which relates to the reliability of the suspicion that the TCN concerned committed the alleged criminal offence is also relevant for a case-by-case assessment which has to be carried out in any case.</p>

²⁰¹ Read in conjunction with Article 8(3)RD.