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Legislation

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## II

(Non-legislative acts)

## DECISIONS

## COMMISSION DECISION (EU) 2017/2336

of 7 February 2017

**SA.21877 (C 24/2007), SA.27585 (2012/C) and SA.31149 (2012/C) — Germany Alleged State aid to Flughafen Lübeck GmbH, Infratil Limited, Ryanair and other airlines using the airport**

(notified under document C(2017) 602)

(Only the German text is authentic)

(Text with EEA relevance)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union, and in particular the first subparagraph of Article 108(2) thereof,

Having called on interested parties to submit their comments pursuant to the provision cited above <sup>(1)</sup> and having regard to their comments,

Having called on interested parties to submit their comments pursuant to the provision cited above <sup>(2)</sup> and having regard to their comments,

Whereas:

## 1. PROCEDURE

### 1.1. PROCEDURE SA.21877

- (1) In 2002, 2003, 2004, 2005 and 2006, the Commission received several complaints from the airline Air Berlin, an environmental NGO (Bund Umwelt und Naturschutz) and private citizens concerning alleged State aid to Flughafen Lübeck GmbH ('FLG'), Infratil Limited ('Infratil') <sup>(3)</sup> and the airline Ryanair <sup>(4)</sup>.
- (2) On 7 November 2005, the Commission asked Germany for information, which Germany provided on 7 February 2006. Further information was asked by letter dated 22 March 2006, to which Germany replied on 12 June 2006. Meetings between the Commission services, Infratil, the majority owner of the company operating the airport, and the Hanseatic City of Lübeck ('Hansestadt Lübeck') took place on 14 October and 4 December 2006. Subsequent to these meetings, Infratil provided additional information by emails and faxes dated 16 and 31 October 2006, 6 November 2006 and 4, 6 and 21 December 2006.

<sup>(1)</sup> OJ C 287, 29.11.2007, p. 27.

<sup>(2)</sup> OJ C 295, 7.12.2007, p. 29 and OJ C 241, 10.8.2012, p. 56.

<sup>(3)</sup> *Infratil* is a New Zealand-based infrastructure investment company, investing in the energy, airport and public transport sectors. It owned and operated in particular the following airports: Wellington International airport, New Zealand; Glasgow Prestwick Airport and Kent International Airport, United Kingdom. It has in the meantime divested its investments in European airports.

<sup>(4)</sup> *Ryanair* is an Irish airline and member of the European Low Fares Airlines Association. The business of the airline was linked with secondary, regional airports. The airline currently operates approximately 160 European destinations. Ryanair had a homogenous fleet consisting of 272 Boeing 737-800 aircraft with 189 seats. Ryanair operated 23 flights per week at the time of the opening decision in 2007 from Lübeck airport to 5 European destinations, namely London-Stansted, UK, Mailand-Bergamo and Pisa, Italy, Palma de Mallorca, Spain, and Stockholm-Skavsta, Sweden.

- (3) By letter dated 18 January 2007, Germany asked the Commission to suspend the preliminary investigation of the file. In a letter of 2 May 2007, the Commission denied the request.
- (4) On 24 April 2007, Germany sent additional comments to the Commission. On 21 June 2007, a meeting took place between Germany and the Commission services.
- (5) By letter dated 10 July 2007, the Commission informed Germany of its decision to initiate the procedure provided for in Article 108(2) TFEU with regard to the financing of Lübeck airport, the financial relations between Hansestadt Lübeck and Infratil, and the airport's financial relations with Ryanair ('the 2007 Opening decision'). The formal investigation procedure was registered under the case number SA.21877 (C 24/2007).
- (6) A corrigendum of the 2007 Opening decision was adopted on 24 October 2007.
- (7) The 2007 Opening decision was published in the *Official Journal of the European Union* <sup>(1)</sup> on 29 November 2007. The corrigendum was published on 7 December 2007 <sup>(2)</sup>. The Commission invited interested parties to submit their comments on the measures in question within one month of the publication date.
- (8) The Commission received comments from Ryanair, Air Berlin, Infratil, FLG, two NGOs <sup>(3)</sup>, the Chamber of Industry and Commerce Lübeck ('IHK Lübeck') <sup>(4)</sup>, the German airline association (Bundesverband der Deutschen Fluggesellschaften, 'BDF') and individual persons <sup>(5)</sup>. Germany replied to those comments on 17 April 2008.
- (9) The Commission's independent consultant Ecorys requested information from Germany on 24 July 2008 in order to compile a report on the matter. Germany addressed the Commission on 1 August 2008 in order to challenge Ecorys' right to obtain information and documents. The Commission replied on 8 August 2008, confirming that the Commission's competences are extended to Ecorys in this matter. Consequently, the requested information was obtained on 18 September 2008.
- (10) On 16 April 2009, the Commission requested further information from Germany. Germany requested a prolongation of the deadline on 21 April 2009, and again on 7 July 2009. The requested information was submitted on 30 October 2009. Further information was requested by the Commission on 29 October 2009, which was submitted by Germany on 16 December 2009.
- (11) On 17 October 2010, the Commission received information from Air Berlin.
- (12) In a letter dated 28 March 2011, the Commission requested additional information from Germany. Germany asked for a prolongation of the deadline on 15 April 2011. On 20 April 2011, the Commission granted Germany's request for extension. On 21 April 2011, a further extension of the deadline was requested by Germany, which was granted by the Commission on 27 April 2011. Germany submitted the first part of the requested information on 16 May 2011. In a letter dated 20 May 2011, the Commission considered the submitted information incomplete and asked for the remaining information. Germany challenged this in a letter from 7 June 2011. The Commission replied on 15 June 2011, requesting the missing information.
- (13) On 8 April 2011, the Commission sent a questionnaire to Ryanair. The answers were returned to the Commission by 4 July 2011. The Commission forwarded these submissions on 18 July 2011 to Germany, inviting for comments until 18 August 2011. On 8 August 2011, the Commission sent a translated version of Ryanair's submissions to Germany, postponing Germany's possibility to comment until 9 September 2011. Germany's comments were finally sent to the Commission on 8 September 2011. On 7 February 2012, the Commission requested further information from Ryanair concerning the Oxera study, which was submitted by Ryanair on 4 July 2011. On 13 February 2012, Ryanair requested an extension of the deadline to reply. On 16 February 2012, Oxera asked the Commission for clarification concerning one of the questions asked. The clarification was submitted by the Commission on 17 February 2012. Ryanair sent its comments on 13 April 2012. These comments were sent to Germany by the Commission on 27 June 2012. Germany commented on Ryanair's submissions in a letter from 10 September 2012.

<sup>(1)</sup> OJ C 287, 29.11.2007, p. 27.

<sup>(2)</sup> OJ C 295, 7.12.2007, p. 29.

<sup>(3)</sup> Schutzgemeinschaft gegen Fluglärm Lübeck und Umgebung Groß Grönau eV and Check-in Lübeck e.V.

<sup>(4)</sup> Industrie- und Handelskammer zu Lübeck (IHK).

<sup>(5)</sup> Peter C. Klanowski and Horst Conrad.

- (14) The final report by Ecorys from 29 March 2011 was sent to Germany on 29 June 2011, inviting Germany to comment. A translation of the report was sent to Germany on 24 August 2011, inviting Germany to comment until 26 September 2011. Germany sent its comments on 10 October 2011.
- (15) On 30 June 2011, Germany sent the second part of the information requested by the Commission. Germany replied to the Commission's letter of 15 June 2011 on 29 June 2011. On 5 July 2011, the Commission asked Germany to send missing information. On 15 July 2011, Germany sent the missing information.
- (16) On 4 July 2011, Ryanair sent comments to the Commission, which were forwarded to Germany on 8 August 2011. Germany commented on these submissions on 8 October 2011.
- (17) The Commission requested further information from Germany on 20 February 2012. An extension of the deadline to submit the information until 17 April 2012 was requested by Germany on 19 March 2012. This was granted by the Commission on 21 March 2012. In a letter dated 17 April 2012, Germany replied to the Commission's questions from 24 February 2012. On 18 April 2012, the Commission asked Germany to send missing information until 28 April 2012, without the possibility of extension. The Commission further stated that, in case of non-compliance, an information injunction would be issued in accordance with Article 10(3) of Council Regulation (EC) No 659/1999 <sup>(1)</sup>. A meeting between the Commission and Germany was held on 2 May 2012. On 3 May 2012, the Commission agreed to an extension until 11 May 2012. In a letter dating 7 May 2012, Germany pointed out procedural errors on the Commission's side and refused the submission of further information.
- (18) In a letter from 10 April 2013, Ryanair sent a report on Oxera's approach to the Market Economy Operator Principle ('MEO principle') to the Commission. The report was sent to Germany on 3 May 2013. Further submissions by Ryanair were sent to the Commission on 20 December 2013.
- (19) In a letter from 24 February 2014, the Commission invited Ryanair to comment on the application of the 2014 Aviation Guidelines <sup>(2)</sup>. On 21 March 2014, the Commission invited Infratil to comment on the 2014 Aviation Guidelines. A formal invitation for all interested parties to submit comments on the 2014 Aviation Guidelines was published in the Official Journal on 15 April 2014 <sup>(3)</sup>. Germany sent its comments on 12 May 2014. Additional comments were submitted by Air Berlin, Infratil and the *Schutzgemeinschaft gegen Fluglärm Lübeck und Umgebung eV* ('SGF') <sup>(4)</sup>.

#### 1.2. PROCEDURES SA.27585 AND SA.31149

- (20) On 28 January 2009, SGF sent a complaint regarding case SA.21877. This was registered under the State aid case number CP 31/2009 (SA.27585).
- (21) By letter dated 5 February 2009, the Commission requested information from Germany regarding press reports about Lübeck airport. Germany replied by letters dated 5 March 2009 and 12 March 2009.
- (22) By letter dated 16 April 2009, the Commission requested further information from Germany. Germany responded on 9 July 2009.
- (23) On 22 June 2010 and 30 June 2010, SGF submitted a further complaint, alleging that further unlawful State aid was provided by Germany in favour of FLG and Infratil. This complaint was registered under the State aid case number CP 162/2010 (SA.31149).
- (24) By letter dated 7 July 2010, the Commission sent that complaint to Germany and requested information. By letter dated 13 July 2010, Germany requested a prolongation of the deadline. The Commission granted the request by letter dated 14 October 2010.

<sup>(1)</sup> Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union of the EC Treaty (OJ L 83, 27.3.1999, p. 1)

<sup>(2)</sup> Communication from the Commission — Guidelines on State aid to airports and airlines (OJ C 99, 4.4.2014, p. 3).

<sup>(3)</sup> OJ C 113, 15.4.2014, p. 30.

<sup>(4)</sup> This is a non-governmental organisation registered under the rules of Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC (OJ L 156, 25.6.2003, p. 17).

- (25) By letter dated 28 March 2011, the Commission requested further information from Germany. By letter dated 8 April 2011 the Commission requested information from Ryanair concerning its agreements with FLG.
- (26) Germany requested a prolongation of the deadline until 15 July 2011. By letter dated 20 April 2011, the Commission invited Germany to answer to questions regarding the complaints until 28 April 2011. By letter dated 21 April 2011, Germany asked for further extension of the deadline. By letter dated 27 April 2011, the Commission accepted the extension of the deadline until 16 May 2011. Germany sent information on 16 May 2011.
- (27) On 20 May 2011, the Commission sent a reminder pursuant to Article 10(3) of Regulation (EC) No 659/1999, stating that the information sent was incomplete. The deadline for the reply was 7 June 2011. Germany replied by letter dated 7 June 2011, rejecting that the letter of 20 May 2011 was a reminder within the meaning of Regulation (EC) No 659/1999, as two of the questions appeared to be reworded and in their opinion one of the questions was new.
- (28) By letter of 15 June 2011, the Commission sent a second reminder pursuant to Article 10(3) of Regulation (EC) No 659/1999 to Germany, giving the possibility to provide information until 29 June 2011. In the event of non-compliance with that reminder, the Commission would consider issuing an information injunction. Germany replied by letter dated 29 June 2011 to some of the questions and informed the Commission that the replies to the remaining questions would be provided during July 2011.
- (29) By letter dated 4 July 2011 the Commission received further information from Ryanair.
- (30) By letter of 5 July 2011, the Commission sent a third reminder according to Article 10(3) of Regulation (EC) No 659/1999 to Germany giving it the possibility to provide information concerning the remaining questions by 15 July 2011. Germany responded by letter dated 15 July 2011.
- (31) By letter dated 18 July 2011 the Commission forwarded Ryanair's submission from 4 July 2011 to Germany, inviting for comments. Germany requested the translation of the Ryanair submission into German. The Commission sent the German version of the submission to Germany by letter dated 8 August 2011.
- (32) By letter dated 8 September 2011 Germany provided comments on Ryanair's submission. On 7 February 2012, the Commission requested further information from Ryanair concerning the Oxera study. On 13 February 2012, Ryanair requested an extension of the deadline to reply. Clarification concerning one of the questions asked by the Commission was asked on 16 February 2012. That clarification was provided by the Commission on 17 February 2012.
- (33) By letter dated 22 February 2012, the Commission informed Germany of its decision to initiate the procedure provided for in Article 108(2) TFEU with regard to potential State aid in favour of Infratil, FLG, Ryanair, and other airlines operating from Lübeck airport ('the 2012 opening decision')<sup>(1)</sup>. In reply, Germany asked the Commission in a letter dated 14 March 2012 for the blackening of certain information contained in the 2012 opening decision. The Commission partially accepted the request in a letter from 20 March 2012, explaining that it was unable to agree to the blackening of certain information. Germany further challenged the Commission's position on confidentiality in a letter from 3 April 2012. The Commission sent a letter to Germany on 25 April 2012 in this matter, submitting another version of the 2012 opening decision and providing further arguments.
- (34) On 2 March 2012, Ryanair sent a request to the Commission, asking for the possibility to review the 2012 opening decision before publication, in order to prevent the publication of confidential information. The Commission replied on 6 March 2012 by pointing out that it is for the Member State to submit such information to Ryanair. After several interchanges between Ryanair, the Commission and Germany, Ryanair submitted a list of requests for removing confidential information and in addition criticised procedural issues on 27 April 2012. Moreover, Germany submitted further requests by Ryanair for blackening of certain information to the Commission on 30 April 2012. On 29 June 2012, the blackened version of the 2012 opening decision was sent to Ryanair.
- (35) As requested by the Commission on 7 February 2012, Ryanair submitted comments in a letter dated 13 April 2012. Those comments were forwarded to Germany by the Commission on 27 June 2012. Germany commented on Ryanair's submissions in a letter dated 10 September 2012.

<sup>(1)</sup> Prior to the opening, the measures were investigated in cases CP 31/2009 (SA.27585) and CP 162/2010 (SA.31149).

- (36) In a letter dated 24 February 2012, the Commission asked Germany to provide more information on the cases within 20 days. On 19 March 2012, Germany requested an extension of the deadline until 20 April 2012. The Commission agreed to an extension of the deadline until 17 April 2012 in a letter dated 21 March 2012. Germany submitted the requested information on 17 April 2012. In a letter dated 18 April 2012, the Commission stated that the information submitted by Germany was incomplete and requested the missing information to be submitted by 28 April 2012. The Commission added that in case of non-compliance, an information injunction would be initiated in accordance with Article 10(3) of Regulation (EC) No 659/1999. On 3 May 2012, the Commission addressed another letter to Germany, urging it to submit the missing information by 11 May 2012.
- (37) On 14 May 2012, Germany submitted comments to the Commission concerning the 2012 Opening decision.
- (38) The 2012 opening decision was published in the Official Journal on 10 August 2012 <sup>(1)</sup>. All interested parties were given the possibility to comment on the decision within one month. By two letters dated 16 August 2012 and 22 August 2012, Ryanair requested an extension of the deadline until 24 September 2012. Wizz Air requested an extension until 24 September on 24 August 2012. On 31 August 2012, Infratil requested an extension until 10 October 2012. Hansestadt Lübeck and FLG requested the Commission on 5 September 2012 to extend the deadline until 10 October 2012. On 7 September 2012, Bundesverband der deutschen Verkehrsflughäfen ('ADV') <sup>(2)</sup> asked for an extension of the deadline until 10 October 2012. On the same day, the Commission granted the requests for extension to Ryanair, Wizz Air, ADV, Hansestadt Lübeck, FLG and Infratil.
- (39) On 9 September 2012, Pro Airport Lübeck e.V. submitted their observations.
- (40) On 10 September 2012, Flughafen Hamburg GmbH ('Hamburg Airport') and the Landesregierung (State government) of Schleswig-Holstein requested the Commission to extend the deadline to submit comments until 10 October 2012. The Commission agreed to the extension on the following day. On 10 September 2012 SGF submitted its comments to the Commission.
- (41) Ryanair submitted its comments to the Commission on 24 September 2012, including a report compiled by Oxera. By letter dated 8 October 2012, Hansestadt Lübeck submitted its comments to the Commission. On 10 October 2012, comments were submitted to the Commission by ADV, FLG, Infratil and Wizz Air, including a report by Oxera. The same day, Ryanair added to its submissions several reports compiled by Oxera.
- (42) On 3 May 2014, Germany forwarded the non-confidential versions of the Oxera reports to Germany, inviting Germany to comment.
- (43) On 15 May 2013, 17 January 2014 and 31 January 2014, Ryanair submitted further information.
- (44) By letter dated 11 February 2013, the Commission asked Germany to submit all contracts in relation to the privatisation of Lübeck airport within 20 days. Such disclosure was denied to the Commission in a letter from 28 February 2014, since the privatisation of Lübeck airport was not part of the current procedure. After consultations between the Commission and Germany, Germany sent the details concerning the privatisation of Lübeck airport in a letter from 13 March 2014.
- (45) The Commission informed Germany on 24 February 2013 and 17 March 2014 about the introduction of the 2014 Aviation Guidelines and its relevance for the current proceedings, inviting Germany to submit comments. In response, Germany submitted information on 27 March 2014. Further submissions were made by Wizz Air, in a letter dated 30 April 2014 and by Germany on 12 May 2014.
- (46) By letter dated 2 September 2014, 12 September 2014 and 26 September 2014, Ryanair submitted further reports prepared by Oxera concerning the recent approach of the Commission concerning the MEO principle.

### 1.3. JOINT PROCEDURE CONCERNING SA.21877, SA.27585 AND SA.31149

- (47) The Commission joined the procedures SA.21877, SA.27585 and SA.31149 in 2014.
- (48) By letter dated 30 September 2014, the Commission requested further information from Germany.

<sup>(1)</sup> OJ C 241, 10.8.2012, p. 56.

<sup>(2)</sup> Federal Association for German Commercial Airports (Bundesverband der deutschen Verkehrsflughäfen).

- (49) On 6 October 2014, Germany requested the Commission to extend the deadline for the submission of the requested information until 30 November 2014. The Commission extended the deadline until 17 November 2014. On 21 November 2014, the Commission sent a reminder to Germany to submit the requested information by 3 December 2014. The Commission stated that in the event of non-compliance with that reminder an information injunction would be initiated in accordance with Article 10(3) of Regulation (EC) No 659/1999. Germany provided the requested information on 3 December 2014. After a teleconference on 18 December 2014, Germany submitted further information on 12 January 2015 and 14 January 2015.
- (50) By email dated 26 January 2015, 9 February 2015 and 27 February 2015, the Commission received submissions from Ryanair.
- (51) On 30 January 2015, Air Berlin stated its interest in a Commission Decision concerning the alleged State aid to Ryanair.
- (52) In a letter dated 23 March 2015, the Commission submitted further comments by third parties, inviting Germany to comment. Germany replied on 9 April 2015 by transmitting its comments on third party submissions.
- (53) In an email from 20 April 2015, the Commission requested further information concerning Yasmina Flughafenmanagement GmbH ('Yasmina') <sup>(1)</sup>, the operator of Lübeck airport in 2013 and 2014. Additional questions concerning the put option prize paid by Infracore were sent to Germany on 4 May 2015.
- (54) Hansestadt Lübeck replied on 5 May 2015, answering the questions concerning Yasmina. In a letter dated 11 May 2015, Germany replied to the Commission's request for more information concerning the put option price.
- (55) On 13 May 2015, the Commission asked Oxera a question concerning the alleged State aid for de-icing charges. In reply, Oxera submitted a report on de-icing on 18 May 2015.
- (56) In an email dated 22 May 2015, the Commission asked Oxera for clarification concerning their reports from September 2014 and February 2015 on the profitability of the 2010 Side Letters, concluded between Ryanair and FLG. A reply was received by the Commission on 28 May 2015.
- (57) On 23 June 2015, the Commission asked Germany additional questions. The replies were received on 25 June 2015 and 3 July 2015. Further questions were sent to Germany by the Commission on 29 June 2015, to which replies were received in a letter, dated 24 July 2015.
- (58) Ryanair sent an explanatory Oxera note to the Commission on 3 July 2015.
- (59) On 4 August 2015, the Commission asked Germany additional questions. The replies were received on 10 September 2015.
- (60) Ryanair submitted another Oxera note dealing with MEO assessments of airport-airline agreements in the context of airport's overall profitability to the Commission on 30 November 2015. Hansestadt Lübeck submitted additional information on 20 January 2016 and Germany on 19 February 2016.

#### 1.4. APPEAL OF THE 2012 OPENING DECISION IN RELATION TO THE SCHEDULE OF AIRPORT CHARGES

- (61) Hansestadt Lübeck applied for the partial annulment of the 2012 opening decision. The General Court annulled the 2012 opening decision in relation to the schedule of airport charges for Lübeck airport adopted in 2006 ('2006 schedule of charges') <sup>(2)</sup>. The Commission appealed against this judgment to the Court of Justice, which confirmed the judgment of the General Court <sup>(3)</sup>. The 2012 opening decision was therefore definitely annulled in relation to the 2006 schedule of charges. Therefore, the 2006 schedule of charges will not be assessed in this Decision.

<sup>(1)</sup> Yasmina was a 100 % subsidiary of 3 Y Logistic und Projektbetreuung GmbH ('3Y'), an investment company owned by a natural person, namely the Saudi Adel Mohammed Saleh M. Alghanmi. Yasmina was set up for the purpose of buying and operating Lübeck airport.

<sup>(2)</sup> Case T-461/12 *Hansestadt Lübeck v European Commission* ECLI:EU:T:2014:758.

<sup>(3)</sup> Case C-524/14 P *Commission v Hansestadt Lübeck* ECLI:EU:C:2016:971.



## 2. DETAILED DESCRIPTION OF THE MEASURES

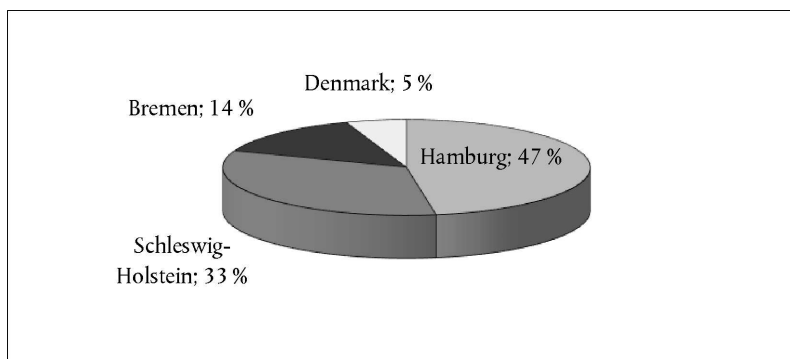
### 2.1. BACKGROUND OF THE INVESTIGATION AND CONTEXT OF THE MEASURES

#### 2.1.1. Catchment area, passenger development and airlines serving the airport

- (62) Lübeck airport is situated approximately 73 kilometres from the city of Hamburg, in the Land Schleswig-Holstein, Germany.
- (63) The airport itself defines its catchment area as the metropolitan area of the city of Hamburg and Öresund (Greater Copenhagen/Malmö). This region could be served by the following airports:
- Hamburg airport (~78 kilometres distance from Lübeck airport, ~65 minutes travelling time by car),
  - Rostock airport (~134 kilometres distance from Lübeck airport, ~1 hour 19 minutes travelling time by car),
  - Bremen airport (~185 kilometres distance from Lübeck airport, ~1 hour 56 minutes travelling time by car),
  - Hannover airport (~208 kilometres distance from Lübeck airport, ~ 2 hour 8 minutes travelling time by car), and
  - Copenhagen airport (~280 kilometres distance from Lübeck airport, ~3 hours travelling time by car and ferry).
- (64) According to a market study carried out by the airport in 2009, the majority of the (outbound) passengers at Lübeck airport came from Hamburg (i.e. 47,20 %). The airport expected an increase of the Danish outbound passengers after the completion of the Fehmarn Belt Fixed Link between Germany and Denmark. Figure 1 summarises the origin of the passengers at Lübeck airport.

Figure 1

**Origin of the outbound passengers at Lübeck airport (Market Study, 2009)**



- (65) The passenger traffic at the airport had increased from 48 652 in 1999 to 546 146 in 2010 (see Table 1). The airport expected to increase its passenger numbers to 2,2 million by 2015. However, that development did not materialise.

Table 1

**Passenger development at Lübeck airport in 1999 to 2013 <sup>(1)</sup>**

Year	Number of passengers
1999	48 652
2000	142 586
2001	192 726
2002	244 768
2003	514 560

Year	Number of passengers
2004	578 475
2005	710 788
2006	677 638
2007	612 858
2008	544 339
2009	697 559
2010	546 146
2011	344 068
2012	359 974
2013	367 252

(<sup>1</sup>) See website Lübeck airport [http://www.flughafen-luebeck.de/images/02-unternehmen/06-zahlen\\_fakten\\_daten/02-monatsstatistik/ab2000.pdf](http://www.flughafen-luebeck.de/images/02-unternehmen/06-zahlen_fakten_daten/02-monatsstatistik/ab2000.pdf) (Status: 22 May 2015).

- (66) At the date of this Decision, no airline is operating from Lübeck. Neither scheduled nor charter flights are on offer.

### 2.1.2. **Ownership of the airport**

- (67) Lübeck airport was originally operated by FLG, which was a limited liability company. The ownership of some airport infrastructure and of the land had remained with Hansestadt Lübeck. FLG could use the airport infrastructure on the basis of a lease agreement. The ownership of FLG changed several times in the recent years. Until 30 November 2005 the sole shareholder of FLG was Hansestadt Lübeck, which held 100 % of the shares. Under the '2005 Participation Agreement' (Beteiligungsvertrag), Hansestadt Lübeck sold with effect of 1 December 2005 90 % of its shares in FLG to Infratil. The remaining 10 % were still held by Hansestadt Lübeck, as minority shareholding. The 2005 Participation Agreement included a number of conditions and put/call options for both parties (for further details see Section 2.3.1).
- (68) To prevent Infratil from exercising its put option, an Additional Agreement (Ergänzungsvereinbarung 2009) was signed in 2009 between Hansestadt Lübeck and Infratil. According to the 2009 Additional Agreement, Infratil had to continue operating the airport until October 2009 and was compensated for certain costs in return (see Table 3).
- (69) At the end of 2009, Infratil exercised its put option and sold back its shares to Hansestadt Lübeck.
- (70) From November 2009 Hansestadt Lübeck was again the sole owner (100 % of shares) of FLG. In November 2009 the City Council of Lübeck ('Bürgerschaft') (<sup>1</sup>) decided that a new private investor for FLG should be found by the end of February 2010 and that the airport should not receive any further funding.
- (71) On 25 April 2010 the citizens of Hansestadt Lübeck decided by public vote to ensure the survival of Lübeck airport. Hansestadt Lübeck deemed further investments for the improvement of the airport infrastructure necessary, in order to privatise the airport.
- (72) On 16 August 2012, Hansestadt Lübeck published a call for tender in the supplement to the *Official Journal of the European Union* (<sup>2</sup>) concerning the sale of Lübeck airport. Until 24 September 2012, seven letters of interest were submitted. By 15 October 2012, five parties placed indicative, non-binding bids. By 20 November 2012,

(<sup>1</sup>) Bürgerschaft of Hansestadt Lübeck consists of representatives of citizens of the city.

(<sup>2</sup>) OJ 2012/S 156-261107 of 16 August 2012 (<http://ted.europa.eu/udl?uri=TED:NOTICE:261107-2012:TEXT:EN:HTML&tabId=1>).

three parties placed binding and final bids. A comparison of the three bids was conducted. It included a system of distribution of points, taking into account both the financial offer and the respective business and development plans. The offer by 3Y Logistic und Projektbetreuung GmbH, Frankfurt ('3Y') which envisaged an *asset deal*, was by far the most advantageous. 3Y was the holding company of Yasmina, a limited liability company set up for the purpose of buying and operating Lübeck airport. On 29 November 2012, the *Bürgerschaft* of Lübeck agreed to the terms and the sale. The sales contract was signed on 14 December 2012 and came into force on 1 January 2013. Yasmina acquired some of the assets of FLG. The assets not sold to Yasmina were transferred to Hansestadt Lübeck by merging FLG into Hansestadt Lübeck (German 'Verschmelzung'). FLG hence ceased to exist as an independent legal entity.

- (73) As a result of the continuous losses made by the airport, Yasmina announced insolvency in April 2014, resulting in the initiation of insolvency proceedings on 23 April 2014. On 1 August 2014, Lübeck airport was taken over by a Chinese investor, PuRen Germany GmbH ('PuRen'). PuRen announced insolvency in September 2015, resulting in the initiation of insolvency proceedings on 30 September 2015. On 1 July 2016, Lübeck airport was taken over by Stöcker Flughafen GmbH & Co. KG ('Stöcker').
- (74) The Commission investigated the following measures, which possibly constituted State aid in favour of FLG, Infratil, Ryanair and other airlines using the airport.

## 2.2. POTENTIAL STATE AID IN FAVOUR OF FLG

- (75) The Commission has opened the formal investigation procedure on the following measures in favour of FLG:
- takeover of all losses incurred in the period 1978 to 2004;
  - lease agreement for land and airport infrastructure (prior to 1 January 2006) at a price under the market price;
  - takeover of outstanding liabilities resulting from several loans FLG had concluded with commercial banks;
  - investment Aid to FLG by means of the 2005 Regional Airports Decision <sup>(1)</sup> and its alleged violation;
  - compensation for FLG losses since November 2009;
  - financing of infrastructure investments by Hansestadt Lübeck and the Land Schleswig Holstein in the years 2010-2015;
  - subordination of shareholder loans of Hansestadt Lübeck to FLG.

## 2.3. POTENTIAL STATE AID IN FAVOUR OF INFRATIL

### 2.3.1. Sale of shares in FLG

- (76) In view of the continuous operating losses of FLG, Hansestadt Lübeck decided to sell its shares in FLG. In order to identify the best purchaser, it launched a call for tender, which was published in the *Official Journal of the European Union* on 21 March 2003.
- (77) Hansestadt Lübeck received indications of interest of five undertakings. It sent a package containing more detailed information to the first four undertakings. One undertaking had submitted its indicative offer on 17 June 2003, after the expiration of the deadline.
- (78) Only one undertaking, namely Infratil, submitted a formal bid. Therefore, Hansestadt Lübeck started negotiations with Infratil. A first sales agreement was concluded in March 2005. However, it was conditional upon obtaining a definitive planning approval (Planfeststellungsbeschluss) for prolonging the runway of the airport within a specified time frame. Following the ruling of the Higher Administrative Court (Oberverwaltungsgericht — 'OVG') Schleswig of 18 July 2005 <sup>(2)</sup>, this condition could no longer be fulfilled.

<sup>(1)</sup> Commission Decision of 19 January 2005, N644i/2002 — Germany — Ausbau der kommunalen wirtschaftsnahen Infrastruktur nach Teil II Ziffer 7 des Rahmenplans der Gemeinschaftsaufgabe 'Verbesserung der regionalen Wirtschaftsstruktur' (i) Errichtung oder Ausbau von Regionalflughäfen (OJ C 126, 12.5.2005, p. 10).

<sup>(2)</sup> The planning permission decision allowing for the developments of Lübeck Airport, which was made on 20 January 2005 and covered various infrastructural measures, has been contested in court by various parties. In the interim procedure two high court decisions have been taken which have force of law: These decisions are Decision 4 MR 1/05 of 18 July 2005 of Schleswig Higher Administrative Court (OVG) and Decision 101/05/EC of 21 October 2005 of Schleswig Higher Administrative Court (OVG). On the basis of these rulings, the planning approval was denied.

- (79) The judgment fundamentally altered the negotiation position of both parties. As the outcome of the former public procurement procedure was only one formal bid, Hansestadt Lübeck considered it unlikely that after the suspension of the airport's expansion there would be more interested parties. As a result, it decided against publishing a second tender. Instead, Hansestadt Lübeck and Infratil reopened negotiations based on the new facts, and agreed on a conditional privatisation contract. A Participation Agreement was concluded on 24 October 2005 ('the 2005 Participation Agreement'). It entered into force on 1 December 2005.
- (80) The 2005 Participation Agreement foresaw the transfer of 90 % of the shares in FLG from Hansestadt Lübeck to Infratil as of 1 December 2005. In return, Infratil paid the so called 'Purchase Price I' of EUR [...] (\*) as well as additional EUR [...] to Hansestadt Lübeck, corresponding to a cash credit which Hansestadt Lübeck had previously granted to FLG for financing operating costs and new investments. Infratil also had to take over the operating losses of the airport for the year 2005.
- (81) Furthermore the 2005 Participation Agreement provided that a 'Purchase Price II' of EUR [...] had to be paid by Infratil at a later time, if the following two conditions were met:
- (a) the airport received an unconditional and definitive planning approval covering a contractually specified content (see recital 82) that does not impose active noise management measures, such as a ban on night flights or noise quota (Lärmkontingent) on FLG, or FLG had contracted construction works with respect to contractually specified measures of a certain value;
  - (b) at least [...] passengers were transported in 2008, or, if condition 1 has been fulfilled already in 2006 or 2007, [...] passengers were transported in 2006 or [...] passengers were transported in 2007.
- (82) The contractually specified content of the planning approval covered the following:
- the extension of runways;
  - the installation of an instrument landing system category II or III ('ILS CAT II' or 'ILS CAT III');
  - the extension of parking space;
  - the existing airport site;
  - the extension of the apron;
- (83) The following items needed to be deducted from the Purchase Price II:
- Purchase Price I (EUR [...]);
  - the operating losses of the airport for the years 2005 to 2008 of a maximum total amount of EUR [...];
  - the costs resulting from the State aid law suit which Air Berlin had filed in German civil courts which Germany estimates to amount to EUR [...];
  - if the planning approval is issued with the contractually specified content (see recital 82), the difference between the planning approval costs, excluding costs for compensation measures) and a fixed amount of [...] euros; Germany estimates this difference to amount to [...] euros;
  - if the planning approval is not issued with the contractually specified content (see recital 82), the planning approval costs.
- (84) According to the 2005 Participation Agreement, planning approval costs cover all costs affecting liquidity (liquiditätswirksam). This includes costs of compensation measures (Aufwendungen für Ausgleichsmaßnahmen) for the planning approval procedure that occur between 1 October 2005 and 31 December 2008.
- (85) Furthermore the 2005 Participation Agreement contained a put option, allowing Infratil to unwind the original purchase of the shares in FLG and to reimburse some agreed costs, if
- the planning approval was not obtained or construction work has not been contracted with respect to the measures mentioned in recital 82 until 31 December 2008 and
  - a specified number of passengers has not been reached.

(\*) Confidential information.

- (86) In the event of the exercise of the put option, Hansestadt Lübeck was obliged to reimburse Purchase Price I and to compensate certain losses. According to the 2005 Participation Agreement Hansestadt Lübeck would have to pay EUR [...] to Infratil if the latter exercised the put option. This amount was calculated as follows:

Table 2

**Put option price as per 31 December 2008 in EUR**

Shareholder loans 2005	[...]
+ Balance of shareholder loans granted for:	
actual approved operating losses	[...]
actual approved investment costs	[...]
– public funding	[...]
costs of planning approval process	[...]
Air Berlin legal costs	[...]
<b>= balance of shareholder loans granted</b>	<b>[...]</b>
+ 5 % interest on shareholder loans p.a.	[...]
+ Purchase Price I	[...]
<b>Total</b>	<b>[...]</b>

**2.3.2. The 2009 Additional Agreement and the renegotiation of the put option — Takeover of further losses, investments and other costs**

- (87) In 2008, Infratil announced to exercise its put option, since the planning approval had not been obtained, customer numbers had not improved to the level specified in the 2005 Participation Agreement and FLG's operating losses had been greater than expected. To keep Infratil as an airport operator, Hansestadt Lübeck agreed to renegotiate certain terms of the 2005 Participation Agreement with regard to the put option. The result was the 2009 Additional Agreement, signed on 12 November 2008, which added further losses, investments and other costs related to the operation of the airport in 2009 to the put option price which Hansestadt Lübeck would have had to pay to Infratil under the 2005 Participation Agreement.
- (88) According to the 2009 Additional Agreement, the new put option price was calculated as follows:

Table 3

**Put option price October 2009 in EUR**

Price of the put option (31 December 2008)	[...]
+ [...] % interest rate on the price of the put option in 2008 for 2009	[...]
+ Balance of shareholder loans granted for:	
Actual approved operating losses 2009	[...]
Actual approved investment costs in 2009	[...]
Cost of planning approval process 2009	[...]
Other expenses 2009	[...]
Air Berlin legal cost incurred in 2009	[...]

<b>= balance of shareholder loans granted</b>	[...]
+ [...] % Interest on shareholder loans for the year 2009	[...]
– Expenses 2009 not covered by loans	[...]
+ offset of the group insurance benefits (i.e. the share of Infratil's group insurance premiums attributable to FLG)	[...]
<b>Total</b>	[...]

- (89) Group insurance benefits were payable by Hansestadt Lübeck in the context of a shareholder loan which had been granted to FLG by Infratil. The insurance policy covered all airports managed by Infratil. The share of costs attributable to FLG amounted to EUR [...].
- (90) The difference between the put option price paid in accordance with the 2009 Additional Agreement and the put option price that Hansestadt Lübeck would have had to pay under the 2005 Participation Agreement thus amounts to EUR [...].
- (91) In return, Infratil waived its right to exercise its put option before 22 October 2009 and granted Hansestadt Lübeck further participation rights. In addition, Infratil provided Hansestadt Lübeck with a written Letter of Intent between FLG and Ryanair, in which both parties confirmed their intention to increase passenger numbers and to cooperate with regard to the establishment of a Ryanair base at Lübeck airport.

#### 2.4. POTENTIAL STATE AID IN FAVOUR OF RYANAIR

##### 2.4.1. 2000 Agreement

- (92) Until 2000, FLG was an airport depending on aviation revenues generated by charter flights and general aviation. In 2000 the airport changed its business model into an airport for low-cost carriers where revenues are generated through a combination of aviation and non-aviation activities.
- (93) FLG signed an Air Services Agreement with Ryanair on 29 May 2000 ('the 2000 Agreement'). The 2000 Agreement with Ryanair included a specification of the airport charges to be paid by Ryanair, as well as the marketing support incentives to be paid by the airport. The 2000 Agreement was scheduled to start on 1 June 2000 and to continue until 31 May 2010.
- (94) For the route to Stansted, the airport had assessed costs and revenues as follows:

Table 4

#### Costs and revenues involved in the 2000 Agreement from FLG's perspective

Elements of the agreement with Ryanair	< 18 turnarounds per week	≥ 18 turnarounds per week
<b>FLG costs in EUR</b>		
Marketing support – costs per arriving passenger	[...]	[...]
	Until 31 May 2005	From 1 June 2005
<b>FLG Income in EUR</b>		
Ryanair payable fees per plane	[...]	[...]
Ryanair payable fees per arriving passenger	[...]	[...]
<i>Ryanair net payable fees per arriving passenger (fees minus marketing support)</i>	[...]	[...]

Elements of the agreement with Ryanair	< 18 turnarounds per week	≥ 18 turnarounds per week
<b>Other:</b>		
Fee on turnover per ticket sold by FLG	[...] %	[...] %
Commission on turnover rental car booked by FLG	[...] %	[...] %
Security fee (paid by Ryanair to appropriate government body) in EUR	[...]	[...]

#### 2.4.2. 2010 Agreements

- (95) On 29 March 2010, Ryanair and Lübeck airport signed Side Letter No 1 to the 2000 Agreement covering the period from 28 March 2010 to 30 October 2010. This side letter prolonged the 2000 Agreement until 30 October 2010 and introduced a new per-passenger incentive payment of EUR [...] to be paid by FLG to Ryanair, in addition to the payment for marketing services specified in the 2000 Agreement of EUR [...] per passenger (below 18 rotations per week) or EUR [...] per passenger (above 18 rotations per week). Since more than 18 rotations per week were flown by Ryanair, a total of EUR [...] per passenger was to be paid by FLG to Ryanair. As all other conditions from the 2000 Agreement were maintained, passenger service fees per departing payments to be paid to FLG amounted to EUR [...], ramp handling charges per turnaround amounted to EUR [...], handling charges per passenger were EUR [...] and security charges per passenger were EUR [...].
- (96) In October 2010, a Side Letter No 2 was signed, which did not maintain the conditions of the March 2010 Side letter, but returned to the schedule of marketing payments as stated in the original 2000 Agreement. The October 2010 Side letter extended the terms of the 2000 Agreement for 3 years until 1 November 2013.
- (97) On the day that Side letter No 1 was entered into, namely on 29 March 2010, FLG also signed a Marketing Services Agreement with Airport Marketing Services Limited ('AMS'), a fully-owned subsidiary of Ryanair. That marketing services agreement also covered the period from 29 March 2010 to 30 October 2010 and set out the advertising services to be provided by AMS on the website [www.ryanair.com](http://www.ryanair.com), in return for a sum of EUR [...] to be paid by FLG.

#### 2.5. CHARGES FOR THE DE-ICING OF AIRCRAFTS AT THE AIRPORT

- (98) The de-icing charges are laid down in a scheme of special charges, applicable to all airlines using the airport. The scheme of special charges is a document separate from the general schedule of charges applicable at the airport. It is updated every few years. The scheme of special charges distinguishes several categories, namely de-icing for aircrafts up to 10 t maximum take-off weight, de-icing for aircrafts from 10 t maximum take-off weight, de-icing liquid and hot water and lays down a price for each of these categories.

### 3. GROUNDS FOR INITIATING THE FORMAL INVESTIGATION PROCEDURE

- (99) In its 2007 and 2012 Opening decisions, the Commission initiated investigations concerning possible State aid in favour of FLG, Infratil and Ryanair, Wizz Air and other charter airlines serving Globalis Reisen.

#### 3.1. POTENTIAL STATE AID IN FAVOUR OF FLG

- (100) The Commission had doubts concerning the loss transfer agreement of 19 October 1978 ('loss transfer agreement'), according to which Hansestadt Lübeck covered the operating losses of FLG in the period 1978 to 2004, the lease agreement for land and airport infrastructure and the takeover of outstanding liabilities. Furthermore, the Commission had doubts on the possible investment aid by means of the 2005 Regional Airports decision and its alleged violation, the compensation of losses since November 2009, the financing of infrastructure investments by Hansestadt Lübeck and the Land Schleswig-Holstein and the subordination of shareholder loans of Hansestadt Lübeck to FLG. In relation to those measures, the Commission expressed doubts whether, under normal market conditions, a market economy operator would also have provided similar advantages to FLG.

### 3.2. POTENTIAL STATE AID IN FAVOUR OF INFRATIL

- (101) When 90 % of the shares in FLG were sold to Infratil, the Commission had doubts regarding the compatibility of the privatisation process with State aid rules. In addition, the Commission suspected possible State aid when the terms of the put option were renegotiated in 2008/2009.

### 3.3. POTENTIAL STATE AID IN FAVOUR OF RYANAIR

- (102) With regard to the 2000 Agreement with Ryanair and the March and October 2010 Side letters, the Commission had doubts whether they conferred a selective advantage to Ryanair and therefore constituted State aid.

### 3.4. CHARGES FOR THE DE-ICING OF AIRCRAFTS AT THE AIRPORT

- (103) The Commission had doubts whether the charges for de-icing, charged since November 2009, involved State aid, since there were indications that the prices charged for de-icing were lower than the costs incurred by the airport.

## 4. COMMENTS FROM GERMANY

### 4.1. POTENTIAL STATE AID IN FAVOUR OF FLG

- (104) Germany pointed out that FLG does not exist anymore. During the course of the privatisation of Lübeck airport, FLG merged into Hansestadt Lübeck. Thereby, Hansestadt Lübeck became the universal successor of FLG and all claims between FLG and Hansestadt Lübeck disappeared. Therefore, Germany states that all questions of State aid between Hansestadt Lübeck and FLG became without object. In addition, Germany commented on the specific measures, stating that all measures were in accordance with State aid rules, since they either constitute existing aid or comply with the MEO principle.

- Loss transfer agreement: According to Germany, since the loss transfer agreement was concluded 1978 and ended on 31 December 2004, it cannot be included in the investigations. If it were to be categorised as State aid, it would merely constitute existing aid. Germany also argued that the loss transfer agreement constituted a general economic policy measure, which cannot be considered State aid. According to Germany, the loss transfer agreement also passes the MEO test as the relevant measures were intended to attract airlines to the airport and to raise passenger numbers.
- Lease agreement and takeover of loans: According to Germany, any aid in relation to those measures would be existing aid. In addition, Germany stated that the rent was in accordance with market standards, as proven by an independent study by Ernst & Young commissioned by Hansestadt Lübeck prior to the sale of FLG to Infratil and which was provided by Germany to the Commission. With respect to the takeover of loans, Germany stated that all debt guarantees were solely provided within the framework of the pre-financing of investments in infrastructure measures, which were in any event financed afterwards through payments under the loss transfer agreement.
- Investment aid to FLG by means of the 2005 Regional Airports Decision and its alleged violation: Germany stated that all concerned measures were never implemented or fell within the public remit sphere.
- Compensation for FLG losses since November 2009: Germany stated that the financing of FLG by Hansestadt Lübeck since 2009 was in accordance with Union State aid rules, since FLG did not exercise an economic activity, as its activities concerned services within the public remit or services of general economic interest.
- Financing of infrastructure investments by Hansestadt Lübeck and the Land Schleswig Holstein: Germany argued that the financing of infrastructure investments concern services of public interest or services of public remit and are thereby in accordance with State aid rules, as provided in the 1994 Aviation guidelines <sup>(1)</sup> (as is the case with regard to the compensation of losses since 2009).

<sup>(1)</sup> Application of Articles 92 and 93 of the EC Treaty and Article 61 of the EEA Agreement to State aids in the aviation sector (OJ C 350, 10.12.1994, p. 5).



- Subordination of shareholder loans of Hansestadt Lübeck to FLG: Germany stated that the subordination agreement of Hansestadt Lübeck in favour of FLG was common market practice and did not give FLG any advantage.

#### 4.2. POTENTIAL STATE AID IN FAVOUR OF INFRATIL

##### 4.2.1. *Sale of shares in FLG*

- (105) Germany argued that the agreed purchase price was in accordance with market standards. Germany further stated that the bidding procedure for the acquisition of 90 % of the shares of FLG was open, transparent, non-discriminatory and unconditional. Germany stated that a renegotiation of the agreement, which was due to the decision of *OVG Schleswig* from 18 July 2005 <sup>(1)</sup>, did not change the outcome of the bidding procedure, which was that the bid of Infratil was the only and highest bid. According to Germany, a new call for interest, subsequent to the judgement, would have been unnecessary and unfruitful, as the situation then was even less attractive for potential bidders than before.
- (106) Germany stated that there was no reason for a new call for interest, as the decision of *OVG Schleswig* changed the value of the airport, but not the actual subject of the bidding procedure. Moreover, Germany is of the opinion that a modification of agreements has to be possible at any time. These arguments were supported by reference to German public procurement law.
- (107) Moreover, Germany stated that the expert report by Ernst & Young concluded that the conditions of the privatisation reflected the current market value of FLG and by far exceeded the economic results of a potential liquidation.

##### 4.2.2. *The 2009 Additional Agreement and the renegotiation of the put option — Takeover of further losses, investments and other costs*

- (108) Germany stated that the agreement between Infratil and Hansestadt Lübeck has to be assessed in the context of the legal and economic situation of Lübeck airport in 2009. This includes the pending planning approval, the pending court cases involving the airport and the economic and financial crisis.
- (109) Germany contested the allegation that there was an advantage for Infratil, since the price for the put option had already been negotiated in the context of the initial agreement with Infratil in 2005 by way of a public, transparent and non-discriminatory tender procedure. Germany argued that the moderate increase in the price in 2009 as compared to the amount agreed in 2005 should be seen as proportionate to the counter-performances by Infratil.
- (110) Germany stated that the takeover of losses was economically more advantageous than the consequences from Infratil's exercise of its put option. Firstly, Germany stressed that to close the airport was not an option, as the full-time operation of the airport was a public service obligation. Secondly, it would not have been possible to find a new private investor within a reasonable time, as a Union wide public procurement procedure would have been necessary. Such a procedure consumes time (approximately 12 months) and resources.

#### 4.3. POTENTIAL STATE AID IN FAVOUR OF RYANAIR

##### 4.3.1. *2000 Agreement*

- (111) According to Germany, there was no economic advantage for Ryanair. Germany stated that a private operator comparable to FLG would have accepted the agreement with Ryanair under similar conditions. When concluding the 2000 Agreement, FLG was pursuing the strategy to get profitable in the long term. In that context, Germany argued that the business strategy of airports was usually based on aeronautic activities as well as non-aeronautic activities, including the operation of shops, restaurants and parking areas. Therefore, in Germany's view, it is profitable to offer low aviation fees to all airlines in order to raise passenger numbers and to achieve significant growth in the non-aeronautic sector, which can compensate for reduced incomes in the aeronautic sector.

<sup>(1)</sup> Oberverwaltungsgericht Schleswig; 4MR1/05.

- (112) Germany further stated that there were several advantages in recruiting airlines that provide scheduled services. In particular, Germany argued that the airport could expect that the respective airlines would not enter into an agreement with competing airports in the future. In addition, the airport was expected to attract other airlines.
- (113) Germany supported its argument concerning the compliance with the conditions on the market with the expert report by Ernst & Young. In addition, Germany pointed out that the private majority shareholder Infratil also continued to support the strategy set out in recital 112 after the privatisation of the airport.
- (114) Germany argued that the business strategy from 2000 holds up from an *ex post* perspective. Passenger numbers increased considerably, Ryanair added new destinations and Lübeck airport was able to acquire new airlines such as Wizz Air. Germany stated that the agreement with Ryanair was essential for the attraction of the private investor Infratil.
- (115) Germany further stated that there was no selective advantage for Ryanair, as FLG would have offered the same conditions to any other interested airline.
- (116) Furthermore, Germany is of the opinion that the alleged advantages in favour of Ryanair cannot be imputed to the State due to the ruling of *Stardust Marine* <sup>(1)</sup>. According to Germany, FLG acted with autonomy and without any exertion of influence by the State, before, during and after the conclusion of the 2000 Agreement. Furthermore, Germany stated that FLG was not integrated into the structures of the public administration. Finally, Germany stated that the supervision of the public authorities over the management of FLG is limited to aviation and public remit matters and does not include business management activities. Further, Germany argued that Hansestadt Lübeck and in particular the supervisory board of FLG were not involved in the decision concerning the 2000 Agreement, as confirmed by the minutes of the supervisory board meeting from 11 July 2000 and a written confirmation of the former CEO of FLG.
- (117) In addition, Germany stated that the 2000 Agreement does not distort or threaten to distort competition and does not affect trade between Member States, as there is no real competitive relationship between Lübeck airport and other airports.

#### 4.3.2. 2010 Agreements

- (118) Germany submitted that the Side Letter No 1 complies with market conditions and that it did not give an advantage to Ryanair. Germany argued by reference to the *Helaba I* <sup>(2)</sup> case that there is no advantage when other operators of regional airports offer Ryanair similar conditions. Germany further argued that this has been proven by Ryanair's comparator analysis.
- (119) Germany argued that low cost carriers such as Ryanair and Wizz Air have fewer demands with regard to ground handling services and infrastructure services. Firstly, less check-in counters are needed as check-in for Ryanair flights is available online and less luggage is carried. Secondly, there are no passenger busses. Thirdly, since walking distances are shorter at Lübeck airport, the time for Ryanair airplanes on the ground is shorter. Fourthly, as there are no transfer flights, no facilities for transfer are needed. Finally, since the flight crew often takes charge of the cleaning inside the airplane, there is less demand for ground cleaning services.
- (120) Germany argued that there was no imputability to the State, using the same arguments as for the 2000 Agreement.
- (121) Germany pointed out that the Side Letter No 2 is an extension of the 2000 Agreement, and did not substantially change the 2000 Agreement. As the 2000 Agreement complies with the requirements of the market, the Side Letter No 2 would also do so.
- (122) Lastly, Germany stated that there is no negative impact on competition or trade, since Lübeck airport is a small regional airport and is not in competition with Hamburg airport.

<sup>(1)</sup> Case C-482/99 *France v Commission* ('Stardust Marine') ECLI:EU:C:2002:294.

<sup>(2)</sup> Case T-163/05, *Bundesverband deutscher Banken v Commission* (*Helaba I*) ECLI:EU:T:2010:59.

#### 4.4. CHARGES FOR THE DE-ICING OF AIRCRAFTS AT THE AIRPORT

- (123) Germany stated that the charges for de-icing are not individually negotiated but are based on a scheme for special services, which are applicable to all airlines. Germany further noted that there was no State aid since the basic elements for such aid were absent. Firstly, the charges were not selective. Secondly, the charges were not imputable to the State, which is confirmed by the fact that Infratil and Yasmina, two private investors, were responsible for setting those charges during the time they were operating the airport for a substantial time. Thirdly, there was no advantage. The private investors Infratil and Yasmina decided not to change the scheme for special services, which is an indication that the de-icing charges were in accordance with the requirements of the market.

### 5. OBSERVATIONS FROM THIRD PARTIES

#### 5.1. POTENTIAL STATE AID IN FAVOUR OF FLG

- (124) In relation to a possible State aid in favour of FLG, the majority of commenting parties agreed with Germany on the matter. In particular, Ryanair, FLG, IHK Lübeck and ADV.
- (125) Disagreeing third parties were SGF, BDF, and two individual persons Peter C. Klanowski and Horst Conrad. These parties argued that FLG received State aid from Hansestadt Lübeck:
- Loss transfer agreement: SGF stated that a public service obligation for the operation of the airport is only given for general aviation and does not include commercial aviation. Contrary to what Germany stated, SGF was of the opinion that airports in Germany can be closed at the request of the operator of the airport. SGF further stated that both the rent paid by FLG until 2006 and the rent paid afterwards are too low;
  - Lease agreement and takeover of loans: According to BDF, the failure of Germany to provide sufficient information to the Commission is an indication for the existence of aid;
  - Potential investment aid to FLG by means of 2005 Regional Airports Decision and its alleged violation: in disagreement with the statements in the opening decision, SGF stated that aid to the airport was granted prematurely, as there was no planning approval decision yet. According to SGF, this created a time advantage for Lübeck airport compared to other airports and threatened competition in the market. With respect to possible aid for infrastructure measures, SGF and Klanowski are of the opinion that some of the measures (namely the financing of security fences, lighting and the instrument landing system) have to be considered operating aid. Further, SGF stated that those measures do not fulfil the criteria concerning accounting and financial reporting as defined in the *Altmark* decision<sup>(1)</sup> by the Court of Justice. Moreover, SGF is of the opinion that the measures do not follow a clearly defined objective of general interest. In addition there is no satisfactory medium-term prospect for the use of the infrastructure. Finally, SGF stated that there is no access to the new infrastructure in an equal and non-discriminatory manner even under the new schedule of charges, as only Ryanair is able to fulfil the criteria to benefit from the lowest fees;
  - Financing of infrastructure investments by Hansestadt Lübeck and the Land Schleswig Holstein: SGF further argued that future investments were calculated on the basis of incorrect assumptions and were therefore excessive. Apart from the airport's failure to generate higher passenger numbers, SGF added that the airport could not curb its losses. In reference to the North German Air Traffic Concept ('Norddeutsches Luftverkehrskonzept'), SGF argues that all larger airports in North Germany (including Hamburg) have ample capacities at their disposal. It is stated that there are no bottlenecks in relation to available capacities until at least 2030. In addition, the investments, in particular the instrument landing system, cannot be regarded as reimbursement for a public service. According to SGF, it was in the economic interest of FLG to invest in this system in order to enable the achievement of its middle-term economic goals.
  - Subordination of shareholder loans of Hansestadt Lübeck to FLG: SGF is of the opinion that Lübeck airport is an 'undertaking in difficulties' and has been so in 2008/2009. In that relation, the subordination agreement is regarded by SGF as an important tool to prevent insolvency. According to SGF, the subordination of shareholder loans amounted to EUR [...].

<sup>(1)</sup> Case C-280/00 *Altmark Trans GmbH und Regierungspräsidium Magdeburg v Nahverkehrsgesellschaft Altmark GmbH* ECLI:EU:C:2003:415.

## 5.2. POTENTIAL STATE AID IN FAVOUR OF INFRATIL

5.2.1. *Sale of shares in FLG*5.2.1.1. **Infratil**

- (126) Infratil stated that the shares to FLG were purchased in accordance with a tender procedure which was Union wide, open, transparent and non-discriminatory. Moreover, the purchase price equals the market value of 90 % of the shares in FLG under the given circumstances. Therefore the 2005 Participation Agreement did not contain any elements of State aid. Infratil added that it gave the best bid, which cannot be altered by the fact that Hansestadt Lübeck and Infratil entered into a second round of negotiations to modify the terms of the original agreement.

5.2.1.2. **Ryanair**

- (127) According to Ryanair, the privatisation has been realised by an open, transparent and non-discriminatory tender procedure, as was proved by an expert report drawn up by Ernst & Young. In this regard, Ryanair stressed the reputation and independence of Ernst & Young. According to Ryanair, closing the airport would not have been an option because of economic and policy reasons.

5.2.1.3. **Schutzgemeinschaft**

- (128) With respect to possible State aid in connection with the privatisation of FLG, SGF expressed strong doubts as to the compatibility of the purchase price with market standard. Further, SGF argued that the agreement contained guarantees by Hansestadt Lübeck, which are also State aid relevant.

5.2.2. *The 2009 Additional Agreement and the renegotiation of the put option — Takeover of further losses, investments and other costs*5.2.2.1. **Infratil**

- (129) Infratil explained that the 2009 Additional Agreement has to be seen in the context of the 2005 Participation Agreement and the condition of obtaining the planning approval. Since the planning approval was eventually not obtained because of the judgment of the OVG, Infratil announced that it would exercise its put option in 2008. The only option for Hansestadt Lübeck to prevent Infratil from this step was the 2009 Additional Agreement.
- (130) Infratil stated that the option chosen by Hansestadt Lübeck met the requirements of the market. If Infratil had exercised the put option, HL would have had to bear all costs and losses stemming from the operation of Lübeck airport from 31 December 2008. A resale of the airport to a private investor would not have been possible within a short period of time and the closure of the airport was not an option for Hansestadt Lübeck, due to an obligation under public law and to financial reasons. In addition, the departure of Infratil would probably have caused Ryanair to reduce or cease to offer its services at Lübeck airport. Therefore, Infratil stated that the operating losses of FLG would have been higher if Infratil had exercised its put option.
- (131) Infratil stated that the difference between the put option price paid in accordance with the 2009 Additional Agreement and the put option price that would have been payable in January 2009 had its basis in performances agreed by the parties. Hansestadt Lübeck would have had to cover all but two of the additional amounts in any case after the de-privatisation, leading to the conclusion that the 2009 Additional Agreement was the most economic ('wirtschaftlich') decision.
- (132) Infratil further argued that the additional amounts did not constitute an advantage for Infratil. Firstly, the additional coverage of losses in 2009 would not have had to be paid by Infratil, if it had exercised its put option. Secondly, Hansestadt Lübeck's obligation to pay interest for the shareholder loans for the period from 1 January 2009 to 22 October 2009 cannot be considered an economic advantage, as Infratil could have realised the same or even higher returns from the proceeds of the put option in January 2009. In a hypothetical scenario, Infratil would have utilised the proceeds for the repayment of existing debts in order to save interest. Furthermore, no advantage was conferred to Infratil since Lübeck airport was not expected to make profits in the short term, but rather to continue to make losses.

- (133) Infratil argued that the exercise of the put option did not enable Infratil to restore the situation *ex quo ante* completely, since Infratil had to carry certain losses (difference between approved operating losses and actual operating losses) without compensation.
- (134) Even if the Commission were to find that the renegotiation of the put option constituted State aid, Infratil considers it to be in compliance with the internal market. If the Commission were to find that Hansestadt Lübeck granted aid to Infratil by taking over losses incurred by FLG in 2009, according to Infratil such aid would merely have been a compensation for the losses incurred in the discharge of services of general economic interest.

#### 5.2.2.2. Hansestadt Lübeck

- (135) Hansestadt Lübeck argued that the agreement to take over losses was the least costly and risky alternative. This is particularly justified on the basis of the legal obligation for Hansestadt Lübeck to operate the airport according to paragraph 45(1) of the German Air Traffic Authorisation Regulation (Luftverkehrs-Zulassungs-Ordnung, 'LuftVZO'). Therefore, a closing of the airport would not have been an option. In addition, closing the airport would have consumed too much time and resources.
- (136) Additionally, Hansestadt Lübeck reminded the Commission that neither Hansestadt Lübeck nor Infratil had previous experience with the privatisation of an airport. This may lead to certain miscalculations, but certainly not to the conclusion that either party did not act in accordance with market principles. Furthermore, Hansestadt Lübeck argued that Infratil was the only bidder in the context of the privatisation, therefore minimising the negotiating power of Hansestadt Lübeck.

#### 5.2.2.3. Schutzgemeinschaft

- (137) SGF submitted that the 2009 Additional Agreement constitutes new aid, leading to an advantage for Infratil. As that the aid exceeds the *de minimis* threshold, it should have been notified, which Germany failed to do.
- (138) According to SGF, Infratil clearly received an advantage from the 2009 Additional Agreement. Regarding the application of the MEO test, SGF pointed out that the positive impact of an agreement on the region should not be taken into consideration. In that context, SGF stated that Lübeck airport had no prospects of profitability. SGF added that FLG could only prevent insolvency in the beginning of 2008 because of the concessions made by Infratil. SGF disagreed that the MEO test was fulfilled, since no private investor would have been willing to keep operating with such losses, as the exercise of Infratil's put option shows.
- (139) With regard to the closure of the airport, SGF argued that Hamburg is equipped with sufficient capacities to operate without Lübeck as back-up airport. In addition, according to SGF, the costs for closure were over-estimated by FLG. Table 5 was deemed more realistic, even though it may still be an overestimation according to SGF:

Table 5

#### Costs for closure of Lübeck airport as submitted by Schutzgemeinschaft

Costs	In thousands EUR
Costs of liquidator	[...]
Current losses for temporary continuation until 2010/2011	[...]
Social plan	[...]
Repayment of subsidies	[...]
Costs of auditor	[...]

- (140) Additionally, the alleged duty to operate the airport as a public service is questioned by SGF, since the permit to operate the airport does not lead to a service of general economic interest. Such a permit can be cancelled.

#### 5.2.2.4. Ryanair

- (141) Ryanair argued that the difference between the put option prices agreed in 2005 and 2009 and the actual put option price paid by Hansestadt Lübeck could have been caused by a number of factors, such as trends in asset prices. Economic conditions prevailing in 2005 were far more buoyant than in 2009, and the difference in price may have been a reflection of this.

### 5.3. POTENTIAL STATE AID IN FAVOUR OF RYANAIR

#### 5.3.1. 2000 Agreement

##### 5.3.1.1. Ryanair

- (142) Ryanair stated that the contract with FLG was entered into on the basis of economic considerations. Lübeck airport was seen as a viable secondary airport to Hamburg airport and Lübeck itself was regarded as valuable cultural destination. In addition, services were launched at Lübeck airport to secure a low cost base and to analyse the demographics so as to establish whether there was a sufficient hinterland surrounding a new airport. Even though Ryanair could not offer a business plan to substantiate its decision to start services at Lübeck airport, Ryanair emphasised that such a business plan is not generally required for a private market investor. Ryanair explained that its services from Lübeck airport were discontinued because of commercial considerations, including cost increases and a yield lower than anticipated (as a consequence of economic recession).
- (143) Ryanair stated that regional airports in the Union are in a difficult market position. Therefore, airport revenues from both aeronautical and non-aeronautical activities have to be taken into consideration, which is referred to as the 'single till approach'. Since contracts with Ryanair typically promise a large number of passengers, such business relations often help to raise the airport's recognisability and to attract other airlines as well as retails and other service providers. In addition, Ryanair stated that there was strong evidence that the increased number of passengers would lead to a rise in non-aeronautical revenues. As proof, Ryanair submitted the following table:

Table 6

#### Non-aeronautic revenues as a percentage of total income at selected airports

GBP million	2010/2011 (%)
Bournemouth	[...]
Liverpool	[...]
Leeds Bradford	[...]
Humberside	[...]
Doncaster Sheffield	[...]
Exeter	[...]
Bristol	[...]
Luton	[...]
Manchester	[...]
Belfast International	[...]

GBP million	2010/2011 (%)
East Midlands	[...]
Newcastle	[...]
Birmingham	[...]
Glasgow	[...]
Cardiff	[...]
Stansted	[...]
Edinburgh	[...]
Aberdeen	[...]
Southampton	[...]
Average	[...]

Source: UK airports performance indicator.

- (144) Ryanair argued that, from an market economy operator viewpoint, any commercial offer will normally be an improvement over the then-current situation, as long as it expects marginal benefits to exceed its marginal costs. Furthermore, Ryanair argued that it has to be considered that Ryanair has significantly reduced needs compared to other airlines given its business model and operational efficiency.
- (145) In order to provide more evidence for the compliance of its 2000 Agreement with market requirements, Ryanair conducted a comparison between airports of comparable size and situation as Lübeck airport. Comparator airports are Bournemouth Airport, Grenoble Airport, Knock Airport, Maastricht Airport, Nimes Airport and Prestwick Airport. A comparison of charges paid by Ryanair at the comparator airports showed that costs paid by Ryanair at Lübeck airport were higher in general than the average level at the comparator airports on both a per-passenger and a per-turnaround basis. Ryanair urged the Commission to consider the comparator analysis more strongly than the profitability analysis in its assessment of whether the 2000 Agreement complies with the MEO principle.
- (146) A report compiled by Oxera calculates the net present value ('NPV') of the 2000 Agreement. The report finds a positive NPV of EUR [...]. Oxera conducted a number of sensitivity checks with respect to this calculation.

#### 5.3.1.2. Air Berlin

- (147) Air Berlin stated that the routes offered by Ryanair from Lübeck airport are in direct competition with those offered by Air Berlin at Hamburg airport. In particular, the destinations of London, Milan and Barcelona are concerned, since both airlines have them in their portfolio.
- (148) Air Berlin argued that the purpose of Ryanair's marketing strategy was to poach potential clients of, amongst others, Air Berlin. Due to the low prices of Ryanair, customers moved from Hamburg to Lübeck airport. Air Berlin claims that as a result of the State aid, Air Berlin suffered substantial economic losses. Air Berlin had to discontinue some of its flights due to the parallel offer by Ryanair at Lübeck airport. In addition, Air Berlin stated that it finds it difficult to open new destinations from Hamburg airport as long as similar destinations are offered by Ryanair from Lübeck airport for excessively low prices.
- (149) Furthermore, Air Berlin referred to the closure of Lübeck airport for 6 days from 19 April 2004 to support its arguments that Ryanair paid unfairly low charges and that there was competition between Lübeck and Hamburg. During the time of closure, Ryanair had to move its traffic from Lübeck airport to Hamburg airport. As a result of the higher airport charges at Hamburg airport, Ryanair incurred additional costs of EUR [...], for which Ryanair billed FLG. Therefore, Air Berlin stressed that Ryanair already obtained an advantage of EUR [...] over airlines operating at Hamburg airport within 6 days.

- (150) Air Berlin further supported its argument by offering a table of passenger numbers and flights before (until 1999) and after (from 2000) Ryanair commenced its operation at Lübeck airport:

Table 7

**Air Berlin table of passenger numbers and flights**

	Passenger numbers (persons)	Movement of airplanes
1997	34 132	[...]
1998	60 520	[...]
1999	48 522	[...]
2000	142 586	[...]
2001	192 726	[...]
2002	244 684	[...]
2003	514 472	[...]

- (151) According to Table 7, there was a significant increase in passenger numbers in 2000, when Ryanair started offering flights from the airport. Air Berlin stated that 97 % of those passengers can be attributed to Ryanair. This is put in perspective with the losses made by FLG before (until 1999) and after (from 2000) Ryanair commenced its operation at Lübeck airport:

Table 8

**Air Berlin table of FLG losses**

FLG	Losses (in EUR)
1999	[...]
2000	[...]
2001	[...]
2002	[...]
2003	[...]
<b>Total</b>	<b>[...]</b>

- (152) On the basis of Tables 7 and 8, Air Berlin argued that, even though the passenger numbers almost doubled between 2002 and 2003, losses increased in that time period by more than EUR [...]. In addition, Air Berlin specified that FLG granted Ryanair preferential conditions, rebates as well as refunds and other payments. The fees paid by Ryanair for using Lübeck Airport were below the fees laid down in the then applicable schedule of charges. Furthermore, Air Berlin stated that Ryanair was providing marketing service not depending on marketing costs. According to Air Berlin, the benefits for marketing services paid to Ryanair appear to be unrelated to the actual marketing expenditures incurred by Ryanair.
- (153) Therefore, Air Berlin believes that the 2000 Agreement between FLG and Ryanair did not meet the market requirements. According to Air Berlin, Lübeck is operated for regional policy considerations rather than for profitability.



- (154) According to Air Berlin the availability of preferential conditions for Ryanair in Lübeck on the one hand and the manner and condition of the conditional privatisation of the airport on the other hand can hardly be regarded separately. Air Berlin does not consider the participation agreement with Infratil as evidence for compliance with the MEO principle as a put option is included. On the contrary Air Berlin is of the opinion that an MEO would have launched a new call for tender for the airport in 2005.
- (155) Additionally, Air Berlin stated that the agreement with Ryanair was imputable to Germany. According to the articles of association of FLG, the supervisory board has to give its approval for charges resulting from the use of the airport (Paragraph 12 of the articles of association). Four of the six members of the supervisory board are elected by Hansestadt Lübeck. Therefore, Air Berlin concluded that Hansestadt Lübeck could be held responsible. Air Berlin believes that certain statements by key FLG officials are further evidence for the imputability of the agreement at hand.

#### 5.3.1.3. Infratil

- (156) With respect to possible State aid granted to Ryanair, Infratil stated that the 2000 Agreement was economically sound, an important asset for the development of the airport and in full compliance with the MEO principle. Infratil is further of the opinion that the 2000 Agreement and its implementation are not imputable to Hansestadt Lübeck or other State entities. Hansestadt Lübeck or the supervisory board issued no orders or guidelines for the adoption of the 2000 Agreement and did not control that adoption.

#### 5.3.1.4. Bundesverband der Deutschen Fluggesellschaften

- (157) BDF is of the opinion that the conditions offered to Ryanair by FLG are not compatible with the internal market, as they do not fulfil the requirements of transparency, non-discrimination and do not contain sanctions if Ryanair does not fulfil its obligations under the 2000 Agreement.
- (158) According to BDF, discriminatory derogations from the effective schedules of charges in favour of one particular airline lead to strong distortions of competition and to a subsidised redistribution of passengers within the same agglomeration, which does not make sense for the overall economy. Further, BDF stated that a measure has to be notified to the Commission if it cannot be ruled out that that measure involves State aid. BDF stated that it is legally possible to shut down a German airport at the request of the operator under certain conditions.

#### 5.3.2. 2010 Agreements

##### 5.3.2.1. Flughafen Lübeck GmbH

- (159) FLG stated that the measure was not imputable to Germany, since the 2010 Agreements were negotiated by FLG autonomously.

##### 5.3.2.2. Ryanair

- (160) Ryanair argued that the 2010 Agreements are not imputable to the State.
- (161) Ryanair stated that Side Letter No 1 and Side Letter No 2 are merely short side letters extending the duration of the existing arrangements under Ryanair's 2000 Agreement. The only new element was a commercially negotiated adjustment to marketing support in the Side Letter No 1. Ryanair therefore stated that the implications of the two side letters are covered by Ryanair's submissions regarding the 2000 Agreement.
- (162) Ryanair submitted a report, compiled by Oxera <sup>(1)</sup>, evaluating the expected profitability of Side Letter No 1 and Side Letter No 2, based on the 2009 business plan <sup>(2)</sup>, drawn up by Lübeck airport prior to signing Side Letter No 1 and Side Letter No 2. The report indicates that, under reasonable assumptions at the time when the two

<sup>(1)</sup> Oxera report, Economic MEOP assessment: Lübeck airport, 6 February 2015.

<sup>(2)</sup> Business plan 'Takeoff Konzept' from 21 December 2009, see [http://www.luebeck.de/stadt\\_politik/rathaus/wahlen/files/M21\\_Take\\_off\\_Konzept\\_HL-Umdruck\\_17-156\\_WA\\_Ltsh.pdf](http://www.luebeck.de/stadt_politik/rathaus/wahlen/files/M21_Take_off_Konzept_HL-Umdruck_17-156_WA_Ltsh.pdf)

Side Letters were signed, they were expected to be sufficiently profitable. An airport behaving like a MEO would have offered similar terms. According to Oxera, this also holds true if the 2010 Marketing services agreement was to be considered jointly with the March and October 2010 Side letters. Marketing costs for Lübeck airport were therefore included in the assessment.

### 5.3.2.3. Air Berlin

- (163) Air Berlin pointed out that there were three agreements signed in 2010: Side Letter No 1, Side Letter No 2 and the 2010 Marketing services agreement. The Commission should take into account all of the 2010 Agreements in its assessment.

## 5.4. CHARGES FOR THE DE-ICING OF AIRCRAFTS AT THE AIRPORT

### RYANAIR AND WIZZ AIR

- (164) Ryanair and Wizz Air argued that all alleged aid granted by Lübeck airport to Wizz Air and other airlines cannot be imputed to the German State, based on the *Stardust Marine* judgment <sup>(1)</sup>. Wizz Air argues that, even though Hansestadt Lübeck was the sole owner of the airport during the time in question, this is not sufficient to confirm any imputability to the State. Wizz Air argues that the lack of imputability to Germany was even more obvious during the time of ownership of 90 % of the FLG shares by Infratil.
- (165) Ryanair and Wizz Air stated that those charges and any discounts represent an insignificant share of an airline's costs of dealing with an airport. According to Ryanair, those charges cannot be assessed in isolation since there is no retail market for de-icing. A discount on de-icing is likely to be counter-weighed by the commercial benefits being obtained by the airport elsewhere in the negotiations. Ryanair cited the Charleroi judgment, where it is confirmed that 'it is however necessary, when applying the private investor test, to envisage the commercial transaction as a whole' <sup>(2)</sup>.
- (166) Finally, Ryanair and Wizz Air stated that the price for de-icing fluid charged at Lübeck airport was the standard price charged across public and private airports.

## 6. COMMENTS OF GERMANY ON THIRD PARTIES

### 6.1. COMMENTS ON RYANAIR'S SUBMISSIONS

- (167) According to Germany, Ryanair's submissions reveal that FLG acted in line with the MEO principle.
- (168) Germany particularly highlighted the usefulness of Ryanair's approach of proving the market conformity of the agreement through a profitability analysis and a comparator analysis.
- (169) According to Germany, the Side Letter No 1 and Side Letter No 2 are not relevant to the present investigation. Firstly, the March and October 2010 Side letters are not imputable to the State since they were autonomously negotiated and entered into by FLG, without interference of Hansestadt Lübeck. Secondly, with regards to Side Letter No 2, Germany pointed out that it merely constituted an extension of the 2000 Agreement, therefore not containing any material change. Therefore, all considerations on the 2000 Agreement also apply to the Side letters.
- (170) Germany stated that it does not understand why the 2010 Marketing services agreement should be included in the present investigation, since it involved no public funds. The costs as laid down in the 2010 Marketing services agreement were covered by the IHK Lübeck. Moreover, Germany commented that the 2010 Marketing services agreement can be regarded as being in compliance with market standards. This is supported by the observation that FLG was charged with fewer costs than other airports with a similar agreement. Even more, the 2010 Marketing services agreement with Lübeck airport was based on the promise of Ryanair to expand its flight portfolio by two destinations.

<sup>(1)</sup> Case C-482/99 *France v Commission* ('Stardust Marine') ECLI:EU:C:2002:294.

<sup>(2)</sup> Case T-196/04 *Ryanair v Commission* ('Charleroi') ECLI:EU:T:2008:585.

- (171) Another point added by Germany is the function of Lübeck airport as a back-up airport for Hamburg airport and as a necessary infrastructure for the Northern German population.

#### 6.2. COMMENTS ON SGF'S SUBMISSIONS

- (172) Germany stated that SGF was not an interested party within the meaning of Article 108(2) TFEU and Article 1(h) of Regulation (EC) No 659/1999, and therefore had no right to submit comments. The members of SGF merely own land in close distance to the airport and therefore want to get rid of the perceived nuisances created by the operation of the airport. Such goals, however, have to be striven for by way of national legal remedies.
- (173) Moreover, Germany argued that the substance of the submissions made by SGF was inaccurate. Firstly, Germany disagrees with SGF's statement that Lübeck airport does not fulfil a public service function. SGF had argued that the airport is only operated in the general interest to the extent of interests regarding 'general aviation'. Germany disagrees with that statement since Lübeck airport has an operational duty for reasons of infrastructural public service functions and the back-up function for Hamburg airport. The latter was officially laid down in the North German Air Traffic Concept ('Norddeutsches Luftverkehrskonzept').
- (174) Regarding the lease agreement, Germany restated its position that there was no advantage for FLG through the old lease agreement until the end of 2005, nor through the new lease agreement from 2006.
- (175) Germany further commented on SGF's submissions concerning the infrastructure investments. Germany stated that planning approval is merely an administrative tool which can be given retrospectively and which is neither a prerequisite to approve funding nor having an effect on competition. In addition, Germany disagrees with SGF's categorisation of the investments as maintenance measures rather than measures for the improvement of the traffic function of the airport. The measures were argued by Germany to be necessary in order to comply with national and international regulations. According to Germany, the fact that Ryanair is the largest user of the airport does not lead to the conclusion that it is favoured.
- (176) Concerning SGF's calculations regarding the middle-term perspectives of Lübeck airport, Germany stated that the submitted observations were incorrect. Germany argues that it has been proven that at the time of the investment optimistic middle-term perspectives existed, as acknowledged by the Commission in its 2007 Opening decision.
- (177) In addition, Germany commented on SGF's claims that FLG was an 'undertaking in difficulty'. Germany is of the opinion that any argumentation by SGF on the basis of the guidelines on State aid for rescuing and restructuring firms in difficulty was moot. According to Germany, those guidelines are not applicable, since the granted benefits do not constitute State aid in the first place. The benefits were never categorised as rescue or restructuring aid or they would have to be approved pursuant to other guidelines.
- (178) Germany disagrees with SGF's statement that Hansestadt Lübeck claimed that the closure of the airport was impossible and that it did not consider such an option. According to Germany, Hansestadt Lübeck considered this option but decided against it, since calculations led to the conclusion that this would not be the most economic decision. In addition, Germany clarified that a closure of an airport cannot be done on an *ad hoc* basis due to paragraph 45(1) LuftVZO. Airport facilities are a public good and have an operational duty. Therefore, in order to be able to close the airport, the operation permit would have to be withdrawn as the result of a lengthy legal procedure. Germany claims that the granting of the withdrawal of the permit is excluded if the responsible administration believes the public interest to outweigh in favour of the continuation of the operation of the airport. Therefore, an attempt to close the airport would not be impossible, but certainly difficult, lengthy, and thereby costly. Such consequences were referred to have happened at the closing of airport Berlin-Tempelhof. Germany therefore believed the decision to discard the option of closing the airport and to rather expand and invest in infrastructure to attract a private investor to be the more economic decision. Retrospectively, this was the correct approach, since a private investor was found.

#### 6.3. COMMENTS ON AIR BERLIN'S SUBMISSIONS

- (179) According to Germany, Air Berlin would have been granted the same advantages as Ryanair if it had fulfilled the same criteria concerning passenger numbers and flight frequency. Instead, Air Berlin denied any offer for negotiations with FLG, since it never intended to take up services at Lübeck airport. In contrast, Air Berlin never objected to the conditions under which Ryanair operates at Hamburg airport. In addition, several airlines have

complained (amongst others to the Commission) that Air Berlin has been benefitting from substantial State aid by the United Arab Emirates. Therefore, it cannot present itself as victim towards its main competitor Ryanair.

- (180) Germany disagreed to the comments of Air Berlin concerning the existence of competition between Lübeck airport and Hamburg airport. In particular, Germany refers to the fact that Hamburg had 70 times as many passengers as Lübeck airport in 2000, when the 2000 Agreement with Ryanair was signed. The absence of complaints by other airports shows that there was no competition between the two airports. Germany further added that Hamburg airport and Rostock airport grew in 2008, while Lübeck airport decreased its passenger numbers by 10 %.
- (181) Furthermore, Germany rejected Air Berlin's argument that there was an economic advantage for Ryanair. Germany stated that Air Berlin used inaccurate calculations and that the only test relevant for assessing whether an airport-airline agreement is market conform was the MEO principle. Germany believes that the Ryanair agreements met the market requirements, since the long-term prospects of the airport were positive in 2000.

#### 6.4. COMMENTS ON BDF'S SUBMISSIONS

- (182) Germany pointed out that Air Berlin is a member of BDF, leading to close ties and overlapping submissions. Germany disagreed that FLG would artificially create demand through excessively low prices and that FLG would deviate from the schedule of charges in a discriminatory manner in favour of one airline. According to Germany, FLG would not have had any reason to discriminate against single airlines in order to increase demand. On the contrary, more airlines would have meant more business at Lübeck airport. Therefore, Germany asserts that any airline could have entered into an agreement with Lübeck airport at similar conditions if it had made an offer comparable to that of Ryanair.

### 7. ASSESSMENT

#### 7.1. INTRODUCTION

- (183) According to Article 107(1) TFEU, 'any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the Internal market'. The criteria laid down in Article 107(1) TFEU are cumulative. In order to determine whether a measure constitutes State aid, the following conditions have to be fulfilled:

- the beneficiary is an undertaking;
- the measure confers an advantage;
- the advantage is granted through State resources;
- the advantage is selective; and
- the measure distorts or threatens to distort competition and is liable to affect trade between the Member States.

- (184) Thus, it must be determined whether those criteria are met in relation to each of the measures under consideration, namely:

- the potential State aid in favour of FLG,
- the potential State aid in favour of Infratil,
- the potential State aid in favour of Ryanair, and
- the charges for the de-icing of aircrafts at the airport.

- (185) As to the potential State aid in favour of FLG, the Commission will first assess whether the potential beneficiary of State aid, FLG, still exists and if not, whether the economic activity of FLG is still continued. In addition, the Commission has to assess whether the advantage lying in any potential State aid to FLG could have been passed on to its successors, i.e. whether there was economic continuity.

- (186) As to the potential State aid in favour of Ryanair, the Commission will only assess the 2000 Agreement. At the date of this Decision, the Commission does not have enough information in its file to assess whether later agreements, in particular those concluded in 2010, constitute State aid in favour of Ryanair. Those agreements therefore will be assessed in a separate decision.

## 7.2. POTENTIAL STATE AID IN FAVOUR OF FLG

### 7.2.1. *Beneficiary of the potential State aid*

- (187) The Commission has opened the formal investigation procedure on potential State aid in favour of FLG. In January 2013, however, part of the assets of FLG were sold to Yasmina. FLG was merged into Hansestadt Lübeck and the legal entity FLG ceased to exist. In 2014, Yasmina announced insolvency, resulting in the initiation of insolvency proceedings in April 2014. In August 2014, PuRen took over the assets of Yasmina.
- (188) In the cases where the Commission takes a negative decision ordering the recovery of incompatible aid to an undertaking in the context of Articles 107 and 108 of the Treaty, the recovery obligation may be extended to a new company to which the beneficiary of the aid in question has transferred or sold part of or all its assets, where that transfer or sale structure demonstrates that there is economic continuity between the two companies.
- (189) If the Commission were to find that there was incompatible aid to FLG which needed to be recovered, it would have to assess who benefitted from the aid and which company the recovery obligation should be addressed to. If there was no company to which the recovery obligation could be extended, the Commission would not need to assess whether there was aid to FLG. Therefore, the Commission considers it appropriate to first assess whether there was economic continuity between FLG and Yasmina and whether the recovery obligation can be extended to Yasmina (see Section 7.2.2) and whether PuRen, the buyer of Yasmina's assets, could have benefitted from the aid (see Section 7.2.3). The Commission then assesses whether the economic activity which might have benefitted from the aid still exists (see Section 7.2.4). The question whether the measures provided to FLG included State aid, and if so, whether such aid was compatible, will only have to be examined if a beneficiary of the aid can be identified, i.e. either if there was economic continuity between FLG and Yasmina or PuRen, or if the aid remained at the level of the economic activity, i.e. at the level of the operation of Lübeck airport.

### 7.2.2. *Economic continuity between FLG and Yasmina*

- (190) In its decision concerning the sale of assets of the airline Alitalia <sup>(1)</sup>, the Commission considered that if the acquisition of assets takes place at market price and does not show economic continuity between the old company and the new structure, it cannot be assumed that the new structure has benefited from the competitive advantage created by State aid already granted to the original company.
- (191) According to established case law <sup>(2)</sup>, economic continuity between the original entity and the new structure is established on the basis of a set of indicators. This set of indicators was confirmed by the Court in the case *Ryanair v Commission* <sup>(3)</sup>. It is however not a mandatory set of cumulative requirements that have all to be fulfilled in each case <sup>(4)</sup>. The following factors may be taken into consideration in assessing the economic continuity between two entities:

— the scope of the sold assets (assets and liabilities, maintenance of workforce, bundle of assets),

<sup>(1)</sup> Commission Decision of 12 November 2008 State aid N 510/2008 — Italy — *Sale of assets of Alitalia* (OJ C 46, 25.2.2009, p. 6).

<sup>(2)</sup> Cases C-328/99 and C-399/00, *Italy and SIM 2 Multimedia v Commission* ECLI:EU:C:2003:252; Commission decision of 17 September 2008, State aid N 321/2008, N 322/2008 and N 323/2008 — Greece — *Vente de certains actifs d'Olympic Airlines/Olympic Airways Services* (OJ C 18, 23.1.2010, p. 9); Commission decision of 12 November 2008 State aid N 510/2008 — Italy — *Sale of assets of Alitalia* (OJ C 46, 25.2.2009, p. 6); Commission decision of 4 April 2012 SA.34547 — France — *Reprise des actifs du groupe SERNAM dans le cadre de son redressement judiciaire* (OJ C 305, 10.10.2012, p. 5).

<sup>(3)</sup> Case T-123/09, *Ryanair Ltd v Commission* ECLI:EU:T:2012:164.

<sup>(4)</sup> Case T-123/09, *Ryanair Ltd v Commission* ECLI:EU:T:2012:164, paragraph 156.

- the sale price,
- the identity of the buyer(s),
- the moment of the sale (after the initiation of preliminary assessment, the formal investigation procedure or the final decision), and
- the economic logic of the operation.

#### 7.2.2.1. Scope of the sold assets

- (192) The Commission notes, at the outset, that, in principle, a complete take-over of the seller's assets by the buyer may point in the direction of economic continuity between the buyer and the seller. However, that may not be the case if the overall assessment shows that the scope of the sale is left to the market. For instance, if the scope of the sales results from an open, transparent, non-discriminatory and unconditional tender procedure, this may point in the direction of economic discontinuity. In this context, the bidders should have the possibility to freely decide whether to bid for individual assets, a group of assets or all assets, they should not be obliged to enter into contracts concluded by the seller, and they should be able to choose freely if they want to take over all employees of the seller, some of them or none of them.
- (193) The Commission observes that the published tender notice for the sale of FLG's assets specified that the bidders could either purchase 90 % of the shares in FLG or realise a comparable economic solution for taking over the operation of the airport. This allowed bidders therefore to bid for the shares in FLG, to bid for assets or bundles of assets or to find another economic solution, such as the lease of assets. This was confirmed in the information memorandum, submitted to all interested bidders prior to submitting an expression of interest. It was therefore clear to the interested bidders that they could offer purchasing shares or purchasing assets or bundles of assets. Indeed, of the five bidders that submitted an indicative offer, two bidders offered to purchase assets, whereas the other bidders offered to purchase shares. Of the three bidders that submitted binding offers, two bidders offered to purchase assets, one offered to purchase shares. 3Y, the holding company of Yasmina, offered the highest price for taking over a bundle of assets. According to Germany, Yasmina took over ca. [...] % of the assets of FLG, based on the overall book value of the assets compared to the value of the assets taken over. Non-purchased items included, amongst others, [...].
- (194) The Commission observes that non-purchased items were subject to two lease agreements between Yasmina and Hansestadt Lübeck. One concerned the airport infrastructure and land that had been subject to a lease agreement between FLG and Hansestadt Lübeck prior to the sales. This lease contract was taken over by Yasmina. The other concerned the remaining assets of the airport that had been transferred from FLG to Hansestadt Lübeck when FLG was absorbed by Hansestadt Lübeck.
- (195) The fact that FLG was sold in an asset deal and that the buyer did not buy a large proportion of the assets points towards an absence of economic continuity. On the other hand, Yasmina leased the assets which were not subject to the purchase from Hansestadt Lübeck, which indicates that as a result of the tender procedure, Yasmina could use all assets. This rather points to the existence of economic continuity.
- (196) With regard to the workforce, the sales contract stated that the employees would be taken over by Yasmina in accordance with paragraph 613a of the German civil code (Bürgerliches Gesetzbuch, BGB). Paragraph 613a BGB is based on Council Directive 2001/23/EC<sup>(1)</sup>. That paragraph stipulates the rights and duties in the case of transfer of business. To be more specific, according to paragraph 613a, '[i]f a business or part of a business passes to another owner by legal transaction, then the latter succeeds to the rights and duties under the employment relationships existing at the time of transfer. If these rights and duties are governed by the legal provisions of a collective agreement or by a works agreement, then they become part of the employment relationship between the new owner and the employee and may not be changed to the disadvantage of the employee before the end of the year after the date of transfer...' <sup>(2)</sup>. In addition, the previous employer or the new owner must notify employees affected by a transfer in writing prior to the transfer and the employee may object in writing to the transfer of the employment relationship.

<sup>(1)</sup> Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses (OJ L 82, 22.3.2001, p. 16).

<sup>(2)</sup> Bürgerliches Gesetzbuch [BGB] Aug. 18. 1896, para 613a 242.

- (197) On the basis of this legal provision, the workforce was informed of the transfer and was taken over if no objections were voiced. In this case, FLG had [...] employees, of which [...] objected to the takeover. These [...] employees were transferred to be employed by Hansestadt Lübeck.
- (198) The transfer of assets did not include any condition that would go beyond the legal obligations, such as a condition on the number of employees to be taken over, or an obligation to maintain the employees beyond the usual contractual obligations as determined by employment law.
- (199) The only contractual stipulation related to employees is a reminder of the applicable employment law; overall, the fact that most of the employees were transferred does not necessarily indicate that there was economic continuity <sup>(1)</sup>.
- (200) However, on balance, given that Yasmina was in a position, through the combination of the sales of part of the assets with two lease contracts on the remaining assets, to use all of the assets previously owned and used by FLG, the scope of the sold assets rather points towards the existence of economic continuity.

#### 7.2.2.2. Sale price

- (201) In order to avoid economic continuity, the assets have to be sold at a market price, for instance through an open, transparent, non-discriminatory and unconditional tender procedure.
- (202) The Commission has to assess whether FLG's assets were indeed sold through an open, transparent, non-discriminatory and unconditional tender procedure to the bidder submitting the highest bid, taking into account transaction security.
- (203) First, the Commission notes that the invitation to submit an expression of interest for FLG's assets did not contain any limitation as to the parties that could submit offers, and did not impose any conditions on potential bidders. Any entity could submit an offer during the tender process. Furthermore, it was made public by publication in the electronic supplement to the *Official Journal of the European Union*.
- (204) Secondly, as regards the principle of transparency, the Commission observes that the bidders had more than a month to decide whether to submit an expression of interest, on the basis of an information memorandum that could be requested from the seller. Subsequently, investors having submitted an expression of interest had about three weeks to evaluate the information provided to them during a due diligence <sup>(2)</sup> and to decide whether to submit an indicative offer until 15 October 2012. All investors having submitted indicative offers had the possibility to participate in an information meeting with the seller. The deadline for binding offers was 20 November 2012.
- (205) The Commission also notes that already prior to publishing the tender notice, the seller determined the criteria according to which the economically best bid was to be selected and communicated the relevant criteria to the bidders from the start of the procedure.
- (206) Thirdly, there was no discrimination between the bidders at any stage of the tender process. All bidders received the same information and clarifications about the tender rules and procedures, deadlines for submission of offers, and on FLG. No bidder was offered exclusivity in the negotiations. In the final phase, three bidders submitted binding offers.
- (207) After having evaluated the binding offers on the basis of the criteria determined prior to the beginning of the procedure, Hansestadt Lübeck came to the conclusion that 3Y made the economically best offer. Hansestadt Lübeck suggested concluding the sales contract to the Bürgerschaft. The Bürgerschaft decided on 29 November 2012 to accept the offer of Yasmina and the assets of FLG were sold to 3Y, who had established Yasmina for that purpose, with effect from 1 January 2013.

<sup>(1)</sup> Commission Decision of 4 April 2012 SA.34547 — France — *Reprise des actifs du groupe SERNAM dans le cadre de son redressement judiciaire*.

<sup>(2)</sup> A due diligence is the examination of a potential target for merger, acquisition, privatisation, or similar corporate finance transaction normally by a buyer.

- (208) Fourthly, a tender for the sale of assets is unconditional when a potential buyer is generally free to acquire the assets and to use them for its own purposes irrespective of whether or not it runs certain businesses <sup>(1)</sup>. In this context, the Commission notes that the published tender notice for the sale of FLG's assets specified that the buyer should continue the operation of the airport. Furthermore, Yasmina, the successful bidder, paid a final purchase price of EUR [...] for the purchase of assets of FLG. Yasmina also entered into two leasing contracts for the infrastructure, land and assets in the ownership of Hansestadt Lübeck. The lease amounted to respectively EUR [...] per year and EUR [...] per year. At the same time, Hansestadt Lübeck committed to provide an investment grant amounting to EUR [...] to Yasmina if certain conditions were met. The sales of the assets of FLG was directly linked to the future investment grant to Yasmina. As the future grant was higher than the purchase price, the sales price was negative.
- (209) In light of these elements, the Commission questions the un-conditionality of the tender procedure. If the sale of assets is carried out through a conditional tender, it cannot be presumed that the transaction was in line with market conditions because of the tender procedure. Therefore, the Commission is not in a position to conclude on the question whether Yasmina paid a market price for FLG's assets. If Yasmina paid indeed less than the market price, then this would point towards the existence of economic continuity.

#### 7.2.2.3. Identity of the buyer

- (210) The buyer was Yasmina, a subsidiary of 3Y. The sole shareholder of 3Y was the Saudi citizen Adel Mohammed Saleh M. Alghanmi. Yasmina was a private undertaking with no former ties to FLG or Hansestadt Lübeck. The fact that Yasmina was independent from FLG as well as from the public authorities, indicates that there is no economic continuity. The Commission therefore concludes that the identity of the buyer does not point towards the existence of economic continuity.

#### 7.2.2.4. The moment of the sale

- (211) Hansestadt Lübeck intended to privatise the airport before the Commission started any investigations. After the first privatisation to Infracore failed in 2009, Hansestadt Lübeck started a second attempt in 2012, which succeeded with the privatisation of the airport to Yasmina. The sale to Yasmina took place after the 2007 and 2012 Opening decisions, but before any final decision was reached by the Commission. The fact that the sale of the airport is part of the continuous efforts of Hansestadt Lübeck to privatise the airport indicates that it is not a deliberate attempt to avoid recovery of the aid. The timing of the sales process points to the absence of economic continuity.
- (212) In addition, the Court has previously held that there is economic continuity when there is the 'objective fact that the effect of the transfer is to evade the obligation to repay the aid at issue' <sup>(2)</sup>. However, since in the current case, there had been no decision by the Commission on the existence of aid at Lübeck airport since 2007, when the case was initially opened, it cannot be concluded that such an intention was present at the time of the privatisation. On the contrary, in this case, Hansestadt Lübeck acted in an economically consistent manner, since the privatisation of the airport was envisaged before the Commission started questioning possible State aid at Lübeck airport <sup>(3)</sup>.
- (213) Furthermore, the Court has previously held that there may be economic continuity where a company has been created to continue some of the activities of an undertaking which has become insolvent <sup>(4)</sup>. However, this is not the case, since Hansestadt Lübeck initiated and finalised the sale to Yasmina without FLG being insolvent. The Commission therefore concludes that the moment of the sale does not point towards economic continuity.

#### 7.2.2.5. Economic logic of the operation

- (214) In the submission of its expression of interest, Yasmina presented an ambitious business plan which aimed at the transformation of Lübeck airport into a modern airport made attractive for a variety of undertakings. The plan was to attract businesses with a modern, high-tech business park, which was to include cinemas, banks, cafés, restaurants and parking facilities with special test tracks, a go-cart track, an ice rink, high fashion boutiques,

<sup>(1)</sup> Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union (OJ C 262, 19.7.2016, p. 1), recital 94.

<sup>(2)</sup> Case T-415/05, *Greece v Commission* ECLI:EU:T:2010:386, paragraph 146.

<sup>(3)</sup> *Ibid.* The Court has found that economic inconsistency may be an indication for financial continuity.

<sup>(4)</sup> Case C-610/10 *Commission v Spain* [2012] ECLI:EU:C:2012:781, paragraph 106.



a boutique hotel, a convention centre, as well as a fashion whole sale village. In addition, a Cargo Village was intended to be built, to connect water-ways with land- and air-ways and to make transport easier. This included storage possibilities, longer runways and maintenance infrastructure. Furthermore, further modifications to the current business plan were envisaged such as cheap fuel for small aircrafts, self-check-in service, fixed base operations with luxurious VIP passengers, advertising the airport as location for air shows and aviation expos. At the same time, Lübeck airport was to continue to operate as an airport, i.e. to offer charter and scheduled flights. From an *ex ante* perspective, Lübeck airport was to remain an airport, but with a changed business plan.

- (215) The Commission observes that while Yasmina's business concept differed from the activities carried out by FLG, Yasmina still planned to offer similar aviation activities as FLG. On balance, this seems to rather point towards the existence of economic continuity. The fact that *ex post*, Yasmina was only able to offer reduced aviation activities, as Ryanair left Lübeck to start flying from the near Hamburg airport, does not alter this conclusion.

#### 7.2.2.6. Conclusion on economic continuity between FLG and Yasmina

- (216) The Commission observes that some of the indicators point towards an absence of economic continuity between FLG and Yasmina and some point towards the existence of economic continuity. Most importantly, the Commission cannot exclude that Yasmina paid less than the market price for the assets of FLG. Therefore, while some of the indicators point towards the absence of economic continuity, the Commission cannot rule out that there was nevertheless economic continuity between FLG and Yasmina. The Commission notes however that in any event, 3Y and Yasmina have been dissolved in the meantime. So even if there had been economic continuity between FLG and Yasmina, the recovery obligation could not be extended to Yasmina anymore.

#### 7.2.3. Economic continuity between FLG and PuRen

- (217) If there was economic continuity between FLG and Yasmina, and given that Yasmina has been dissolved in the meantime, the Commission has to assess whether the buyer of Yasmina's assets benefitted from potential State aid to FLG and whether the recovery obligation would need to be extended to this buyer.
- (218) Before Yasmina was dissolved, its assets were sold to another private investor, PuRen. The Commission notes that Yasmina's assets were sold in a court supervised insolvency proceeding in line with German insolvency law <sup>(1)</sup>. This seems to indicate that in any event, if there had been economic continuity between FLG and Yasmina, the chain of economic continuity would have been broken at this stage. PuRen therefore did not benefit from potential State aid to FLG.

#### 7.2.4. Advantage to the sold economic activity

- (219) The main economic activity that FLG exercised, i.e. the operation of Lübeck airport, also does not exist anymore, given that Lübeck airport has ceased to operate scheduled flights and charter flights. At the date of this Decision, no airline is serving Lübeck airport. Therefore, the sold economic activity could not have benefitted from the potential State aid to FLG either.
- (220) Furthermore, the Commission has to assess whether the negative sales price paid by Yasmina for the assets of FLG could still have provided an advantage to the sold economic activity <sup>(2)</sup>, in this case the airport. To this end, the Commission has to assess whether Hansestadt Lübeck behaved like a MEO. The costs of the sale of the airport would have to be compared to the costs of a counterfactual scenario, which could in the case at hand have been the closing of the airport or the continued operation of the airport by FLG.
- (221) However, given that at the date of this Decision, no airline serves the airport and that therefore no scheduled flights or chartered flights are offered to or from Lübeck airport, the Commission considers that there is no need to assess whether the negative sales price provided an advantage to the sold economic activity. The sold economic activity has disappeared from the market.

<sup>(1)</sup> Insolvency law ('Insolvenzordnung') of 5 October 1994 (BGBl. I S. 2866), last amended by Article 16 of the Law of 20 November 2015 (BGBl. I S. 2010).

<sup>(2)</sup> See Commission Decision of 27 February 2008 on State aid C 46/07 (ex NN 59/07) which Romania has implemented for Automobile Craiova (former Daewoo Romania) (OJ L 239, 6.9.2008, p. 12).

- (222) This finding is without any prejudice to the assessment of whether the most recent sales of Lübeck airport to Stöcker involved State aid to the buyer. Furthermore, the Commission reminds Germany that any measure aiming to prepare Lübeck airport to take up scheduled flights or charter flights in the future is subject to State aid control and would have to be notified to the Commission.

### 7.2.5. Conclusion

- (223) The Commission finds that there is no need to take a decision as to whether potential State aid to FLG constitutes State aid within the meaning of Article 107(1) TFEU, and if so, whether such State aid could be declared compatible with the internal market. The legal entity FLG has ceased to exist and so has its economic activity. Furthermore, even if there was economic continuity between FLG and Yasmina, it would not be possible anymore to recover the aid from Yasmina as it has been dissolved and its assets were sold in court supervised insolvency proceedings in line with German insolvency law.

## 7.3. POSSIBLE STATE AID IN FAVOUR OF INFRATIL

### 7.3.1. Sale of shares in FLG

#### 7.3.1.1. Advantage

- (224) An advantage within the meaning of Article 107(1) TFEU is any economic benefit which an undertaking would not have obtained under normal conditions, that is to say, in the absence of State intervention <sup>(1)</sup>.
- (225) According to Article 345 TFEU, 'The Treaties shall in no way prejudice the rules in Member States governing the system of property ownership'. The privatisation of a firm — a transfer from the public to the private sector — is an economic policy choice which, in itself, falls within the exclusive competence of Member States.
- (226) In accordance with established case law <sup>(2)</sup> and Commission practice <sup>(3)</sup>, when a Member State sells shares in undertakings, the purchaser does not receive an advantage if the Member State's behaviour is consistent with that of an MEO. This is the case when a hypothetical private shareholder, motivated by the prospect of profit, would have entered into the transaction. Thus non-economic considerations, such as industrial policy reasons, employment considerations or regional development objectives cannot be taken into account. This principle has been repeatedly confirmed by the Commission and the Court <sup>(4)</sup>.
- (227) In its *Stardust Marine* judgment the Court stated that, '[...] in order to examine whether or not the State has adopted the conduct of a prudent investor operating in a market economy, it is necessary to place oneself in the context of the period during which the financial support measures were taken in order to assess the economic rationality of the State's conduct, and thus to refrain from any assessment based on a later situation.' <sup>(5)</sup>.
- (228) Therefore, in order to assess whether Hansestadt Lübeck acted as an MEO when privatising Lübeck airport, it is necessary to value the different options Hansestadt Lübeck had at that time, in order to verify whether Hansestadt Lübeck has chosen the financially most advantageous option available. In principle, an assessment carried out by one or more independent audit companies can serve as evidence for the market value of a transaction.
- (229) In 2004, Hansestadt Lübeck ordered a valuation of closure and continuation of the airport by an independent private bank <sup>(6)</sup> ('the Berenberg study'). The Berenberg study assessed the worst case and best case value of the following options:

<sup>(1)</sup> Case C-342/96 *Kingdom of Spain v Commission* ECLI:EU:C:1999:210, paragraph 41; Case C-39/94 *Syndicat français de l'Express international (SFEI) and others v La Poste and others* ECLI:EU:C:1996:285, paragraph 60.

<sup>(2)</sup> See for example: Case T-296/97 *Alitalia v Commission* ECLI:EU:T:2000:289; Cases T-228/99 and T-233/99, *WestLB v Commission* ECLI:EU:T:2003:57; Case T-366/00, *Scott SA v Commission* ECLI:EU:T:2007:99; Cases C-328/99 and C-399/00, *Italy and SIM 2 Multimedia v Commission* ECLI:EU:C:2003:252; Case T-358/94, *Air France v Commission* ECLI:EU:T:1996:194.

<sup>(3)</sup> XXIIIrd Report on Competition Policy, 1993, p. 255.

<sup>(4)</sup> Commission Decision C(2013) 3546 final of 19 June 2013, SA.36197(N/2013) — *Portugal Privatisation of ANA — Aeroportos de Portugal*, OJ C 256, 5.9.2013, p. 3; Case C-40/85 *Belgium v Commission*, ECLI:EU:C:1986:305.

<sup>(5)</sup> Case C-482/99 *France v Commission* ('Stardust Marine') ECLI:EU:C:2002:294, paragraph 71.

<sup>(6)</sup> Valuation by Berenberg Consult GmbH (a subsidiary of Hamburger Privatbank Berenberg).

Table 9

**Options of HL and valuation by Berenberg Consult**

Options	Worst case (in EUR)	Best case (in EUR)	Mean value (in EUR)
Privatisation (best case incl. subsidies, sale of airport site in 2009, debtor warrant (Besserungsschein))	[...]	[...]	[...]
Ordinary closing (Ordentliche Schließung) (best case without direct liability of shareholders 'Durchgriffshaftung')	[...]	[...]	[...]
Insolvency (best case without Durchgriffshaftung)	[...]	[...]	[...]
Continuing operations as before (no difference between best case and worst case)	[...]	[...]	[...]

- (230) The reference date (Stichtag) was 31 December 2003. The Berenberg study concluded that the costs for continuing airport operations would amount to EUR [...]. The Berenberg study has estimated these costs under the assumption that the airport would continue to be loss making in the following years. For the privatisation option, the valuation estimated costs to amount between EUR [...] and EUR [...]. This valuation included a positive purchase price of EUR [...]. As a potential buyer of the airport would reflect expected losses in its purchase price, this estimated price indicates that the valuation assumed profitability after privatisation. The assumption of profitability can be explained by increased efficiency after privatisation and by an expected growth in passenger numbers. It is therefore substantiated. In particular, Ryanair had announced to create a base at Lübeck airport in case of a runway extension.
- (231) On this basis, Hansestadt Lübeck decided to initiate the privatisation process of the airport as it was financially the most advantageous option available. The Commission notes that the Berenberg study expected it possible to sell the airport activities at a positive price, while if they were to remain in the public hand, these activities were expected to be continuously loss making.
- (232) The agreement concluded between Hansestadt Lübeck and Infratil consists of several elements and contains different scenarios that reflect the situation in October 2005.
- (233) Since the planning approval was suspended by the OVG Schleswig judgment in July 2005 (see recital 78), Infratil was prevented from expanding the airport. Therefore the value of FLG decreased. Furthermore the planned expansion of services by Ryanair, and thus the profitability of the airport, was largely depending on obtaining the planning approval in the future.
- (234) Infratil, being a New Zealand investor and being one of the first private investors to invest in a regional airport in continental Europe, had only a small information base for its risk assessment. Based on previous experience and knowledge of German administrative proceedings, Hansestadt Lübeck could reasonably expect that the planning approval would be obtained. At the same time, Hansestadt Lübeck had to accept that Infratil would attribute a higher risk to the planning approval process and Hansestadt Lübeck had thus to accept that Infratil would not be willing to pay the full purchase price from the beginning. The result was the negotiation of a put option as well as the splitting of the purchase price into the immediately payable Purchase Price I and a Purchase Price II that only had to be paid if and once the planning approval was obtained. Due to the circumstances, the Commission concludes that a private shareholder would have negotiated similar options.
- (235) The Commission has also to assess whether the transaction price stipulated for the negotiated options met market requirements.

*Purchase Price I (EUR [...]) and the put option*

- (236) In this scenario, the conditions specified in the 2005 Participation Agreement are not fulfilled and the planning approval is not obtained. As a result, Infratil does not have to pay Purchase Price II. The study of the independent consultant company Ecorys, commissioned by the Commission, shows that without the extension, Lübeck airport was expected to be loss making:

Figure 2

**Low case NPV (90 % equity value) & purchase price**

[...]

- (237) Under these circumstances, Infratil would have been expected to exercise the put option. Purchase Price I therefore constitutes a merely symbolic price, secured by an exit strategy for Infratil to reverse the transaction. As in this scenario the operation of the airport would not be profitable, the Commission concludes that the positive price of EUR [...] complies with the market conditions and that no economic advantage was granted to Infratil.
- (238) The put option price of EUR [...] (to be paid by Hansestadt Lübeck) mainly consists of payments for shareholder loans, investments, operating losses, and the costs for the planning approval process — costs which Hansestadt Lübeck would have had to cover without the privatisation of the airport. Considering the different components of the price, the put option would be equivalent to undoing the agreement, reversing the original transaction.
- (239) The Commission further notes that the takeover of operating losses is limited to EUR [...]. However, it can be concluded from the losses of the airport in the years prior to the privatisation that Infratil must have been aware that the actual losses would exceed this limit by far, in the case where Lübeck airport would not grow as expected.

Table 10

**FLG losses 1995-2010 in EUR (thousand)**

Year	Losses of FLG in EUR (thousand)
1995	[...]
1996	[...]
1997	[...]
1998	[...]
1999	[...]
2000	[...]
2001	[...]
2002	[...]
2003	[...]
2004	[...]
2005	[...]
2006 (1 January-31 March)	[...]
2007	[...]
2008	[...]
2009	[...]
2010	[...]

- (240) When extrapolating the increase of the losses from the three years before the privatisation (2002-2004), losses of more than EUR [...] could be expected for the period between 1 October 2005 and 31 December 2008. Even if the losses from the year prior to the privatisation were assumed to remain constant, losses of EUR [...] could

have been expected. Therefore, in the case of a resale of the shares, and taking into consideration that Hansestadt Lübeck would take over EUR [...] of losses, Infratil could have reasonably known that it would have to carry additional losses of between EUR [...] and EUR [...]. This estimation is supported by *ex post* data, according to which the airport had accumulated losses amounting to EUR [...] in the period in question.

- (241) It is clear that a private seller would not have been able to negotiate a more favourable put option price. The Commission therefore concludes that Hansestadt Lübeck acted like a MEO when negotiating the put option and that no economic advantage was granted to Infratil.

*Purchase Price II (EUR [...])*

- (242) Purchase Price II of EUR [...] had to be paid by Infratil only if certain conditions were met that ensured the profitability of the airport.
- (243) The price corresponds to the sales price negotiated by the parties in March 2005 during the public procurement procedure.
- (244) The existence of an economic advantage can be excluded, if the sale complies with the market conditions. This can be assumed when a sale is carried out through a public tender and the following cumulative conditions are fulfilled <sup>(1)</sup>:
- the shareholding is sold by a competitive tender that is open to all comers, transparent and non-discriminatory;
  - no conditions are attached to the sale which are not customary in comparable transactions between private parties and which are capable of potentially reducing the sales price;
  - the shareholding is sold to the highest bidder;
  - the bidders must be given enough time and information to carry out a proper evaluation of the assets upon which their bid is based.
- (245) These conditions were met by the tender taking place in March 2005. As there were five different undertakings indicating their interest in buying the airport, it is not apparent that only Infratil was able to submit a credible bid. Furthermore the public tender procedure was designed to ensure effective and non-discriminatory competition under German national law.
- (246) The Commission observes that the sales price in the first purchase agreement of March 2005 amounted to EUR [...]. However, the terms of the agreement were renegotiated in October 2005. The resulting conditions for Purchase Price II, as well the agreed deductions mentioned in recital 83 were not an outcome of the original tender procedure. Therefore, in order to assess whether the agreed price meets the market requirements, the MEO principle needs to be applied.
- (247) In order to establish whether Hansestadt Lübeck would have been able to negotiate a higher purchase price, the prevailing circumstances, in particular the level of risk from the exercise of the put option for Infratil and the potential losses resulting therefrom have to be taken into consideration.
- (248) As outlined in recital 240, even taking into account the EUR [...] of losses covered by the Hansestadt Lübeck, Infratil had to expect additional financial losses between EUR [...] and EUR [...] when exercising the put option. From an *ex ante* perspective, Infratil was therefore faced with the situation of potentially realising profits in the case of a materialisation of the second scenario, while at the same time risking high losses in the case of the exercise of the put option.
- (249) Germany stated that from the perspective of 2005, Hansestadt Lübeck considered it very unlikely that the conditions for exercising the put option would materialise, namely that the planning approval would not be obtained and the passenger numbers would be below [...].
- (250) However, as noted in recital 234, Hansestadt Lübeck had to expect Infratil to attribute a higher risk to the planning approval process.

<sup>(1)</sup> See point 403 of the European Commission's XXIIIrd Report on competition policy, 1993; point 4.2.3.1 of the Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union (OJ C 262, 19.7.2016, p. 1).

- (251) With regard to the passenger numbers, Germany argues that Ryanair announced to establish a base at Lübeck airport if existing runways would be enlarged and that the establishment of a *base* was expected to lead to passenger numbers of [...] per year.
- (252) The Commission notes that actual passenger numbers at Lübeck airport did not reach this threshold but rather decreased between 2005 and 2008 to 544 339 in 2008 (see Table 1). However, the Commission notes in this context that circumstances, like the effects of the financial crisis, which could not have been anticipated in 2005, may explain a significant deviation between expected and actual passenger numbers.
- (253) The Ecorys study commissioned by the Commission as well as the expert report drawn up by Ernst & Young ordered by HL in 2005 expected the passenger numbers to rise to [...] in 2008. This figure was based on the assumption that a planning approval would be obtained in the first half of 2008 and that construction works at Lübeck airport would be postponed until the end of 2008.
- (254) Based on this numbers, it would have been rather reasonable for Hansestadt Lübeck to consider the possibility that passenger numbers would remain below the threshold of [...]. Since reaching the passenger number threshold was a pre-condition for the put option to lapse, and since the obtaining of the planning approval was uncertain, the exercise of the put option had to be considered as an option.
- (255) Thus given the reasonable possibility of Infratil exercising the put option and the corresponding risk of high losses, the Commission assumes that a private shareholder would not have been able to negotiate a higher purchase price, as the deal would otherwise not have been profitable for a potential investor.
- (256) The Commission therefore regards Hansestadt Lübeck's decision to accept a sales price of EUR [...] with the agreed deductions as specified in the 2005 Participation Agreement to be economically sound.
- (257) This result corresponds to the findings of the Ernest & Young study, which estimates the revenues from the sale of the shares in FLG at about EUR [...] and therefore concludes that the agreed price would have been accepted by a private investor in a comparable situation.
- (258) The Ecorys study estimates a much higher market value for the shares of about EUR [...]. However, the study does not consider the high financial risks for Infratil when exercising the put option as outlined in recitals 247 and 248. In the Ecorys study, this risk is put at zero and therefore not taken into account when estimating Purchase Price II. The varying numbers used for the calculation with regard to investments/CAPEX further contribute to a different risk assessment of both studies.
- (259) Furthermore the use of different passenger number growth rates leads to a substantial difference in the results of the studies.
- (260) In the light of these considerations, the Commission concludes that Purchase Price II as specified in the 2005 Participation Agreement complies with the market conditions and that no economic advantage has been granted to Infratil.

#### 7.3.1.2. Conclusion on the overall profitability of the deal

- (261) It follows from the assessment of the measure set out above that Hansestadt Lübeck was faced with the decision to either close the airport, to continue its loss-making operation or to sell Lübeck airport. Hansestadt Lübeck chose the most economic option available when deciding to sell the airport. When assessing the concrete terms of the 2005 Participation Agreement, the interrelation of the two scenarios (i.e. Purchase Price I and the put option and Purchase Price II) needs to be taken into account. As it has been found that it was reasonable from an *ex ante* perspective to consider both the payment of Purchase Price II and the exercise of the put option as possible, the risks for both parties resulting from this have to be considered. Especially with regard to the potential financial losses of Infratil resulting from the exercise of the put option, the Commission considers it unlikely that a private seller in the stead of Hansestadt Lübeck would have been able to negotiate a more favourable agreement.
- (262) The Commission therefore concludes that Hansestadt Lübeck acted like a MEO when negotiating the 2005 Participation Agreement. As a result, the measure did not grant Infratil any economic advantage and did not constitute State aid.

**7.3.2. The 2009 Additional Agreement and the renegotiation of the put option — Takeover of losses, investments and other costs of FLG in 2009**

- (263) As stated above, the 2009 Additional Agreement signed on 12 November 2008 did not modify the amounts payable for the put option under the 2005 Participation Agreement, but included the takeover of losses, agreed investments and other costs related to the operation of Lübeck airport in 2009, resulting in a total put option price of EUR [...] (see recital 90).
- (264) In its 2012 Opening decision, the Commission had opened investigations into two separate measures:
- (a) the takeover of losses, investments and other measures of FLG in 2009,
  - (b) the difference between the put option price agreed in 2005 and the actual put option price paid.

However, on the basis of the information received, the Commission finds that these two issues concern the same measure, namely the 2009 Additional Agreement between Hansestadt Lübeck and Infratil.

**7.3.2.1. Advantage**

- (265) To determine whether the put option price under the 2009 Agreement included an economic advantage for Infratil, the Commission needs to apply the MEO test. In order to be able to determine whether Hansestadt Lübeck chose the financially most advantageous option available, the Commission has to place itself in the position of a private shareholder at the time when the agreement was signed <sup>(1)</sup>.
- (266) The Commission finds that after Infratil announced its intention to exercise its put option in 2009, Hansestadt Lübeck was faced with the following options:
- (a) close the airport;
  - (b) search for a new private operator and meanwhile
    - resume the operation of the airport; or
    - sign the 2009 Additional Agreement so that Infratil would continue the operation of the airport until a new operator was found.
- (267) The option of closing the airport (option a) would have required Hansestadt Lübeck to pay the put option price of EUR [...] (see recital 238) immediately and to initiate the procedure for closing the airport, facing additional costs (see the Berenberg study, presented in Table 9).
- (268) In the first subscenario of option b (Hansestadt Lübeck resumes operation of the airport until a new private investor is found), Hansestadt Lübeck would have had to pay the put option price to Infratil laid down in the 2005 Participation Agreement and to cover all costs arising from the operation of the airport until a new investor would be found. Deriving from the put option price paid in 2009 (see Table 3), the costs for operating losses, investment, the planning approval process and legal costs alone would have amounted to EUR [...]. Therefore, already by October 2009, Hansestadt Lübeck would have faced costs of approximately EUR [...] (put option price according to 2005 Participation Agreement plus operating costs for November 2008 to October 2009).
- (269) Germany submitted that a resale of FLG to a new private investor would have required a new Union wide tender procedure, which is estimated to take a minimum of 12 months. The Commission notes that a private operator would indeed have taken into account the estimated duration of the tender procedure.
- (270) Another subscenario in option b was to sign the 2009 Additional Agreement in order to keep Infratil from exercising the put option until 22 October 2009. In this scenario, assuming that Infratil would exercise its put option in October 2009, Hansestadt Lübeck would have had to pay the put option price under the 2009 Additional Agreement. As this price consists of the put option price of the 2005 Participation Agreement and additional costs relating to the operation of the airport in 2009, the potential costs for Hansestadt Lübeck are comparable to those of the second scenario.

<sup>(1)</sup> Case C-482/99 *France v Commission* ("Stardust Marine") ECLI:EU:C:2002:294, paragraph 71.

- (271) The 2009 Additional Agreement had however an advantage for HL in so far as it provided Hansestadt Lübeck with the time to prepare a tender to find a new investor. Furthermore, the immediate departure of Infratil carried the risk of causing Ryanair to reduce its services at Lübeck airport, and thereby to potentially enlarge future operating losses. Moreover, the reduction of Ryanair's services could have had a negative impact on the planning approval procedure, as FLG justified its need for an extension of the airport primarily with the growth of the low cost segment.
- (272) In the light of these considerations, the Commission concludes that signing the 2009 Additional Agreement was the most advantageous option available and that Hansestadt Lübeck therefore acted like a MEO.

#### 7.3.2.2. Conclusion

- (273) In view of the comparison of the different options and the related costs, it can be concluded that the 2009 Additional Agreement was in line with the MEO principle, since it constituted the least financially burdensome and most economically forward looking option at the time.
- (274) This finding is supported by the reasonable assumption that Hansestadt Lübeck would not have been able to find a new investor in 2009. This has proven to be true from an *ex post* perspective, since a new investor was only found in 2012.
- (275) Furthermore, the elements of the put option price correspond to those under the 2005 Participation Agreement and merely expand the components of the put option price to the costs in 2009. Like the 2005 Participation Agreement, the 2009 Additional Agreement also contains a limit for the operating losses and investment costs to be paid by Hansestadt Lübeck.
- (276) On the basis of those considerations, the Commission concludes that there was no economic advantage granted to Infratil and thus the measure did not constitute State aid.

### 7.4. POTENTIAL STATE AID IN FAVOUR OF RYANAIR

#### 7.4.1. Economic advantage

- (277) Where an airport has public resources at its disposal, aid to an airline can, in principle, be excluded where the relationship between the airport and the airline satisfies the MEO test.
- (278) Under the 2014 Aviation Guidelines <sup>(1)</sup>, the existence of aid to an airline using a particular airport can, in principle, be excluded if the price charged for the airport services corresponds to the market price ('first approach'), or if it can be demonstrated through an *ex ante* analysis — that is to say one founded on information available when the aid is granted and on developments foreseeable at the time — that the airport/airline arrangement will lead to a positive incremental profit contribution for the airport and is part of an overall strategy leading to profitability at least in the long term ('second approach').
- (279) The second approach means that it must be assessed whether, at the date when an agreement was concluded, a prudent market economy operator would have expected the agreement to be incrementally profitable. This to be measured by the difference between the incremental revenues expected to be generated by the agreement (that is, the difference between the revenues that would be achieved if the agreement were concluded and the revenues that would be achieved in the absence of the agreement) and the incremental costs expected to be incurred as a result of the contract (that is, the difference between the costs that would be incurred if the agreement were concluded and the costs that would be incurred in the absence of the agreement), the resulting cash flows being discounted with an appropriate discount rate.
- (280) As regards the first approach (a comparison with the 'market price'), the Commission does not consider that, at the present time, an appropriate benchmark can be identified to establish a true market price for services provided by airports <sup>(2)</sup>. It therefore considers an *ex ante* incremental profitability analysis to be the most relevant approach for the assessment of arrangements concluded by airports with individual airlines.

<sup>(1)</sup> See 2014 Aviation Guidelines, paragraph 53.

<sup>(2)</sup> See 2014 Aviation Guidelines, paragraph 59.



- (281) It should be noted that, in general, the application of the MEO principle based on an average price on other, similar markets may prove helpful if such a price can be reasonably identified or deduced from other market indicators. However, this method is not that relevant in the case of airport services, as the structure of costs and revenues tends to differ greatly from one airport to another. This is because costs and revenues depend on how developed an airport is, the number of airlines which use the airport, its capacity in terms of passenger traffic, the state of the infrastructure and related investments, the regulatory framework which can vary from one Member State to another and any debts or obligations entered into by the airport in the past <sup>(1)</sup>.
- (282) Moreover, the liberalisation of the air transport market complicates any purely comparative analysis. As can be seen in this case, commercial practices between airports and airlines are not always based exclusively on a published schedule of charges. Rather, these commercial relations vary to a great extent. They include sharing risks with regard to passenger traffic and any related commercial and financial liability, standard incentive schemes and changing the spread of risks over the term of the agreements. Consequently, one transaction cannot really be compared with another based on a turnaround price or price per passenger.
- (283) In addition, benchmarking is not an appropriate method to establish market prices if the available benchmarks have not been defined with regard to market considerations or the existing prices are significantly distorted by public interventions. Such distortions appear to be present in the aviation industry, for reasons explained in paragraphs 57 to 59 of the 2014 Aviation Guidelines:

'Publicly owned airports have traditionally been considered by public authorities as infrastructures for facilitating local development and not as undertakings operating in accordance with market rules. Those airports' prices consequently tend not to be determined with regard to market considerations and in particular sound ex ante profitability prospects, but essentially having regard to social or regional considerations.

Even if some airports are privately owned or managed without social or regional considerations, the prices charged by those airports can be strongly influenced by the prices charged by the majority of publicly subsidised airports as the latter prices are taken into account by airlines during their negotiations with the privately owned or managed airports.

In those circumstances, the Commission has strong doubts that at the present time, an appropriate benchmark can be identified to establish a true market price for services provided by airports. This situation may change or evolve in the future [...] <sup>(2)</sup>.

- (284) Moreover, as the Union courts have recalled, benchmarking by reference to the sector concerned is merely one analytical tool amongst others to determine if a beneficiary has received an economic advantage which it would not have obtained in normal market conditions <sup>(3)</sup>. As such, while the Commission may use that approach, it is not obliged to do so where, as in this case, it would be inappropriate.
- (285) Ryanair essentially argued that the MEO test can be applied based on a comparison with the commercial arrangements of other European airports. In particular, it compared charges paid by Ryanair at Bournemouth, Grenoble, Knock, Maastricht, Nîmes and Prestwick airports with the charges paid by Ryanair under the agreements at Lübeck airport. The study did not assess whether the sample of benchmark airports fulfilled all the criteria spelled out in the 2014 Aviation guidelines, as it only assessed traffic volumes, type of airport traffic and prosperity of the surrounding area <sup>(4)</sup>.
- (286) In its 2012 Opening decision, the Commission compared the charges laid down in the March and October 2010 Side letters with charges at Hamburg airport, which led to doubts as to the market conformity of the charges laid down in the Side letters. The Commission notes that traffic volume in Lübeck is much lower than in Hamburg airport. In fact, Hamburg is the airport with the most traffic in Northern Germany. Hamburg is used for all segments of air transport, whereas Lübeck was specialised in low cost carriers which required fewer check-in

<sup>(1)</sup> See Commission Decision 2011/60/EU of 27 January 2010 on State aid C 12/2008 (ex NN 74/07) — Slovakia — Agreement between Bratislava Airport and Ryanair, recitals 88 and 89 (OJ L 27, 1.2.2011, p. 24).

<sup>(2)</sup> See 2014 Aviation guidelines, paragraphs 57 to 59.

<sup>(3)</sup> See, as regards benchmarking by reference to profitability (as opposed to pricing) in the sector, Joined Cases T-319/12 and T-321/12 *Spain and Ciudad de la Luz v Commission* ECLI:EU:T:2014:604, paragraph 44.

<sup>(4)</sup> See 2014 Aviation guidelines, paragraph 60 for further criteria to be assessed.

counters and facilities for transfer passengers, no passenger busses, less luggage handling personnel and facilities, less cleaning personnel, and allowed for a shorter circulation time. Consequently, Hamburg airport is not sufficiently comparable to Lübeck airport.

- (287) In light of those considerations, the Commission considers that the approach generally recommended in the 2014 Aviation guidelines for applying the MEO test to relationships between airports and airlines, namely the *ex ante* incremental profitability analysis, must be applied to this case <sup>(1)</sup>.
- (288) This approach is justified by the fact that an airport operator may have an objective interest in concluding a transaction with an airline where it may reasonably expect this transaction to improve its profits (or reduce its losses) compared to a counterfactual situation in which this transaction is not concluded, regardless of any comparison with the conditions offered to airlines by other airport operators, or even with the conditions offered by the same airport operator to other airlines.
- (289) In addition to those considerations, the airport infrastructure must be open to all airlines and not dedicated to a specific airline in order to exclude that the advantage resulting from compatible aid to the airport operator is passed on to a specific airline.
- (290) The Commission also notes in this context that price differentiation is a standard business practice. Such differentiated pricing policies should, however, be commercially justified.
- (291) The Commission considers that arrangements concluded between airlines and an airport can be deemed to satisfy the MEO test when they incrementally contribute, from an *ex ante* point of view, to the profitability of the airport. The airport should demonstrate that, when setting up an arrangement with an airline (for example, an individual contract or an overall scheme of airport charges), it is capable of covering all costs stemming from the arrangement, over the duration of the arrangement, with a reasonable profit margin on the basis of sound medium-term prospects <sup>(2)</sup>.
- (292) In order to assess whether an arrangement concluded by an airport with an airline satisfies the MEO test, expected non-aeronautical revenues stemming from the airline's activity must be taken into consideration together with airport charges, net of any rebates, marketing support or incentive schemes. Similarly, all expected costs incrementally incurred by the airport in relation to the airline's activity at the airport have to be taken into account. Such incremental costs may encompass all categories of expenses or investments, such as incremental personnel, equipment and investment costs induced by the presence of the airline at the airport <sup>(3)</sup>.
- (293) The Commission considers in its constant decision making practice that costs which the airport would have to incur anyway, independently from the arrangement with the airline, should not be taken into account in the MEO test <sup>(4)</sup>.
- (294) According to the *Charleroi* judgement <sup>(5)</sup> when assessing the measures in question the Commission has to take into account all the relevant features of the measures and their context. In other words, the Commission has to analyse the expected impact of the agreement with Ryanair on FLG, taking into account all relevant features of the measure in question.
- (295) The Court declared in the *Stardust Marine* judgment that, '[...] in order to examine whether or not the State has adopted the conduct of a prudent investor operating in a market economy, it is necessary to place oneself in the context of the period during which the financial support measures were taken in order to assess the economic rationality of the State's conduct, and thus to refrain from any assessment based on a later situation.' <sup>(6)</sup>

<sup>(1)</sup> See 2014 Aviation guidelines, paragraphs 59 and 63.

<sup>(2)</sup> See 2014 Aviation guidelines, paragraph 63.

<sup>(3)</sup> See 2014 Aviation guidelines, paragraph 64.

<sup>(4)</sup> 2014 Aviation guidelines, paragraph 64; Commission Decision (EU) 2015/1226 of 23 July 2014 on State aid SA.33963 (2012/C) (ex 2012/NN) implemented by France in favour of Angoulême Chamber of Commerce and Industry, SNC-Lavalin, Ryanair and Airport Marketing Services (OJ L 201, 30.7.2015, p. 48); Commission Decision (EU) 2015/1584 of 1 October 2014 on State aid SA.23098 (C 37/07) (ex NN 36/07) implemented by Italy in favour of Società di Gestione dell'Aeroporto di Alghero So.Ge.A.AL S.p.A. and various air carriers operating at Alghero airport (OJ L 250, 25.9.2015, p. 38); Commission Decision (EU) 2016/2069 of 1 October 2014 concerning measures SA.14093 (C76/2002) implemented by Belgium in favour of Brussels South Charleroi Airport and Ryanair (OJ L 325, 30.11.2016, p. 63).

<sup>(5)</sup> Case T-196/04 *Ryanair v Commission* ('Charleroi') ECLI:EU:T:2008:585, paragraph 59.

<sup>(6)</sup> Case C-482/99 *France v Commission* ('Stardust Marine') ECLI:EU:C:2002:294, paragraph 71.

- (296) In order to apply the MEO test, the Commission has to place itself at the time when the agreement was concluded. The Commission has also to base its assessment on the information and assumptions which were at the disposal of FLG when the agreement was concluded.

#### 7.4.2. *Application of the MEO principle to the 2000 Agreement*

##### 7.4.2.1. *Preliminary remarks*

- (297) The Commission notes that Air Berlin argued that the agreements between Ryanair and Lübeck airport were not profitable as the losses of FLG increased continuously (see Table 8) after the arrival of Ryanair. As Ryanair and Wizz Air were the only airlines flying regular lines from the airport, Air Berlin concluded that FLG's losses must be attributable to these airlines.
- (298) The Commission notes that even if a significant correlation between the number of Ryanair passengers at Lübeck airport and the losses incurred by FLG could be established, such correlation would not necessarily imply that the losses result from the operation of Ryanair at Lübeck airport. Germany stated that more than [...] % of the losses between 2000 and 2005 resulted from investments necessary to adapt the airport to increased passenger numbers. Such investments were necessary to increase the airport value in the event of the envisaged privatisation and to prepare the airport to attract any airline.
- (299) In addition, the Commission recalls that the MEO test is based on an *ex ante* assessment. According to the case law of the Court of Justice, the conduct of a private market operator, which is used to assess the conduct of a public operator, does not need to be aimed at short-term profitability but can be guided by prospects of profitability in the longer term <sup>(1)</sup>. Even where an airport is loss-making over the period of Ryanair's operation, it is still possible that an airport airline agreement is incrementally profitable to an airport on an *ex ante* basis.
- (300) As a final remark, the Commission notes that in the context of the present investigation, Ecorys was asked to compile a report on the profitability of the 2000 Agreement between FLG and Ryanair <sup>(2)</sup>. However, the report was based on a total cost approach, rather than an incremental cost approach and will therefore not be taken into consideration.

##### 7.4.2.2. *Assessment of incremental costs and revenues*

- (301) As a time frame for assessing the agreement in question a MEO would have chosen as a starting point the date of the signature of the agreement, i.e. 29 May 2000. As an end date a MEO would have taken the end date as stipulated in the 2000 Agreement, i.e. 31 May 2010.
- (302) For the purpose of assessing the agreement in question and given the findings in recitals 282 to 301, both the existence and the amount of possible aid in this agreement have to be assessed in the light of the situation prevailing at the time it was signed and, more specifically, in the light of the information available and developments foreseeable at that time.
- (303) At the time of the negotiation of the agreement, FLG expected the business of Ryanair at Lübeck airport to lead to increased passenger numbers, thereby increasing non-aeronautic revenues, to the expansion of non-aeronautic services, as well as to the attraction of further airlines. Even though FLG was making losses in the years preceding the agreement, Ryanair's business at the airport was expected to lead to moderate profits in the medium- to long-term.
- (304) Germany provided data on the *ex ante* expected growth of passenger numbers as well as the expected incremental costs and revenues, in a best-case and worst-case scenario.

<sup>(1)</sup> Case C-305/89, *Italian Republic v Commission of the European Communities (ALFA Romeo)* ECLI:EU:C:1991:142.

<sup>(2)</sup> The report has previously been mentioned in Section 7.3.1.1 regarding the profitability of the agreement between HL and Infratil.

- (305) Incremental revenues that a private investor would reasonably expect from the agreement include:
- (a) additional aeronautical revenues from passengers and landing charges paid by Ryanair and
  - (b) additional non-aeronautical revenues from, for example, car parking, franchised shops, or directly operated shops.
- (306) Applying the 'single-till' principle, the Commission takes the view that both aeronautical and non-aeronautical revenues should be taken into account <sup>(1)</sup>.
- (307) Germany submitted that based on the charges stipulated in the 2000 Agreement, the airport expected to have average aeronautical revenues of EUR [...] per passenger. FLG estimated revenues from non-aviation business as representing [...] % of aviation business income.
- (308) Incremental costs that a private investor would reasonably expect from the agreement would include:
- (a) incremental operational costs directly caused by the Ryanair agreement,
  - (b) costs for marketing services,
  - (c) investment costs directly linked to the Ryanair agreement.
- (309) Germany stated that it was necessary to increase the number of staff of FLG to handle the expected passenger numbers. FLG expected incremental operational and personnel costs of EUR [...] per passenger.
- (310) Based on the 2000 Agreement, FLG expected incremental marketing costs for the period 2000-2012 of EUR [...] in the best case and EUR [...] in the worst case.
- (311) Regarding investment costs, Germany stated that the airport infrastructure already existed prior to the agreement with Ryanair and that the initially planned operation of Ryanair at Lübeck airport did not require any additional infrastructure investments.
- (312) Germany submitted the following revenues and operating costs for the best case (Table 11) and the worst case (Table 12):

Table 11

**Best-case costs and revenues**

year	passengers	aeronautic revenues	non-aeronautic revenues	operating costs
2000	[...]	[...]	[...]	[...]
2001	[...]	[...]	[...]	[...]
2002	[...]	[...]	[...]	[...]
2003	[...]	[...]	[...]	[...]
2004	[...]	[...]	[...]	[...]
2005	[...]	[...]	[...]	[...]
2006	[...]	[...]	[...]	[...]
2007	[...]	[...]	[...]	[...]
2008	[...]	[...]	[...]	[...]
2009	[...]	[...]	[...]	[...]

<sup>(1)</sup> See 2014 Aviation guidelines, paragraph 64.

year	passengers	aeronautic revenues	non-aeronautic revenues	operating costs
2010	[...]	[...]	[...]	[...]
2011	[...]	[...]	[...]	[...]
2012	[...]	[...]	[...]	[...]
<b>Total</b>	[...]	[...]	[...]	[...]

Table 12

**Worst-case costs and revenues**

year	passengers	aeronautic revenues	non-aeronautic revenues	operating costs
2000	[...]	[...]	[...]	[...]
2001	[...]	[...]	[...]	[...]
2002	[...]	[...]	[...]	[...]
2003	[...]	[...]	[...]	[...]
2004	[...]	[...]	[...]	[...]
2005	[...]	[...]	[...]	[...]
2006	[...]	[...]	[...]	[...]
2007	[...]	[...]	[...]	[...]
2008	[...]	[...]	[...]	[...]
2009	[...]	[...]	[...]	[...]
2010	[...]	[...]	[...]	[...]
2011	[...]	[...]	[...]	[...]
2012	[...]	[...]	[...]	[...]
<b>Total</b>	[...]	[...]	[...]	[...]

- (313) FLG estimated positive financial effects from the 2000 Agreement with Ryanair. In this regard, Table 13 summarises the revenues from aeronautic and non-aeronautic activities, as well as the costs directly attributable to the operation of Ryanair at the airport and marketing costs.

Table 13

**Ex ante profitability assessment**

profitability assessment	Best case (in EUR)	Worst case (in EUR)
aeronautic revenues	[...]	[...]
non-aeronautic revenues	[...]	[...]
operating costs	[...]	[...]
marketing costs	[...]	[...]
<b>Total</b>	[...]	[...]

- (314) In the best case, Germany rounded passenger numbers to [...], leading to aeronautic revenues of EUR [...]. In the worst-case scenario, a total of [...] passengers was expected, leading to aeronautic revenues of EUR [...]. Since non-aeronautic revenues were expected to amount to [...] % of aeronautic revenues, non-aeronautic revenues were calculated to be EUR [...] in the best case and EUR [...] in the worst case. It was calculated that operating costs would amount to a total of EUR [...] in the best case and EUR [...] in the worst case. Marketing costs were not calculated on a per passenger basis, but were estimated, in total, to be EUR [...] in the best case and EUR [...] in the worst case.
- (315) Table 13 shows that revenues stemming from the 2000 Agreement were expected to exceed costs, leading to an annual surplus of EUR [...] in the best case and EUR [...] in the worst case.
- (316) The Commission finds the approach taken by Germany sound. The estimated average aeronautical revenues were based on the terms of the 2000 Agreement with Ryanair. The non-aeronautical revenues were expected to be [...] % of the aeronautical revenue, which seems to be in line with general expectations as regards non-aeronautical revenues at other airports (see Table 6). The assumption that the staff number would need to be increased when passenger numbers increase also seems reasonable.
- (317) The Commission notes that investments related to the expansion of Lübeck airport were not specific to Ryanair but could potentially be exploited by other airlines. This indicates that investment costs did not have to be included in the incremental costs of the Ryanair agreement. In this respect, the Commission notes that Germany emphasised that FLG continuously attempted to attract other airlines and succeeded in this attempt by attracting other airlines (such as Wizz Air). In addition, according to Germany, Lübeck airport unsuccessfully tried to initiate negotiations for an agreement with Air Berlin for years.
- (318) Germany submitted that in order to successfully privatise Lübeck airport, it was necessary to significantly increase passenger numbers. The Commission accepts that investments were made to prepare Lübeck airport for higher passenger numbers <sup>(1)</sup>.
- (319) The Commission further notes that the 2000 Agreement did not require FLG to make investments <sup>(2)</sup>. FLG could have fulfilled its obligations under the contract without investing in an expansion of the airport.
- (320) In the light of those considerations, the Commission concludes that Germany's approach not to attribute investments made at Lübeck airport to the agreement with Ryanair is reasonable.
- (321) Having analysed the information provided by Germany, the Commission disagrees however on one point of the analysis and amends it accordingly. The 2000 Agreement sets out as its end date 30 May 2010. Germany took into account incremental costs and revenues for the years 2011 and 2012 when calculating the incremental profitability of the 2000 Agreement. The Commission considers that it is appropriate to take only into account the incremental costs and revenues generated over the duration of the contract. In view of this necessary amendment, the Commission has carried out its own analysis by using directly the incremental profitability analysis submitted by Germany and amending this analysis where necessary as summarised in Tables 14, 15 and 16:

Table 14

**Best-case costs and revenues**

year	passengers	aeronautic revenues	non-aeronautic revenues	operating costs
2000	[...]	[...]	[...]	[...]
2001	[...]	[...]	[...]	[...]
2002	[...]	[...]	[...]	[...]
2003	[...]	[...]	[...]	[...]

<sup>(1)</sup> See Decision (EU) 2015/1226.

<sup>(2)</sup> Decision (EU) 2015/1584.

year	passengers	aeronautic revenues	non-aeronautic revenues	operating costs
2004	[...]	[...]	[...]	[...]
2005	[...]	[...]	[...]	[...]
2006	[...]	[...]	[...]	[...]
2007	[...]	[...]	[...]	[...]
2008	[...]	[...]	[...]	[...]
2009	[...]	[...]	[...]	[...]
2010	[...]	[...]	[...]	[...]
<b>Total</b>	[...]	[...]	[...]	[...]

Table 15

**Worst-case costs and revenues**

year	passengers	aeronautic revenues	non-aeronautic revenues	operating costs
2000	[...]	[...]	[...]	[...]
2001	[...]	[...]	[...]	[...]
2002	[...]	[...]	[...]	[...]
2003	[...]	[...]	[...]	[...]
2004	[...]	[...]	[...]	[...]
2005	[...]	[...]	[...]	[...]
2006	[...]	[...]	[...]	[...]
2007	[...]	[...]	[...]	[...]
2008	[...]	[...]	[...]	[...]
2009	[...]	[...]	[...]	[...]
2010	[...]	[...]	[...]	[...]
<b>Total</b>	[...]	[...]	[...]	[...]

Table 16

**Ex ante profitability assessment**

profitability assessment	Best case (in EUR)	Worst case (in EUR)
aeronautic revenues	[...]	[...]
non-aeronautic revenues	[...]	[...]
operating costs	[...]	[...]
marketing costs	[...]	[...]
<b>Total</b>	[...]	[...]

- (322) The Commission has taken out the revenues and operating costs expected for the years 2011 and 2012, as in those years, the 2000 Agreement was expected to have expired already (see Tables 14 and 15). The Commission relied instead on the revenues and operating costs expected for the years 2000-2010, resulting in the revenues and operating costs presented in Table 16. As to the marketing costs, the Commission calculated the average marketing costs per passenger that could have been expected in the best case and in the worst case scenario according to the information provided by Germany. It then multiplied the average marketing costs per passenger with the number of passengers that could have been expected for the years 2000-2010, resulting in an expected marketing costs of EUR [...] in the best case scenario, and EUR [...] in the worst case scenario (see Table 16).
- (323) Finally, while the *ex ante* analysis undertaken by FLG and submitted by Germany did not discount the future payments to the date on which the contract was concluded, it is clear from the figures provided that the contract was expected to be profitable.
- (324) In addition to the data provided by Germany, Oxera has submitted a profitability analysis of the 2000 Agreement <sup>(1)</sup>. Oxera used outturn data, i.e. data on the actual costs and revenues incurred, from the period prior to the agreement, where possible, to deduct assumptions about FLG's expectations at the time of signing the agreement. Oxera calculated passenger numbers based on outturn data up until the point of signing the agreement. Aeronautical revenues and marketing costs were based on the charges and payments stipulated in the 2000 Agreement. For the calculation of non-aeronautical revenues and operating costs, Oxera used outturn data from the period after the agreement was concluded.
- (325) The NPV of the 2000 Agreement with Ryanair was estimated to be EUR [...]. Therefore the agreement was expected to be profitable.
- (326) Oxera calculated the NPV without attributing investment costs to the 2000 Ryanair agreement. This is in line with the Commission's finding (see recitals 316 to 320) that investments made at Lübeck airport did not have to be attributed to the 2000 Agreement.
- (327) The Commission notes that Oxera used *ex ante* available data for the calculation of passenger numbers, aeronautical revenues and marketing charges but based its assessment of non-aeronautical revenues and operating costs on *ex post* data. Oxera stated that it did not have access to *ex ante* projections of non-aeronautical revenues and operating costs. The Commission notes that only revenues and costs that the airport expected to incur *ex ante*, at the time when it entered into the agreement with the respective airline, can be taken into account for assessing whether such agreement was in line with the MEO principle. An assessment partially based on *ex post* data can, however, serve to support the validation of the assumptions taken to determine the *ex ante* expected revenues and costs. Indeed, the *ex ante* data reconstructed by Oxera as regards aeronautic revenues (EUR [...]) lies between the *ex ante* expected aeronautic revenues of FLG submitted by Germany in the best case (EUR [...]) and the worst case scenario (EUR [...]). The *ex ante* data reconstructed by Oxera as regards marketing costs (EUR [...]) is even lower than the one submitted by Germany: FLG expected *ex ante* marketing costs of EUR [...] in the best case and of EUR [...] in the worst case. This confirms that the *ex ante* expectation of FLG was sufficiently conservative.

#### 7.4.3. Conclusion

- (328) The information provided by Germany indicates that FLG could have expected a positive incremental return on the 2000 Agreement. The assumptions on which that expectation were based appear reasonable. This is supported by the fact that the expected growth of passenger numbers was outperformed by the real growth during the years 2000-2005. The limits to the growth of the passenger number were largely due to the impossibility to obtain the planning approval and to enlarge the airport, which were not foreseeable at the time of the conclusion of the 2000 Agreement. The expectations of FLG are supported by the study provided by Oxera.
- (329) It could therefore have been reasonably expected that the 2000 Agreement with Ryanair would be incrementally profitable for FLG. Consequently, an MEO would have entered into the agreement, since it incrementally contributed, from an *ex ante* point of view, to the profitability of the airport. Similarly, in view of the clearly positive contribution the 2000 Agreement can also be considered to be part of the implementation of an overall strategy to lead to profitability at least in the long term.

<sup>(1)</sup> Oxera report, Economic MEOP assessment: Lübeck airport, 1 September 2014.



- (330) The 2000 Agreement between FLG and Ryanair therefore does not confer an economic advantage that Ryanair would not have obtained under normal market conditions. Therefore, it does not constitute State aid within the meaning of Article 107(1) of the Treaty. This finding is without any prejudice to the assessment of whether the 2010 Agreements involved State aid to Ryanair.

#### 7.5. CHARGES FOR THE DE-ICING OF AIRCRAFTS

##### 7.5.1. *Selectivity*

- (331) To fall within the scope of Article 107(1) TFEU, a State measure must favour 'certain undertakings or the production of certain goods'. Hence, only those measures favouring undertakings which grant an advantage in a selective way fall under the notion of State aid.
- (332) According to case law of the European Courts, it needs to be determined whether under a particular statutory scheme (the 'system of reference'), a State measure is such as to favour 'certain undertakings or the production of certain goods' in comparison with other undertakings which are in a legal and factual situation that is comparable in the light of the objective pursued by the measure in question. A measure which differentiates between undertakings in a comparable situation would be *prima facie* selective. If a *prima facie* selective measure is justified by the nature or general scheme of the system, it will not be considered selective and will thus fall outside the scope of Article 107(1) TFEU <sup>(1)</sup>.
- (333) The Commission therefore has to undertake a three-step-analysis: First, the system of reference needs to be determined. Second, it should be determined whether a given measure constitutes a derogation from that system insofar as it differentiates between economic operators who, in light of the objectives intrinsic to the system, are in a comparable factual and legal situation. If such a derogation exists (and therefore the measure is *prima facie* selective), it needs to be established, in the third step of the test, whether the derogation is justified by the nature or the general scheme of the system.
- (334) In the case at hand, the Commission opened the formal investigation procedure in relation to the charges for the de-icing of aircrafts.
- (335) First, the Commission has to determine the system of reference under which the charges for de-icing are to be assessed. In this context, the Commission notes that the charges for de-icing of aircrafts at the airport are laid down in a scheme of special charges. While such scheme of special charges is not part of the general schedule of charges for infrastructure use, the scheme of special charges has certain features in common with the general schedule of charges: the scheme of special charges sets out prices for certain services provided by the airport to airlines and prices for material needed for such services. It applies to all airlines using the airport. It is adapted every few years to cater for changes in the costs of the special services. In particular, the airport alone is competent to draw up the scheme of special charges.
- (336) In its *Lübeck* judgment, the Court of Justice held that the 2006 schedule of charges of Lübeck airport was to be considered as reference system <sup>(2)</sup>. In light of the similarities between the general schedule of charges and the scheme of special charges, the Commission concludes that the scheme of special charges at Lübeck airport has to be considered the reference framework under which the charges for de-icing of aircrafts at Lübeck airport are to be assessed.
- (337) Second, the Commission has to assess whether the scheme of special charges differentiates between economic operators who are in a comparable factual and legal situation. The Commission observes that the scheme of special charges applies to all airlines using Lübeck airport. When using the de-icing services for aircrafts, the scheme of special charges does not differentiate between the different airlines. Indeed, every aircraft de-iced at Lübeck airport is subject to the same charges, which depend on the take-off weight of the aircraft as well as the amount of de-icing liquid and hot water used. Therefore, the charges for the de-icing of aircrafts at Lübeck airport do not derogate from the system of reference, because they do not differentiate between airlines using the airport. The Commission concludes that the de-icing charges are, *prima facie*, not selective.

<sup>(1)</sup> Case T-210/02 *RENV British Aggregates Association v Commission*, ECLI:EU:T:2012:110, paragraphs 82 and 83; Joined Cases C-106/09 P and C-107/09 P, *Commission and Spain v Government of Gibraltar and United Kingdom*, ECLI:EU:C:2011:732, paragraphs 74 and 75; Case C-518/13 *Eventech v The Parking Adjudicator*, ECLI:EU:C:2015:9, paragraphs 54 and 55.

<sup>(2)</sup> Case C-524/14 P *Commission v Hansestadt Lübeck* ECLI:EU:C:2016:971, paragraph 62.

- (338) Given that the charges for de-icing are, *prima facie*, not selective, there is no need to assess whether such charges are justified by the nature or the general scheme of the system.

#### 7.5.2. Conclusion

- (339) Therefore, the charges for de-icing of aircrafts do not constitute State aid within the meaning of Article 107(1) TFEU.

### 8. CONCLUSION

- (340) The Commission finds that there is no need to take a decision as to whether potential State aid to FLG constitutes State aid within the meaning of Article 107(1) TFEU, and if so, whether such State aid could be declared compatible. The legal entity FLG has ceased to exist and so has its economic activity. Furthermore, even if there was economic continuity between FLG and Yasmina, it would not be possible to recover the aid from Yasmina anymore as Yasmina has been dissolved and its assets were sold in court supervised insolvency proceedings in line with German insolvency law.
- (341) The sale of shares in FLG to Infratil in 2005 did not provide an advantage to Infratil, because Hansestadt Lübeck acted like a MEO when selling the shares. The renegotiation of the put option in 2009 and the taking over of further losses, investments and other costs, as laid down in the 2009 Additional Agreement did not provide an advantage to Infratil either. In that context also Hansestadt Lübeck acted like a MEO.
- (342) The 2000 Agreement between FLG and Ryanair would, from an *ex ante* point of view, have contributed to the profitability of the airport. Consequently, a MEO would have entered into the agreement which does not provide an advantage to Ryanair.
- (343) The charges for de-icing of aircrafts at the airport do not appear to be selective,

HAS ADOPTED THIS DECISION:

#### Article 1

It is not necessary to decide whether the potential State aid to FLG constitutes State aid within the meaning of Article 107(1) of the Treaty of the Functioning of the European Union and if so, whether it could be declared compatible with the internal market, as the economic activity of FLG has ceased to exist, and as it is not possible anymore to recover the aid.

#### Article 2

The sale of 90 % of the shares of FLG to Infratil and the conditions of the put option renegotiated in 2009 do not constitute State aid within the meaning of Article 107(1) of the Treaty on the Functioning of the European Union.

#### Article 3

The 2000 Agreement between Ryanair and Lübeck airport does not constitute State aid within the meaning of Article 107(1) of the Treaty on the Functioning of the European Union.

#### Article 4

The charges for the de-icing of aircrafts do not constitute State aid within the meaning of Article 107(1) of the Treaty on the Functioning of the European Union.

*Article 5*

This Decision is addressed to the Federal Republic of Germany.

Done at Brussels, 7 February 2017.

*For the Commission*  
Margrethe VESTAGER  
*Member of the Commission*

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**COMMISSION DECISION (EU) 2017/2337****of 29 May 2017****on the amounts allocated to the provision of technical support in the agricultural sector as well as to the production and marketing of quality agricultural products pursuant to the Milk and Fat Law under State aid SA.35484 (2013/C) (ex SA.35484 (2012/NN))***(notified under document C(2017) 3487)***(Only the German text is authentic)**

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union, and in particular the first subparagraph of Article 108(2) thereof <sup>(1)</sup>,

Having called on interested parties to submit their comments pursuant to the provision cited above and having regard to their comments,

Whereas:

**1. PROCEDURE**

- (1) By letters dated 28 November 2011 and 27 February 2012, the European Commission (hereinafter: 'the Commission') asked Germany for additional information concerning the 2010 Annual Report on State aid in the agricultural sector, which Germany had submitted in accordance with Article 21(1) of Council Regulation (EC) No 659/1999 <sup>(2)</sup>, now Article 26(1) of Council Regulation (EU) 2015/1589 <sup>(3)</sup>. Germany answered the Commission's questions by letters dated 16 January 2012 and 27 April 2012. In the light of Germany's answers, it emerged that Germany had granted financial support to the German dairy sector pursuant to the 1952 Milk and Fat Law (Gesetz über den Verkehr mit Milch, Milcherzeugnissen und Fetten, hereinafter: 'the MFG').
- (2) By letter dated 2 October 2012, the Commission informed Germany that the measures in question had been registered as non-notified aid under registration number SA.35484 (2012/NN). By letters dated 16 November 2012, 7, 8, 11, 13, 14, 15 and 19 February, 21 March, 8 April, 28 May, 10 and 25 June and 2 July 2013, Germany submitted further information.
- (3) By letter of 17 July 2013 (C(2013) 4457 final) (hereinafter 'the opening decision'), the Commission informed Germany that it had decided to initiate the procedure laid down in Article 108(2) TFEU in respect of this aid. For the purposes of investigating the sub-measures in question as regards their compatibility with the internal market, the Commission distinguished between two separate periods:
  1. period from 28 November 2001 to 31 December 2006;
  2. period from 1 January 2007.
- (4) In its opening decision, the Commission found for several of the sub-measures under the MFG either that they did not constitute State aid within the meaning of Article 107(1) TFEU or that they did constitute State aid but fell outside the scope of State aid rules.
- (5) For other sub-measures, the Commission found that they were compatible with the internal market either for the period from 28 November 2001 to 31 December 2006 or for the period from 1 January 2007 or for both periods.

<sup>(1)</sup> With effect from 1 December 2009, Articles 87 and 88 of the EC Treaty have become Articles 107 and 108, respectively, of the TFEU. The two sets of Articles are in substance identical. For the purposes of this Decision, references to Articles 107 and 108 of the TFEU should be understood as references to Articles 87 and 88, respectively, of the EC Treaty where appropriate.

<sup>(2)</sup> Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 108 of the treaty on the functioning of the European Union (OJ L 83, 27.3.1999, p. 1).

<sup>(3)</sup> Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union (OJ L 248, 24.9.2015, p. 9). With effect from 14 November 2015, this Council Regulation repeals Regulation (EC) No 659/1999 and replaces these rules. In accordance with Article 35 of Regulation (EU) 2015/1589, references to the repealed Regulation are regarded as references to Regulation (EU) 2015/1589 and must be read in accordance with the correlation table in Annex II to that Regulation.

- (6) For all other sub-measures, including sub-measures underlying this decision on the provision of technical support in the agricultural sector as well as State aid granted for the production and marketing of quality agricultural products, the Commission raised doubts in the opening decision as to their compatibility with the internal market.
- (7) After a number of mistakes in the opening decision were discovered, a correction was sent to the German authorities by letter dated 16 December 2013.
- (8) The corrected opening decision was published in the *Official Journal of the European Union* <sup>(4)</sup>. The Commission invited interested parties to submit their comments within one month.
- (9) By letter dated 20 September 2013, Germany submitted comments concerning the Opening Decision.
- (10) The Commission received 19 sets of comments from interested parties. One of these parties asked the Commission not to disclose its identity and gave sound reasons for this. A total of ten sets of comments, but not the ones referred to in the previous sentence, referred to the sub-measures at issue for the provision of technical support in the agricultural sector as well as State aid granted for the production and marketing of quality agricultural products.
- (11) These comments were transmitted to Germany by letters of 27 February, 3 March and 3 October 2014.
- (12) By a letter dated 21 March 2014, Germany informed the Commission that it would not be responding to the aforementioned comments submitted by interested parties.
- (13) By letter dated 31 March 2014, Germany submitted to the Commission a comment made by Bavaria regarding the comments made by the party whose identity was not disclosed (see recital 10).
- (14) Germany did not initially respond to the comments submitted by interested parties in February 2014. Germany responded to an additional opinion dated 8 July 2014 by letter dated 3 December 2014.
- (15) The Commission requested further information from Germany by letter of 13 November 2014. Germany answered the Commission's questions by letter dated 27 February 2015.
- (16) On 30 June 2016, the Federal Ministry of Food and Agriculture submitted additional information on sub-measure RP 2.
- (17) The Commission again requested further information from Germany by letter of 15 November 2016. After requesting an extension of the deadline set by the Commission to reply to the letter, Germany answered the Commission's questions by letter dated 13 January 2017.

## 2. DESCRIPTION OF THE MEASURES AND COMMENTS BY THE GERMAN AUTHORITIES

- (18) In the following description, we will discuss the sub-measures under the aid granted for the provision of technical support in the agricultural sector as well as State aid earmarked for the production and marketing of quality agricultural products pursuant to the MFG, about which the Commission expressed doubts as to their compatibility with the internal market. Specifically, the following sub-measures are discussed (in the following text, the specific sub-measures will be referred to according to the classification in the Annex of the Opening Decision): BY 3, BY 10, BW 4, BB 1, BB 3, HE 2, HE 3, HE 9, NI 5, NI 6, NI 7, NW 4, NW 5, NW 6, RP 1, RP 5, SL 2, SL 5, TH 3, TH 4, TH 9, TH 10 (technical support for the period 2001-2006); RP 2 (technical support for the period from 2007); BW 10, BW 11, NI 1 and TH5 (quality products for the period 2001-2006).

### *Legal basis*

- (19) The MFG is a federal law which entered into force in 1952 and has since been amended several times <sup>(5)</sup>. It is the law underlying the aid measures at issue, and its validity is unlimited in time.

<sup>(4)</sup> See footnote 3.

<sup>(5)</sup> Most recently by Article 397 of the Regulation of 31 August 2015 (BGBl. I, p. 1474).

- (20) Section 22(1) of the MFG authorises the German Federal States (hereinafter: 'Länder') to impose a milk levy on dairies based on the quantities of delivered milk. According to the information made available by Germany, nine (out of sixteen) German Länder made use of this authorisation, i.e. Baden-Württemberg, Bavaria, Brandenburg, Hessen, Lower Saxony, North Rhine-Westphalia, Rhineland-Palatinate, Saarland and Thuringia. The levies imposed by the Länder amount to up to EUR 0,0015 per kg of milk.
- (21) Germany has demonstrated that the milk levy is not applicable to imports. By contrast, exports may be subject to the milk levy.
- (22) Section 22(2) of the MFG provides that the revenues obtained from the milk levy may be used solely for:
1. improving and sustaining quality on the basis of certain implementing provisions;
  2. improving hygiene during milking and the delivery, processing and distribution of milk and milk products;
  3. milk yield recording;
  4. advice to operators on matters relating to the dairy industry and ongoing training of young employees;
  5. advertising aimed at increasing the consumption of milk and milk products;
  6. performance of the tasks conferred by the MFG.
- (23) Section 22(2a) of the MFG provides that, by derogation from paragraph 2, the revenues generated pursuant to paragraph 1 may also be used to:
1. reduce increased structural collection costs in respect of the supply of milk and cream from the producer to the dairy.
  2. reduce increased transport costs in respect of the supply of milk between dairies where such supply is necessary to ensure the supply of drinking milk to the recipient dairy's sales area, and
  3. improve quality regarding the central distribution of milk products.
- (24) Section 22(4) of the MFG provides that contributions and fees paid by dairies or their associations to establishments in the dairy industry for the purposes set out in paragraph 2 may be offset in full or in part by the revenues generated by the milk levy.
- (25) Whilst the MFG sets the framework, it is the implementing regulations issued by the Länder on the basis of the MFG that provide the actual legal basis for the measures in question.

#### *Financing*

- (26) By letter of 13 January 2017, the German authorities confirmed that the measures referred to in this decision were financed exclusively from the milk levy and that no additional funds from Länder budgets were used.

#### **2.1. Provision of technical support in the agricultural sector**

- (27) Between 2001 and 2006, Baden-Wuerttemberg, Bavaria, Brandenburg, Hessen, Lower Saxony, North Rhine-Westphalia, Rhineland-Palatinate, Saarland and Thuringia granted financial support for measures aimed at the provision of technical support in the agricultural sector (sub-measures BY 3, BY 10, BW 4, BB 1, BB 3, HE 2, HE 3, HE 9, NI 5, NI 6, NI 7, NW 4, NW 5, NW 6, RP 1, RP 5, SL 2, SL 5, TH 3, TH 4, TH 9 and TH 10).
- (28) From 2007, Rhineland-Palatinate granted financial support for one measure aimed at the provision of technical support in the agricultural sector (RP 2).
- (29) Between 2001 and 2011, the total budgetary resources provided (all Länder combined) amounted to a total of EUR 23,7 million.

- (30) The financial assistance is provided for general information measures which benefit all operators in the dairy sector. These measures are aimed at the use of milk and dairy products in general, are limited to providing information about the objective characteristics of milk, do not include subjective claims about the benefits of certain products of one or more companies and do not constitute advertising. Only general measures that equally benefit all producers in the milk sector are financed. Individual producers or the origin of the milk are not named. No direct payments are made to processing and marketing companies (with the exception of measure RP 2).
- (31) Aid intensity of the measures is up to 100 % of eligible costs, except where otherwise indicated.

### Technical support in the period 2001-2006

#### BY 3

- (32) Bavaria granted financial support for the collection of general factual and technical information regarding milk production as well as for the publication and provision of general information on dairy topics (for example, milk production on farms). Costs associated with the dissemination of scientific knowledge in a generally comprehensible manner (through publications and presentations) and the preparation of factual information on quality systems, which are made available to dairy farmers in Bavaria and the interested public, were also subsidised. The measures were carried out by the Association of Dairy Producers (Verband der Milcherzeuger e.V. — VMB).
- (33) In its communication of 20 September 2013 <sup>(6)</sup>, Germany argued that, upon further review, the measure BY 3 did not constitute State aid, since it contained no specific benefits for individual companies. Even if it were considered a form of aid, the existing aid is protected under grandfathering. In the alternative, it was argued that the aid was compatible with the internal market.
- (34) Moreover, the measures concerned were compatible with the internal market regardless of the evidence that the funds were used for the dissemination of new methods. Article 15(2)(e) of Commission Regulation (EC) No 1857/2006 <sup>(7)</sup> and the 2007-2013 Guidelines <sup>(8)</sup> waive this requirement (dissemination of new methodologies). Instead, the decisive factor is disseminating scientific findings. This is also applicable to the 2000-2006 period, since no circumstances that would have warranted more stringent criteria existed at that time.
- (35) Germany argued that the measure was not confined to a particular group, but that the whole dairy sector was supported in a general way and no more than EUR 100 000 was spent per beneficiary within three years.
- (36) According to the German authorities, the beneficiaries of this measure were 'farmers, producer groups, the general public and SMEs'.
- (37) According to the communication issued by German authorities on 27 February 2015, the annual expenditure on operations for measures BY 3 and BY 10 for the period 2001-2006 was in the range of EUR 471 986- EUR 518 057. Considering the number of milk producers and dairy plants (47 287-56 755) over the same period, a yearly amount of between EUR 9,13 and EUR 10,46 was spent per beneficiary (milk suppliers and dairies).

#### BY 10

- (38) Bavaria granted the Milchwirtschaftliche Untersuchungs- und Versuchsanstalt (MUVA) Kempten financial support for the exchange between different actors (research institutes and authorities) of information related to milk as a raw material.
- (39) In its communication of 20 September 2013, Germany argued <sup>(9)</sup> that measure BY 10 did not constitute State aid, since it was not aimed at a transfer of information from MUVA to milk producers or dairy plants. However, even if it were considered a form of aid, the existing aid was protected under grandfathering. In the alternative, it was argued that the aid was compatible with the internal market.

<sup>(6)</sup> pp. 34-36

<sup>(7)</sup> Commission Regulation (EC) No 1857/2006 of 15 December 2006 on the application of Articles 87 and 88 of the EC Treaty to State aid to small and medium-sized enterprises active in the production of agricultural products and amending Regulation (EC) No 70/2001 (OJ L 358, 16.12.2006, p. 3).

<sup>(8)</sup> Community guidelines for State aid in the agriculture and forestry sector 2007 to 2013 (OJ C 319, 27.12.2006, p. 1).

<sup>(9)</sup> pp. 37-39

- (40) In the same communication <sup>(10)</sup>, Germany argued that the 'beneficiaries' of the measure were predominantly the authorities.
- (41) In its comments dated 27 February 2015, Germany estimated the total annual expenditure related to measures BY 3 and BY 10 at EUR 471 986-518 057 (see paragraph 37).

## BW 4

- (42) Baden-Württemberg granted financial support for general public relations activities and consumer information related to milk and milk products. This measure referred to the following, among others:
- (a) consumer information on the nutritional value and the general properties of dairy products;
  - (b) general information on labelling rules or quality criteria of milk and milk products;
  - (c) provision of speakers or information stands with regard to the above mentioned topics for consumer events (e.g. International Day of Milk);
  - (d) running or participating in training and scientific conferences on the subject of dietary milk and dairy products;
  - (e) organisation of events and the comprehensive presentation of the dairy industry at fairs (Landwirtschaftliches Hauptfest).
- (43) The measure was coordinated by the Milchwirtschaftlicher Verein Baden-Württemberg (MVBW). The technical implementation of the measure was carried out by the MVBW itself or by third parties commissioned by it.
- (44) In its comments dated 20 September 2013 <sup>(11)</sup>, Germany upheld its view that the measure did not constitute State aid because no individual undertakings or branches of production were favoured.
- (45) In the alternative, it was argued <sup>(12)</sup> that the measures materially complied with the requirements of the Community Guidelines applicable at the time, and could be considered fundamentally as a form of provision of technical assistance in accordance with point 14.1 of the Community Guidelines for State aid in the agriculture sector <sup>(13)</sup> (hereinafter: the '2000-2006 Guidelines'). The measures serve the general and wide dissemination of current scientific knowledge of the properties of milk and dairy products.
- (46) According to Germany, the 'Allgemeine Öffentlichkeitsarbeit' (general public relations activities) measures were not limited to a particular group, but supported the entire dairy sector in a general manner. Thus the conditions indicated in point 14.2 of the Guidelines have been observed. Point 14.3 of the 2000-2006 Guidelines stated that State aid may cover up to 100 % of the costs. The level of aid was lower than the limit of EUR 100 000 per beneficiary for a three-year period laid down in point 14.3.

## BB 1

- (47) Brandenburg sponsored training and education costs under the measure 'Improving Hygiene'. Areas of focus included animal health, improvement of milk hygiene and the quality of raw milk as well as analysis of performance issues. The measure was implemented by the Landeskontrollverband Brandenburg (LKVB). The maximum support rate did not exceed 60 % of eligible costs.
- (48) In its communication of 20 September 2013, Germany argued <sup>(14)</sup> that the measure 'Verbesserung der Hygiene' (Improving Hygiene) for the period 2001-2006 was compatible with the internal market. The consultancy services on offer were not limited to a particular group, but were made available to all milk producers in Brandenburg. Individual businesses were not favoured. The measure, it was argued, corresponded to the third indent of point 13.2 of the 2000-2006 Guidelines, i.e. the costs of training personnel to apply quality assurance systems.

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<sup>(10)</sup> p. 38

<sup>(11)</sup> p. 43

<sup>(12)</sup> p. 47

<sup>(13)</sup> OJ C 28, 1.2.2000, p. 2.

<sup>(14)</sup> pp. 39-40



- (49) In their communication of 27 February 2015, the German authorities confirmed that, in principle, all milk producers in the federal state had access to the consultancy services (complex and special consultancy) in question. Germany argued that the grants provided for part funding were fixed amounts of EUR 161,19 per farm in case of complex consultancy or EUR 144,62 per farm in case of special consultancy. Thus the upper limit of EUR 100 000 per company per three-year period could not be exceeded. According to the German authorities, the specified values were calculated for the year 2006, but other years' values were of a similar order. Germany also claimed that the final beneficiaries (dairy plants & milk producers) were SMEs.

BB 3

- (50) By the end of 2007, Brandenburg had funded the provision of information on economic issues and the dissemination of newly acquired information and knowledge in industry issues related to the Milk Law, dairy policy, milk production and milk quality, animal feeding and husbandry, promotion, protection from animal diseases, etc. No advice or training was provided to individual persons. The measure was delegated to the Landesvereinigung der Milchwirtschaft Brandenburg-Berlin e. V. (LVMB) and the Landesbauernverband Brandenburg e.V. (LBV).
- (51) In its comments dated 20 September 2013<sup>(15)</sup>, Germany claimed that the abovementioned measure was compatible with the internal market. The measure was carried out in accordance with the 2000-2006 Guidelines, as a form of technical assistance pursuant to point 14.1. The purpose of the measure was to improve the efficiency and professionalism of agriculture in the Community, thus contributing to the long-term economic viability of the sector.
- (52) State-wide milking and quality competitions organised by the LVMB were carried out in accordance with the fourth indent of point 14.1 as 'Veranstaltung von Wettbewerben' (organisation of competitions).
- (53) In its comments dated 27 February 2015, Germany argued that the Brandenburg companies that won competitions at the International Green Week (IGW) were distinguished and thus became known to a larger share of the general public. For this purpose, around EUR 463 provided to LVMB from milk levies was spent in 2006<sup>(16)</sup>.
- (54) LBV organised consulting services through their milk consultants, available for all stakeholders of the dairy industry, within the framework of the project 'Milcherzeugerberatung' (Milk producer consultancy). Funding was provided as co-financing from the milk levies, as part of the project funding. According to the documents submitted, LBV received a grant from the regional government amounting to EUR 20 000 for this purpose in 2006. According to the German authorities, the procedures in previous years were similar.
- (55) State aid was not restricted to selected groups. All persons concerned in the relevant sector of the milk industry had an equal opportunity to participate in the professional competitions. Therefore, the conditions laid down in point 14.2 of the 2000-2006 Guidelines were satisfied.

HE 2

- (56) Hessen granted financial support to the Landesvereinigung für Milch und Milcherzeugnisse Hessen e.V. (LVMH) for the measure 'Fortbildung für Erzeuger durch das Innovationsteam' (Training for Producers by the Innovation Team). Under this measure, the innovation team of LVMH prepared scientific information in the context of specialist articles and training. These included the collection and bundling of information and sharing of knowledge through scientific articles as well as training for farmers and farm workers.
- (57) Germany claimed that the effects on competition were low<sup>(17)</sup>. Therefore, the aid could be granted up to a maximum rate of 100 % to cover the cost of accurately described activities, in particular training and education. The eligible costs could include the actual cost of organising the training programme, travel and subsistence expenses together with the cost of the provision of replacement services during the absence of the farmer or the farm worker. This case relates to training for farmers on the abovementioned subjects and thus the requirements laid down in point 14.1 of the 2000-2006 Guidelines were satisfied.

<sup>(15)</sup> pp. 40-41

<sup>(16)</sup> Communication dated 27 February 2015, p. 47.

<sup>(17)</sup> Communication of September 2013, pp. 41-42.

- (58) The requirements laid down in point 14.2 were also satisfied as all natural and legal persons in the area concerned had, in principle, an opportunity to participate in the training, based on objectively defined criteria. The maximum allowable limit of EUR 100 000 was not exceeded as around EUR 125 was paid in aid per beneficiary over three years, in accordance with the criteria laid down in point 14.3.

### HE 3

- (59) Hessen granted financial support for public relations activities aimed at educating consumers on milk and milk products, including their nutritional values and uses. The nutrition team of LVMH disseminated scientific knowledge in a generally understandable form, organised information events and campaigns (not directed to specific businesses), and conducted PR activities in the form of flyers, brochures, handouts, recipes or posters related to the production, treatment and processing of milk and dairy products.
- (60) In its comments dated 20 September 2013 <sup>(18)</sup>, Germany claimed that measure HE 3 did not constitute a State aid because no individual undertakings or branches of production were favoured. The measure constituted 'pure consumer education'. In the alternative, Germany argued that the aid was compatible with the internal market.
- (61) If the measure were classified as State aid, contrary to the view expressed by Germany, it would, in any event, have been in accordance with the decision-making practice prevailing at the time and therefore be regarded as materially legitimate. The measure was not limited to a particular group, but supported the entire dairy sector in a general manner. Thus the conditions indicated in point 14.2 of the 2000-2006 Guidelines were observed. Point 14.3 of the 2000-2006 Guidelines stated that State aid may cover up to 100 % of the costs. The actual amount of the grants was well below the applicable threshold of EUR 100 000 per beneficiary within three years (point 14.3 of the 2000-2006 Guidelines). In the period 2001-2006, there were about 6 000 active dairy farmers in Hessen, giving rise to an average grant amount of about EUR 170 per beneficiary in the period in question.

### HE 9

- (62) Hessen granted financial assistance to the LVMH for the measure 'Training of young dairy farmers'. The purpose of this measure was to improve the skills of young dairy farmers. The eligible costs included the actual cost of organising the training programme, travel and subsistence expenses together with the cost of the provision of a replacement during the absence of the farmer or the farm worker.
- (63) In its comments dated 20 September 2013 <sup>(19)</sup>, Germany claimed that the impact on competition was low. Therefore, such aid could be granted up to a maximum rate of 100 % to cover the cost of accurately described activities, in particular training and education. The described measure could be classified under point 14.1 of the 2000-2006 Guidelines, as it ultimately constituted the education and training assistance described therein.
- (64) The measure included classical training in the dairy sector which was in principle open to all producers, thus satisfying the requirements laid down in point 14.2 of the 2000-2006 Guidelines. Aid covering up to 100 % of the costs is therefore permitted in those cases. The total amount of aid granted in the period 2001-2006 was about EUR 35 000, not exceeding the upper threshold of EUR 100 000 per beneficiary per three-year period (see point 14.3 of the 2000-2006 Guidelines).

### NI 5

- (65) Lower Saxony granted the Landesvereinigung der Milchwirtschaft Niedersachsen e.V. (LVMN) financial support for participation in fairs and exhibitions and for the preparation of scientific information in a readily comprehensible form. In this context, subsidised costs included rent and equipment for exhibition premises as well as the cost of publication of factual information (brochures, recipes etc.) on milk and dairy products, including their nutritional values and uses, and on milk production in Lower Saxony. The measure was coordinated by the LVMN. The technical implementation of the measure was carried out by the association itself or by third parties commissioned by it.

<sup>(18)</sup> pp. 43-47

<sup>(19)</sup> pp. 43-47

- (66) In its comments dated 20 September 2013 <sup>(20)</sup>, Germany argued that the measure was governed by the fourth indent (organisation of competitions, exhibitions and fairs) of point 14.1. of the 2000-2006 Guidelines. The main component of the measure was subsidising the exhibition stand of the LVMN. In this respect, the aid measure was considered acceptable and compatible with EU law, in Germany's opinion, if it additionally fulfilled the requirements contained in points 14.2 and 14.3.
- (67) Lower Saxony expressed the view that the relevant requirements were satisfied, since all dairy farms had benefited from the measure (2001-2006 average: around 17 500 farms). This was achieved, on the one hand, by ensuring that all dairy farms had access to the measure (point 14.2 of the 2000-2006 Guidelines) and by ensuring that the aid did not exceed EUR 100 000 per beneficiary within 3 years (point 14.3 of the 2000-2006 Guidelines).

#### NI 6 (2001-2003)

- (68) Lower Saxony also granted financial support for the participation of processing undertakings in fairs. Germany claimed that the aid granted in the period between 2001-2006 was in accordance with the requirements contained in point 14.1 of the 2000-2006 Guidelines. From 26 November 2003, the measure was based on approved State aid No 200/2003, which was in force until 31 December 2008, with a maximum aid intensity of 50 % or a maximum aid amount of EUR 70 000 per beneficiary over a three-year period.
- (69) In its comments of 20 September 2013 <sup>(21)</sup>, Germany argued that the measure provided aid only to enterprises active in processing and marketing (dairy plants) for their participation in fairs and exhibitions. That being the case, the evaluation of this measure was not governed by the fifth indent of point 14.1 (as assumed in the Opening Decision of the Commission), but by the fourth indent of point 14.1. Based on this, aid granted in the period 2001-2003 was regarded as compatible with the internal market.
- (70) In their comments dated 27 February 2015, the German authorities warrant that measure NI 6 was open to all companies active in the area of processing and marketing of dairy products in the relevant period (1 January 2002-26 November 2003 <sup>(22)</sup>) and was awarded according to objective criteria. Moreover, the measure was independent from membership in producer or other agricultural organisations.
- (71) According to the same comments, the maximum aid intensity for this measure was 48 %. Only one company (Nordmilch eG) received a total amount of aid in excess of EUR 100 000 under the measure in the period in question. According to the German authorities, Nordmilch eG did not fall within the definition of an SME. They were therefore looking into recovering this individual aid.

#### NI 7

- (72) Lower Saxony granted financial support for general consumer information campaigns on the use of milk as a foodstuff. The beneficiary was the LVMN, on whose behalf the information material was created.
- (73) In its comments dated 20 September 2013 <sup>(23)</sup>, Germany claimed that the measure 'general public relations activities' did not constitute a State aid because no individual undertakings or branches of production were favoured.
- (74) Germany argued <sup>(24)</sup> that the measure materially complied with the requirements of the Guidelines applicable at the time and could essentially be considered as provision of technical assistance in accordance with point 14.1 of the 2000-2006 Guidelines, as its purpose was the general dissemination of scientific knowledge and information about the properties of milk and dairy products.
- (75) According to Germany, the measure was not limited to a particular group, but supported the entire dairy sector in a general manner. As a consequence, the conditions laid down in point 14.2 of the 2000-2006 Guidelines were met.

<sup>(20)</sup> p. 55

<sup>(21)</sup> p. 56

<sup>(22)</sup> In this regard, German authorities gave assurances that no legally binding commitments had been made towards beneficiaries in 2001 (in the period relevant for the examination).

<sup>(23)</sup> p. 43

<sup>(24)</sup> pp. 58-59

- (76) According to Germany, the amount of aid granted was well below the upper threshold of EUR 100 000 per beneficiary within three years, laid down in point 14.3. Considering an average of about 17 500 milk producers in Lower Saxony in the period indicated above and a total amount of approximately EUR 6,9 million earmarked for measure NI 7 in the entire period, around EUR 395 of aid was paid per beneficiary.

*NW 4 and NW 5*

- (77) North Rhine-Westphalia granted financial support for informative events and measures to raise general awareness amongst consumers and measures regarding the use of milk and dairy products and their general characteristics (sub-measure NW 4). The grant recipients were Landesvereinigung der Milchwirtschaft Nordrhein-Westfalen e.V. (LVMNRW) and Landwirtschaftsverbände Rheinland und Westfalen-Lippe.
- (78) North Rhine-Westphalia granted further financial support for events related to the exchange of knowledge between milk producers on dairy industry issues (sub-measure NW 5).
- (79) The costs of event organisation and management, consultation, education and training related to issues of the dairy industry were subsidised. Aid intensity amounted to up to 30 %.
- (80) In its comments dated 20 September 2013 <sup>(25)</sup>, Germany argued that no favouring of individual companies or sectors occurred under measures NW 4 and NW 5 since they were aimed at the general public. As a consequence, these measures cannot be considered as a form of technical assistance. In addition to that, the potential benefits of both measures lacked substantive and geographic selectivity.
- (81) In their comments of 27 February 2015, the German authorities estimate the range of total annual expenditure under measure NW 4 in the period 2001-2006 to be between EUR 335 200 and EUR 497 800. With some 10 000 businesses holding dairy cattle over the same period, an annual amount between EUR 33,52 and EUR 49,78 was earmarked per beneficiary. Under measure NW 5, annual expenditure of EUR 14 000 works out at around EUR 1,40 per beneficiary per year.

*NW 6*

- (82) North Rhine-Westphalia granted financial support for the collection of relevant data that contributed to market transparency. Costs incurred by the Vereinigung der Milchindustrie LVMNRW during the collection, analysis and publication of relevant data related to the dairy market were eligible for funding. The results were made public in the form of notices and market reports and were available free of charge to everyone. They contributed to the transparency of the market and promoted the sharing of factual and scientific information and knowledge between different businesses in the dairy sector.
- (83) In its comments of 20 September 2013 <sup>(26)</sup>, Germany claimed that the measure was not substantively or geographically selective. In the alternative, Germany argued that the compatibility requirements of the Guidelines had been met.
- (84) The beneficiaries were farmers, producer groups and all stakeholders in the dairy sector <sup>(27)</sup>.
- (85) In its comments of 27 February 2015, Germany estimates the range of total annual expenditure under measure NW 6 in the period 2001-2006 to be between EUR 139 400 and EUR 155 900. With some 10 000 businesses holding dairy cattle over the same period, an annual amount between EUR 13,94 and 15,59 was earmarked per beneficiary.

*RP 1 and SL 2*

- (86) Rhineland-Palatinate and Saarland granted financial support for the dissemination of consumer information, including scientific knowledge in a generally understandable form, generic factual information on products, their nutritional benefits and suggested uses. Costs of participation in fairs and exhibitions, travel expenses, publication costs, rent paid for exhibition spaces, symbolic prizes worth up to EUR 250 per prize and winner were eligible for funding.

<sup>(25)</sup> pp. 70-74

<sup>(26)</sup> p. 76

<sup>(27)</sup> Communication of February 2013.

- (87) Promotional activities <sup>(28)</sup> or measures aimed at the products of particular companies were excluded from funding. The coordination and technical implementation of the measure was carried out by Milchwirtschaftliche Arbeitsgemeinschaft Rheinland-Pfalz e.V. (MILAG) and the Landesvereinigung der Milchwirtschaft des Saarlandes e.V. (LVMS).
- (88) In its comments dated 20 September 2013 <sup>(29)</sup>, Germany claimed that these measures did not constitute State aid because no individual undertakings or branches of production were favoured. According to the German position, these measures constitute 'pure consumer education'. In the alternative, Germany argued that the aid was compatible with the internal market. Point 8 of the Community Guidelines on state aid for advertising of agricultural produce specified the measures which were considered a form of technical aid in the agricultural sector within the meaning of point 14 of the 2000-2006 Guidelines.
- (89) The decision-making practice of the Commission in the period 2000-2006 across several product areas and Member States indicated that the introduction of measures which were comparable with the measures at issue here was considered to be materially legal and approvable by the Commission in the abovementioned period.
- (90) Germany added that even if they were classified as State aid contrary to the opinion of Germany, measures RP 1 and SL 2 were at least in accordance with the former decision-making practice and could therefore be regarded as materially legitimate. According to Germany, the 'general public relations activities' measures were not limited to a particular group, but supported the entire dairy sector in a general manner. As a consequence, the conditions laid down in point 14.2 of the 2000-2006 Guidelines were met. In accordance with point 14.3, the subsidies could cover up to 100 % of the costs.
- (91) In its communication of 27 February 2015, Germany argued that State aid granted over a period of three years under the ceiling of EUR 100 000 per beneficiary amounted to a sum between EUR 46 and EUR 73 per year per beneficiary <sup>(30)</sup>.

*RP 5 and SL 5*

- (92) Rhineland-Palatinate and Saarland granted financial support for consulting and training programmes for milk producers to improve the hygiene of milking equipment and the quality of the delivered milk (sub-measures RP 5 and SL 5). Proven consultancy costs were subsidised up to a maximum of EUR 75 000 per year in Rhineland-Palatinate and up to EUR 15 000 per year in the Saarland. Ongoing advisory services were excluded from the subsidy. The coordination and the technical implementation of these measures was carried out by the Landeskontrollverband Rheinland-Pfalz e.V. (LKVRP) and the LVMS.
- (93) In its comments of 20 September 2013 <sup>(31)</sup>, Germany claimed that the special consultancy on milking technology and the measures for the improvement of the quality of raw milk in Rhineland-Palatinate and Saarland were compatible with the internal market in the period of 2001-2006.
- (94) The aim of the measures was to offer specialist consulting in the field of milk technology and provide related advice and training for milk producers chosen on an ad hoc basis after problems (such as increased somatic cells) have been identified in the context of quality inspections of the delivered milk, with the involvement of veterinarians to improve udder health and thus the quality of raw milk. Any milk producer in Rhineland-Palatinate or Saarland could have benefited from this offer. Membership in LKVRP or LVMS was not necessary. Consulting services that were ongoing or were called upon at regular intervals (such as tax and legal advice or advertising) were not eligible for funding.
- (95) Germany argues that it thus constitutes a subsidised service. No direct payments were made to farmers.

<sup>(28)</sup> The legal basis for promotional activities in Rhineland-Palatinate is set in Decision No 381/2009 on State aid entitled 'Agrarmarketingmaßnahmen in Rheinland-Pfalz'.

<sup>(29)</sup> p. 43

<sup>(30)</sup> Communication of 27 February 2015, p. 48.

<sup>(31)</sup> p. 80

- (96) According to the views expressed by Rhineland-Palatinate, consulting assistance pursuant to the third indent of point 14.1 of the 2000-2006 Guidelines is not dependent on the dissemination of new methodologies. Such an obligation unquestionably applies to the promotion of 'other activities for the dissemination of new methods', in accordance with the fifth indent of point 14.1 of the 2000-2006 Guidelines. In addition, consulting services that were ongoing or were called upon at regular intervals were expressly excluded from funding under this measure.
- (97) The conditions laid down in points 14.2 and 14.3 of the 2000-2006 Guidelines are fulfilled, according to the views expressed by Germany, since membership of LKVRP or the service provider is not necessary.
- (98) Germany gave assurances that the total aid amount of EUR 100 000 per beneficiary over a period of three years was not exceeded. About 300 milk producers were advised in Rhineland-Palatinate per year and about 100 in Saarland. Given an annual appropriation of about EUR 59 000 in Rhineland-Palatinate and about EUR 13 000 in Saarland, the average funding per beneficiary is around EUR 197 in Rhineland-Palatinate and EUR 130 in Saarland.
- (99) The beneficiaries were farmers (SMEs) and producer associations.

*TH 3 and TH 4*

- (100) Thuringia granted financial support for Landesvereinigung Thüringer Milch e.V. (LVTM) for the participation at trade and consumer exhibitions (Grüne Tage Thüringen) and the organisation of conferences with the purpose of disseminating scientific information (Thüringer Milchtage) (sub-measure TH 3).
- (101) In addition, the publication of factual information about producers from the region was also subsidised (general public relations, International Day of Milk and Thüringer Milchkönigin) (sub-measure TH 4).
- (102) Material and personnel costs were both eligible for aid. The beneficiary was LVTM.
- (103) In its comments of 20 September 2013 <sup>(32)</sup>, Germany argued that measure TH 3 should be considered compatible with the internal market (point 14.1 of the 2000-2006 Guidelines). Its purpose was to improve the efficiency and professionalism of agriculture in the Community, thus contributing to the long-term economic viability of the sector.
- (104) The organisation of conferences for the dissemination of scientific information (e.g. Thüringer Milchtage) is governed by the third indent, 'Consulting Fees', of point 14.1 of the 2000-2006 Guidelines. Participation in trade shows and consumer exhibitions representing the Thuringian dairy industry (e.g. Grüne Tage Thüringen) was governed by the fourth indent of point 14.1, 'Organisation of Competitions, Exhibitions and Fairs'.
- (105) Germany argued that the measure was not limited to a particular group, but served to support the entire dairy sector in a general manner (see point 14.2 of the 2000-2006 Guidelines). Earmarked aid did not exceed EUR 100 000 per beneficiary over a three-year period.
- (106) In its comments dated 20 September 2013 <sup>(33)</sup>, Germany also argued that measure TH 4 focused on 'general public relations'. Its purpose was the broad dissemination of up-to-date scientific findings related to the properties of milk and dairy products and therefore constituted a form of technical assistance within the meaning of point 14.1 of the 2000-2006 Guidelines. The activities of the Landesvereinigung Thüringer Milch e.V. could be classified as consulting fees under the scope of the third indent of point 14.1 of the 2000-2006 Guidelines.
- (107) Spending on stands and consumer campaigns at trade fairs could be assigned under the fourth indent of point 14.1 of the 2000-2006 Guidelines (organisation of competitions, exhibitions and fairs). Multiplier events disseminating new methods and findings could be assigned under the fifth indent (other activities for the dissemination of new methods).
- (108) The measure as a whole was not limited to a particular group, but benefited the entire dairy sector in a general manner (point 14.2 of the 2000-2006 Guidelines).

<sup>(32)</sup> p. 82

<sup>(33)</sup> p. 83

- (109) The amount of aid granted per beneficiary did not exceed EUR 100 000 over a period of three years.

*TH 9 and TH 10*

- (110) Thuringia granted financial support for the training of employees in dairy farms (sub-measure TH 9) and for the promotion of professional competitions (sub-measure TH 10).
- (111) The training courses were aimed at workers on dairy farms and aimed at improving the skills of agricultural workers (certificate of competence in 'milking'). The measure was coordinated by the Verein Landvolksbildung Thüringen (VLT).
- (112) The second measure funded the organisation of professional competitions in the fields of breeding and milking. The competitions were organised by Thüringer Landjugendverband e.V. (TLJV) and Thüringer Melkergemeinschaft e.V. (TMG). As part of the measure, the preparation and running of competitions and participation in transregional competitions were subsidised.
- (113) In its comments of 20 September 2013 <sup>(34)</sup>, Germany claimed that training under sub-measure TH 9 was aimed at employees working at dairy cow farms. Training was carried out by Verein Landvolksbildung Thüringen. Payments were to be classified as a service fee paid to the association in return for services actually provided, calculated and reimbursed at market rates.
- (114) Germany thus maintained its view that the State aid conditions pursuant to Article 107 TFEU are not met. State aid conditions pursuant to Article 107 TFEU were similarly not met with regard to the training offer to employees either, since the payments were not company-specific.
- (115) In the alternative, it was argued that the requirements laid down in point 14 of the 2000-2006 Guidelines for this measure were satisfied. This case relates to training for farmers on the abovementioned subjects and thus the requirements laid down in the first indent of point 14.1 were satisfied. All persons who were active in the area concerned had the opportunity to participate in further training of the type described above, on the basis of objectively defined criteria. Therefore, the conditions laid down in point 14.2 of the 2000-2006 Guidelines were satisfied. The maximum allowable limit of EUR 100 000 per beneficiary per three-year period was not exceeded (point 14.3). Rather, the cumulative amount of aid under this sub-measure did not exceed EUR 100 000 over three years.
- (116) In its comments of 20 September 2013 <sup>(35)</sup>, Germany also argued in connection with sub-measure TH 10 that the organisation and running of professional competitions in the fields of animal breeding and milk production had been financed under this measure. The competitions were organised by TLJV and TMG. The organisers received standard market-calculated fees for the organisation and execution of, or participation in, transregional events.
- (117) As the payments are considered service fees to be offset against equivalent expenses, there was no favourable treatment and hence no legal relevance with respect to State aid.
- (118) In the alternative, it was argued that the requirements laid down in the fourth indent of point 14 of the 2000-2006 Guidelines for this measure were satisfied. State aid was not restricted to selected groups. All persons who were active in the area concerned had the opportunity to participate in professional competitions of the type described above, on the basis of objectively defined criteria. Therefore, the conditions laid down in point 14.2 of the 2000-2006 Guidelines were satisfied. The maximum allowable limit of EUR 100 000 per beneficiary per three-year period laid down in point 14.3 of the Guidelines was not exceeded. Rather, the cumulative amount of aid under this sub-measure did not exceed EUR 100 000 over three years.

**Technical assistance from 2007 onwards**

*RP 2*

- (119) Rhineland-Palatinate granted financial support to processing and marketing companies for their participation in events to share knowledge between businesses, competitions, exhibitions and fairs (sub-measure RP 2). This support was not limited to the first participation of an undertaking in a particular fair or exhibition. Aid intensity was limited to 10 % of proven costs, but not more than EUR 5 200 per business and event.

<sup>(34)</sup> p. 84

<sup>(35)</sup> p. 85

- (120) According to point 105 of the Community guidelines for State aid in the agriculture and forestry sector 2007 to 2013 <sup>(36)</sup> (hereinafter ‘the 2007-2013 Guidelines’), State aid for the provision of technical support granted to companies active in the processing and marketing of agricultural products must fulfil all the conditions of Article 5 of Commission Regulation (EC) No 70/2001 <sup>(37)</sup>, subsequently replaced by Article 27(3) of Commission Regulation (EC) No 800/2008 <sup>(38)</sup>. According to those rules, the aid intensity must not exceed 50 % of the eligible costs. The eligible costs shall be the costs incurred for renting, setting up and running the stand for the *first* participation of an undertaking in any particular fair or exhibition. Point 106 of the 2007-2013 Guidelines provides that state aid towards the cost covered by points 104 and 105 may not be granted to large companies.
- (121) Since Germany did not prove that any of the above conditions laid down for technical assistance had been satisfied in relation to this measure, the Commission expressed doubts in the Opening Decision as to its compatibility with the internal market. The Opening Decision invited Germany to provide a full assessment of the respective measures in the light of the above criteria and to provide appropriate documentation substantiating its answers <sup>(39)</sup>.
- (122) In its comments dated 20 September 2013 <sup>(40)</sup>, Germany explained that Rhineland-Palatinate would address the concerns of the Commission and amend the eligibility rules for future subsidies such that only the *first* participation of an undertaking in a particular fair or exhibition could be subsidised. Germany argued that the requirements laid down in Section IV.K of the 2007-2013 Guidelines in connection with Article 15(2) of Regulation (EC) No 1857/2006 <sup>(41)</sup> were thus fulfilled.
- (123) The funded projects were re-evaluated by the German authorities having regard to this additional requirement. In individual years, the following payments were made in relation to the repeated participation of an enterprise in a particular fair or exhibition.

Year	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012
Number	2	2	1	1	2	1	2	3	3	6
Amount in EUR	5 113	5 113	10 226	5 113	10 226	5 113	10 226	5 113	2 500	1 764

- (124) On 30 June 2016, the Federal Ministry of Food and Agriculture informed the Commission (see paragraph 16) that measure RP 2 was not limited to SMEs in the period from 2007 onwards. The two undertakings Hochwald Foods GmbH and MUH Arla eG had also received aid under this measure.
- (125) In its comments dated 13 January 2017, Germany stated that the eligible costs for the sub-measure in question in the period from 2007 onwards had related exclusively to setting up an exhibition stand. No additional costs had been subsidised during this period.

<sup>(36)</sup> OJ C 319, 27.12.2006, p. 1.

<sup>(37)</sup> Commission Regulation (EC) No 70/2001 of 12 January 2001 on the application of Articles 87 and 88 of the EC Treaty to State aid to small and medium-sized enterprises (OJ L 10, 13.1.2001, p. 33).

<sup>(38)</sup> On 1 July 2014, Commission Regulation (EC) No 800/2008 of 6 August 2008 declaring certain categories of aid compatible with the common market in application of Articles 87 and 88 of the Treaty (General block exemption Regulation) (OJ L 214, 9.8.2008, p. 3) was repealed by Commission Regulation (EU) No 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty on the Functioning of the European Union (OJ L 187, 26.6.2014, p. 1).

<sup>(39)</sup> Paragraph 244 of the Opening Decision.

<sup>(40)</sup> p. 77

<sup>(41)</sup> This Regulation was repealed on 1 July 2014 by Commission Regulation (EU) No 702/2014 of 25 June 2014 declaring certain categories of aid in the agricultural and forestry sectors and in rural areas compatible with the internal market in application of Articles 107 and 108 of the Treaty on the Functioning of the European Union (OJ L 193, 1.7.2014, p. 1).



## 2.2. State aid for improving the quality of delivered milk (2001-2006)

- (126) Baden-Württemberg, Lower Saxony and Thuringia (sub-measures BW 10, BW 11, NI 1 and TH 5) granted financial support for improving the quality of the delivered milk through advice and training of dairy producers, the compilation and updating of databases and checks of dairy producers, parallel with the introduction of the 'Quality Management QM Milk' quality assurance systems<sup>(42)</sup>. The aim of the measures was to improve the quality of delivered milk. Neither the training of inspectors with the purpose of obtaining specialised knowledge nor the accreditation of approved laboratories were subsidised.
- (127) The final beneficiaries of these sub-measures were milk-producing agricultural SMEs in the primary sector. According to Germany, the aid was available to all the farmers in the area concerned who were eligible based on objectively defined conditions<sup>(43)</sup>.
- (128) Between 2001 and 2011, the expended budget (all Länder combined) amounted to EUR 3,3 million.
- (129) According to information provided by the German authorities, aid intensity was a maximum of 100 % of eligible costs in the years 2001-2011. The German authorities stated that the financing of the measure had expired on 31 December 2012 in Baden-Württemberg and was limited until 31 December 2014 in Lower Saxony and Thuringia.
- (130) In the Opening Decision, Germany was requested to provide a detailed assessment according to the 2000-2006 Guidelines (in particular point 13.2: maximum 50 % of eligible costs or EUR 100 000 per beneficiary over a period of three years, whichever is the greater)<sup>(44)</sup>.

### *BW 10 and BW 11*

- (131) In its comments of 20 September 2013<sup>(45)</sup>, Germany stated that these measures were implemented by Milchprüfing Baden-Württemberg (BW 10) and Milchwirtschaftlichen Verein Baden-Württemberg (BW 11).
- (132) According to Germany, the beneficiaries of the activity were milk-producing farms (milk producers) who participated in the QM Milch quality assurance system.
- (133) In the case of measure BW 10, the performance of audits at dairy farms<sup>(46)</sup> and the cost of initial certification (introductory farm audit and possibly a follow-up audit) by a recognised certification body were subsidised.
- (134) In the case of measure BW 11, informational and advisory functions were funded in connection with the introduction of quality assurance systems<sup>(47)</sup>. According to Germany, these payments are proportionally dependent on the number of milk producers entering the quality management system (QM-Milch).
- (135) According to Germany, total expenses amounted to EUR 478 575. 4 500 milk producers were financed in connection with initial certification with a view to entry into the quality assurance system. The expenses thus amounted to EUR 106 per beneficiary.

### *NI 1*

- (136) Lower Saxony granted financial support for the implementation of a quality assurance system for milk producers (not for processing and marketing firms). The measure was delegated to LVMN.

<sup>(42)</sup> The QM-Milch milk quality management system is a nationwide business-to-business standard for milk production set for milk producers and dairy plants, which was recognised as a basis for certification testing.

<sup>(43)</sup> Paragraph 66 of the Opening Decision.

<sup>(44)</sup> Paragraph 253 of the Opening Decision.

<sup>(45)</sup> p. 11

<sup>(46)</sup> Comments of 20 September 2013, p. 12.

<sup>(47)</sup> Comments of 20 September 2013, p. 12.

- (137) According to the comments by Germany on 20 September 2013 <sup>(48)</sup>, preparatory actions for the implementation of the QM-Milch quality assurance system (mainly advisory services to farmers who wanted to introduce the QM-Milch system) were financed in the period 2001-2005 and then farm audits conducted within the framework of that quality assurance system were financed from 2003. Since 2003, the costs for the coordination of the quality assurance system and the creation of a database have also been financed.
- (138) In its comments of 20 September 2013 <sup>(49)</sup>, Germany argued that the aid granted for consulting services amounted to 50 % of the cost and an amount of EUR 12,78 per case for each farmer, not exceeding the upper threshold indicated in point 13.2 of the 2000-2006 Guidelines. For farm audits carried out from 2003, aid intensity was 50 % of the costs and amounted to EUR 35 per farmer for a three-year period.
- (139) Germany has confirmed that the checks on the farm audits were carried out by or on behalf of third parties. The Landeskontrollverband Niedersachsen was commissioned as an independent audit institution.

#### TH 5

- (140) The measure was introduced in 2004 <sup>(50)</sup>. The measure was carried out by Thüringer Verband für Leistungs- und Qualitätsprüfungen in der Tierzucht (TVLEV).
- (141) According to Germany, expenses for the initial certification, a necessary revision audit after three years and the construction and maintenance of databases were funded from the levy. In the period 2004-2006, producers were only subsidised with respect to initial certification. The average aid granted to individual producers amounted to approximately EUR 83.
- (142) The beneficiaries of this measure were milk producers.

### 3. GROUNDS FOR INITIATING THE FORMAL INVESTIGATION PROCEDURE

- (143) In the Opening Decision, the Commission found that all the conditions were met for the existence of State aid <sup>(51)</sup>.
- (144) The Commission initiated the procedure under Article 108(2) TFEU, as the Commission had doubts, based on the information available at that time, as to whether certain sub-measures were compatible with the internal market (see paragraph 18).

### 4. COMMENTS FROM GERMANY ON THE OPENING OF THE FORMAL INVESTIGATION PROCEDURE

- (145) The German authorities transmitted their comments to the Commission on 20 September 2013, 27 February 2015 and 13 January 2017. A summary of the German authorities' comments on the individual measures can be found in the above descriptions of the measures (see point 2: Description of the measures and comments by the German authorities).

### 5. COMMENTS FROM INTERESTED PARTIES ON THE OPENING OF THE FORMAL INVESTIGATION PROCEDURE

- (146) Between 6 and 18 February 2014, the Commission received ten sets of comments from interested parties relating to the measures underlying this Decision <sup>(52)</sup>.

<sup>(48)</sup> Comments of September 2013, p. 50.

<sup>(49)</sup> p. 50

<sup>(50)</sup> Comments of 20 September 2013, pp. 83-84.

<sup>(51)</sup> Section 3.3.

<sup>(52)</sup> The Commission received comments from the Landesvereinigung der Milchwirtschaft Niedersachsen e.V. on all measures financed via the milk levy in general and not only on the sub-measures at stake here. The association argued that there was no aid. A full description of these comments is given in Commission Decision (EU) 2015/2432 of 18 September 2015 concerning State aid SA.35484 (2013/C) (ex SA.35484 (2012/NN)) granted by Germany in respect of milk quality tests pursuant to the Milk and Fat Law (OJ L 334, 22.12.2015, p. 23).

- (147) In its comments of 6 February 2014 received on 13 February 2014, Verband der Milcherzeuger Bayern e.V. (VMB) expressed its surprise with respect to measure BY 3 regarding the fact that the Opening Decision called in question the measures implemented by VMB until 2006 from a State aid point of view, whereas no complaint was put forward regarding the measures implemented from 2007. In this respect, VMB recalled that the task priorities and the manner of its activities had not changed since 1954 and the VMB had been receiving funds from 'milk levies' since 1957. In its comments, the VMB further noted that the services it offered do not constitute concrete 'technical assistance' for individual establishments, but rather provision of technical and factual information in a general manner, equally accessible to all interested parties.
- (148) In its comments of 4 February 2014, received by the Commission on 6 February, the Milchwirtschaftliche Verein Allgäu-Schwaben e.V. (MV) claimed with respect to measure BY 10 that the objective of this measure is the dissemination of know-how and knowledge about dairy-related issues (e.g. food laws) to governments and other institutions. To this end, MUVA employees receive access to industry-relevant information, and then process and pass it on (in the form of opinions, lectures and publications, in particular to the authorities concerned). As well as the MUVA newsletters that are enclosed with the *Deutsche Molkereizeitung* (German Dairy Newspaper), significant contributions to the dissemination of information on quality assurance (hygiene, production safety) are disseminated. According to the MV, this constitutes an overarching activity whose results do not benefit individual farms, but rather are brought to the attention of particular authorities for the purposes of further training.
- (149) In their letter dated 4 February 2014 and received by the Commission on 11 February 2014, the Landesvereinigung für Milch und Milcherzeugnisse Hessen e.V. (LVMH) commented on measures HE 2, HE 3 and HE 9, executed by them. First, they noted that, contrary to the statement annexed to the Opening Decision of the Commission, the measures in question did not benefit only dairy plants, but rather the entire dairy industry. With regard to the content, the LVMH ensured under measure HE3 that consumer information and education were the focus of the general public relations activities, with consumer education carried out on a neutral level independent from dairy plants.

With regard to measure HE 2, 'Fortbildung für Erzeuger durch das Innovationsteam' (Training for Producers by the Innovation Team), LVMH remarked that the focus was on the transfer of knowledge. Current information and study results had been pooled, processed for use by farmers and disclosed, among others, in the form of lecture events, conferences and training courses.

HE2 and HE9 promoted special educational and training events for young professionals, farmers and agricultural workers where all farmers or agricultural workers had the opportunity to participate in the training on equal terms.

- (150) In their letter dated 6 February 2014, received by the Commission on 10 February 2014 and 11 February 2014, the Landeskontrollverband Nordrhein-Westfalen e.V. and the Landesvereinigung der Milchwirtschaft Nordrhein-Westfalen e.V., respectively, fully endorsed the comments made by Germany on 20 September 2013 in relation to the measures carried out in North Rhine-Westphalia.
- (151) Similarly, in their joint letter dated 6 February 2014, received by the Commission on 11 February 2014, the Rheinische Landwirtschafts-Verband e.V. and the Westfälisch-Lippische Landwirtschaftsverband e.V. supported the comments made by Germany on 20 September 2013 in relation to measure NW 5.
- (152) In its letter dated 6 February 2014, received by the Commission on 11 February 2014, the Landesvereinigung Thüringer Milch e.V. fully endorsed the comments made by Germany on 20 September 2013 in relation to the measures carried out in Thuringia.
- (153) In its comments of 10 February 2014, received by the Commission on 14 February 2014, Milchwirtschaftliche Arbeitsgemeinschaft Rheinland-Pfalz e.V. (MILAG) indicated with respect to measure RP 1 that it had a general nature. It related to general information about milk as foodstuff; the objective was not to discourage consumers from buying milk products from other Member States. Moreover, there was no promotion of individual brands or products of selected companies/individual producers. MILAG therefore did not consider this measure to

constitute a form of State aid. In the alternative, in its comments, MILAG stated about the same measure that it in any event materially complied with the requirements of the then applicable Guidelines and can be considered provision of technical assistance pursuant to point 14.1 of the 2000-2006 Guidelines. In particular, the measure was in principle available to all consumers, and therefore to market participants in the dairy sector as well. It consisted purely of consumer education and the measure did not constitute any support for milk processing undertakings, but rather provided general consumer information.

Regarding measure RP 2, MILAG considers that the additional funding requirement whereby only the first participation of a business in a particular fair or exhibition can be subsidised satisfies the relevant conditions of State aid regulations.

With regard to measure RP 5, MILAG indicated that the measure was centred on offering special advice related to milking technology to interested milk producers on an ad hoc basis. This offer was open to all milk producers in Rhineland-Palatinate as membership in the Landeskontrollverband, i.e. the body offering advice, was not necessary. Consulting services that were ongoing or were called upon at regular intervals were not eligible for funding and no direct payment was made to farmers. Therefore, the measure was also compatible with the requirements for State aid for the period 28 November 2001-31 December 2006. Moreover, MILAG considered that consulting assistance pursuant to the third indent of point 14.1 of the 2000-2006 Guidelines was not dependent on the dissemination of new methodologies. MILAG also gave assurances that the total amount of aid granted did not exceed EUR 100 000 per beneficiary over a three-year period. The average funding per beneficiary per year was EUR 197.

- (154) In its comments of 6 February 2014, registered by the Commission as received on 18 February 2014, the Milchprüfing Baden-Württemberg eV (MPBW) considered that measure BW 10 did not constitute State aid, or at least did not constitute an advantage.
- (155) The Milchwirtschaftliche Verein Baden Württemberg e.V. (MVBW) endorsed in its letter of 6 February 2014, received by the Commission on 7 February 2014, the remarks made by Milchprüfing Baden-Württemberg e.V. in relation to measures BW 4 and BW 11, considering that these two measures did not constitute State aid, or at least did not constitute an advantage.

## 6. ASSESSMENT OF THE MEASURES

### 6.1. Existence of State aid — Application of Article 107(1) TFEU

- (156) Article 107(1) TFEU lays down that any aid granted by a Member State or through State resources in any form which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods and affects trade between Member States is incompatible with the internal market.

#### 6.1.1. Aid granted by the State or through State resources

- (157) The German authorities have confirmed that the measures referred to in this decision were financed exclusively from the milk levy (see paragraph 26).
- (158) Milk levy resources are considered State resources within the meaning of Article 107(1) TFEU.
- (159) According to settled case-law, it is not permitted to make a distinction as to whether aid is granted directly by the State or by a public or private body designated or established by that State<sup>(53)</sup>. However, for advantages to be capable of being categorised as State aid within the meaning of Article 107(1) TFEU, they must, first, be granted directly or indirectly through State resources and, second, be imputable to the State<sup>(54)</sup>.
- (160) With regard to the measures described above, it is apparent that support is granted on the basis of a Federal law, the MFG, in conjunction with the application of the legal provisions of the Länder.

<sup>(53)</sup> Judgment of the Court of 20 November 2003, *Ministère de l'Économie, des Finances et de l'Industrie v GEMO*, C-126/01, EU:C:2003:622, paragraph 23.

<sup>(54)</sup> Judgment of the Court of 20 November 2003, *Case C-126/01, Ministère de l'Économie, des Finances et de l'Industrie v GEMO*, C-126/01, EU:C:2003:622, I-13769, paragraph 24.

- (161) Specifically, Section 22(1) of the MFG provides that the Land Governments, acting in consultation with the Land association or professional organisations, may collect levies jointly from dairies, milk collection centres and creameries in order to promote the dairy industry.
- (162) Under the second sentence of Section 22(1) of the MFG, the governments of the Länder may, if requested to do so by the association or professional organisations, collect joint levies of up to 0,2 cents per kilogram of delivered milk. Therefore, the collection of levies is clearly the responsibility of the Land Governments.
- (163) The legal basis for collecting a milk levy in the individual German Länder is provided by corresponding Land regulations on the detailed arrangements for collecting the levy, including the amount of the levy. As a consequence, the collection of a milk levy is regulated by the Land Governments, i.e. by the State. This is not altered by the fact that the regulations in question are issued in consultation with the respective Land association representing the dairy industry <sup>(55)</sup>.
- (164) In the case in hand, a levy is collected from private undertakings (dairies, milk collection centres, creameries). Revenue from this levy flows into the respective state budgets before being used for financing various support measures. Therefore, it is considered as being under State control <sup>(56)</sup>.
- (165) It follows that the measures financed by milk levy funds are granted by State resources and are imputable to the State.

#### 6.1.2. *Selective advantage/Undertakings*

- (166) Costs such as those for training, consultancy, information materials for the purposes of public relations, or fees for taking part in trade fairs and competitions are costs that a business has to pay in the context of its usual business activities. The same applies to expenses relating to the production and marketing of high quality products. If certain businesses are relieved of these costs in whole or in part, they are put at an advantage.
- (167) The Commission takes the view that the sub-measures under consideration confer an advantage upon milk producers and dairies.
- (168) In its comments dated 20 September 2013, Germany initially argued that some of the measures contained in the Opening Decision did not constitute aid because they either did not bring any concrete advantage to a single company (see paragraph 33 with respect to measure BY 3), or were not aimed at the transfer of knowledge to milk producers or dairy plants (see paragraph 39 with respect to measure BY 10), or did not favour certain businesses or sectors (see paragraphs 44, 60, 73, 80 and 88 with respect to measures BW 4, HE 3, NI 7, NW 4 and NW 5, RP 1 and SL 2), or there was no substantive or geographic selectivity to potential benefits (see paragraphs 80 and 83 with respect to measures NW 4, NW 5 and NW 6, respectively).
- (169) In addition, the MPBW and the MVBW, in their comments dated 6 February 2014, argued that there was no selective advantage from measures BW 10, BW 4 or BW 11 (see paragraphs 154 and 155 respectively).
- (170) However, the Commission is of the opinion that the above-listed measures ultimately benefit the dairy sector as well and as such confer an advantage upon milk producers and dairy plants that are to be considered as businesses.
- (171) In the case of measure BY 3, the Commission assumes that, even if this measure was aimed at the general public, it ultimately conferred an advantage on the milk sector, as it could be presumed that it would have a positive effect on milk consumption.
- (172) In relation to measure BY 10, the Milchwirtschaftliche Verein Allgäu-Schwaben mentioned in its comments dated 4 February 2014 that the MUVA Newsletter was enclosed with the 'Deutsche Molkerei Zeitung', and that, in addition, appropriate articles sharing information regarding quality assurance would be disseminated (see paragraph 148). Therefore, the Commission considers that the entire dairy sector (milk producers and dairy plants) should also be regarded as a beneficiary of measure BY 10.

<sup>(55)</sup> For example, in Lower Saxony: Ordinance on the collection of a levy within the dairy industry of 26 November 2004 (Official Gazette of Lower Saxony No 36/2004, p. 519), amended by Article 6 of the Ordinance of 22 December 2005 (Official Gazette of Lower Saxony No 31/2005, p. 475).

<sup>(56)</sup> Judgment of the Court of 30 May 2013 in Case C-677/11 *Doux Élevage SNC and Coopérative agricole UKL-ARREE v Ministère de l'Agriculture*, C-677/11, EU:C:2013:348, Paragraphs 32, 35 and 38.

- (173) With regard to measures BW 4, HE 3, NI 7, NW 4 and NW 5, RP 1, and SL 2, the Commission takes the view that the dissemination of current scientific knowledge about the properties of milk and dairy products, the organisation of campaigns, informative events and measures to raise general awareness amongst consumers, events for the exchange of knowledge between producers, and general consumer information campaigns about milk are also to be considered as technical assistance that benefited the entire dairy sector.
- (174) In relation to measures BW 10 and BW 11, the Commission also takes the view that these benefited dairy farms that took part in the QM Milch quality assurance scheme.
- (175) Moreover, the measures in question were selective as it benefited a single economic sector (i.e. the dairy industry).

#### 6.1.3. Distortion of competition and effect on trade

- (176) The Court of Justice has consistently held that strengthening the competitive position of an undertaking through the granting of State aid generally distorts competition with other competing undertakings not having benefited from this aid <sup>(57)</sup>. Aid for an undertaking that operates in a market open to intra-Union trade appears to affect trade between Member States <sup>(58)</sup>. There was substantial intra-Union trade in agricultural products in the period 2001-2012. For example, intra-Community imports to and exports from Germany of products falling within heading 0401 of the Combined Nomenclature (milk and cream, not concentrated nor containing added sugar or other sweetening matter) <sup>(59)</sup> were worth EUR 1,2 billion and EUR 957 million respectively in 2011 <sup>(60)</sup>.
- (177) The measures being assessed in this Decision benefit milk producers and dairy farms and thus strengthen their competitive position. As described in paragraph 176 above, trade in the products of dairies and milk producers does take place within the Union. The Commission therefore takes the view that the measures at issue were such as to distort or risk distorting competition or to affect trade between the Member States.
- (178) In the light of the foregoing, the conditions of Article 107(1) TFEU are fulfilled. It can therefore be concluded that the schemes under consideration constitute State aid within the meaning of that Article.

#### 6.2. Legality of the aid

- (179) According to Article 108(1) TFEU, the Commission must, in cooperation with Member States, keep under constant review all existing systems of aid. To that end, the Commission can obtain from Member States all information necessary for the review of existing aid schemes and, if necessary, issue a recommendation on appropriate measures.
- (180) Article 1(b)(i) of Regulation (EU) 2015/1589 defines existing aid as all aid which existed prior to the entry into force of the TFEU in the respective Member State and is still applicable after the entry into force of that Treaty.
- (181) However, according to Article 1(c) of Regulation (EU) 2015/1589, any alteration to existing aid makes it 'new aid'. Article 4 of Commission Regulation (EC) No 794/2004 <sup>(61)</sup> defines an alteration to existing aid as 'any change, other than modifications of a purely formal or administrative nature which cannot affect the evaluation of the compatibility of the aid measure with the common market'.
- (182) According to case-law <sup>(62)</sup>, the original scheme is transformed into a new aid scheme only if the change affects the essence of the provision; there can be no question of such a substantive alteration where the new element is clearly severable from the initial scheme.
- (183) According to Article 108(3) TFEU, all new aid has to be notified to the Commission and it cannot be put into effect before it has been approved by the Commission (standstill obligation).

<sup>(57)</sup> Judgment of the Court of 17 September 1980, Philip Morris Holland BV v Commission, C-730/79, EU:C:1980:209, paragraphs 11 and 12.

<sup>(58)</sup> See in particular judgment of 13 July 1988, French Republic v Commission, ECLI:EU:C:1988:391, paragraph 19.

<sup>(59)</sup> Commission Implementing Regulation (EU) No 927/2012 of 9 October 2012 amending Annex I to Council Regulation (EEC) No 2658/87 on the tariff and statistical nomenclature and on the Common Customs Tariff (OJ L 304, 31.10.2012, p. 1).

<sup>(60)</sup> Source: Eurostat.

<sup>(61)</sup> Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Council Regulation (EU) 2015/1589 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union (OJ L 140, 30.4.2004, p. 1).

<sup>(62)</sup> Judgment of the Court of 30 April 2002, Gibraltar v Commission, T-195/01 and T-207/01, ECLI:EU:T:2002:111, paragraph 111.

- (184) According to Article 1(f) of Regulation (EU) 2015/1589, new aid put into effect in contravention of Article 108(3) TFEU is unlawful.
- (185) On the basis of the MFG and in the context of the powers conferred on them, the German Länder have adopted implementing measures which constitute the legal bases for the measures being assessed in this Decision. Although the Milk and Fat Law, which provides the framework for the aid schemes in question, entered into force in 1952 <sup>(63)</sup>, the individual schemes were introduced through corresponding implementing provisions of the corresponding Länder only after 1958 <sup>(64)</sup>.
- (186) The measures to which this Decision relates therefore constitute new aid within the meaning of Article 1(c) of Regulation (EU) 2015/1589.
- (187) Germany did not at any time notify the aid schemes at issue in accordance with Article 108(3) of the TFEU. These schemes are therefore unlawful.

### 6.3. Compatibility of the aid with the internal market

- (188) Under Article 107(3)(c) TFEU, aid to facilitate the development of certain economic activities or of certain economic areas may be considered compatible with the internal market, where such aid does not adversely affect trading conditions to an extent contrary to the Union interest.
- (189) Pursuant to the Commission notice on the determination of the applicable rules for the assessment of unlawful State aid <sup>(65)</sup>, the measures must be assessed in accordance with the guidelines in force at the time when the aid was granted.
- (190) Specific guidelines have applied for the agriculture sector since 1 January 2000. Aid granted during the period between 28 November 2001 and 31 December 2006 (hereinafter: 'the period 2001-2006') is to be assessed in the light of the 2000-2006 Guidelines.
- (191) Aid granted since 1 January 2007 (hereinafter: 'the period from 2007') will be assessed in the light of the 2007-2013 Guidelines.
- (192) The period since 28 November 2001 is hereinafter referred to as the 'period of investigation'.
- (193) Based on the suspensive effect of the formal procedure under Article 108(3) TFEU, the Commission is examining the measures which underlie this decision up to 17 July 2013, the date on which the Commission notified Germany of its decision to initiate proceedings under Article 108(2) TFEU (see paragraph 3).

#### 6.3.1. Provision of technical support in the agricultural sector in the period 2001-2006

- (194) The measures carried out between 2001 and 2006 with the objective of providing technical support in the agricultural sector have to comply with the conditions set out in point 14 of the 2000-2006 Guidelines.

<sup>(63)</sup> See recital 17.

<sup>(64)</sup> Bavaria: Verordnung über eine Umlage für Milch (Ordinance on a levy for milk) of 30 June 1983 (GVBl. p. 547); Baden-Württemberg: Verordnung über die Erhebung von milchwirtschaftlichen Umlagen (Ordinance on the charging of levies in respect of the dairy industry) of 18 May 2004 (GBl. pp. 350, 355); North Rhine-Westphalia: Verordnung über Umlagen zur Förderung der Milchwirtschaft (Ordinance on Levies to Support the Dairy Industry) of 30 November 1965 (GV. NW. 1965, p. 349); E.g. Rhineland Palatinate: Landesverordnung zur Durchführung des Milch- und Fettgesetzes (Land Ordinance implementing the Milk and Fat Law) of 16 August 1960 (GVBl. p. 218, BS 7842-2); Brandenburg — Verordnung zur Übertragung der Ermächtigungen zum Erlass von Rechtsverordnungen nach dem Milch- und Fettgesetz (Ordinance Implementing the Delegated Powers pursuant to the Milk and Fat Law — ÜErmVO) of 5 December 1992 (GVBl.II/92, [No 72], p. 764); Hessen — Verordnung über die Erhebung einer Umlage zur Förderung der Milchwirtschaft (Ordinance on the collection of a levy to promote the dairy industry) of 1 December 1981 (GVBl. I 1981 p. 427); Saarland: Verordnung über die Erhebung einer Umlage auf dem Gebiet der Milchwirtschaft (Ordinance on the collection of a levy within the dairy industry) of 9 December 1982 (Official Gazette 1982, p. 1007); Thuringia: Thüringer Verordnung über die Erhebung einer Umlage zur Förderung der Milchwirtschaft (Thuringian Ordinance on the collection of a levy to promote the dairy industry) of 27 November 2001 (GVBl. 2000, 20). In Lower Saxony, the milk levy was introduced by the Order on the collection of a levy within the dairy industry of 6 July 1951, in the version of the Order of 25 March 1952 (Official Gazette of Lower Saxony, Sb. I p. 689). However, the collection of the levy during the relevant period for State aid purposes was based on the Ordinance on the collection of a levy within the dairy industry of 22 May 1973 (Official Gazette of Lower Saxony, p. 179), and the use of the funds raised by the levy was regulated by the Land guidelines on the awarding of grants to support the dairy industry in Lower Saxony pursuant to Section 22(2) of the Milk and Fat Law of 8 November 1985 (Ministerial Gazette of Lower Saxony No 43/1985).

<sup>(65)</sup> OJ C 119, 22.5.2002, p. 22.

- (195) Under point 14.1 the eligible costs included those incurred by education and training programmes, the provision of farm management services, consultancy fees, the organisation of (or participation in) competitions, exhibitions and trade fairs and other activities for the dissemination of knowledge relating to new techniques <sup>(66)</sup>. According to point 14.1 of the 2000-2006 Guidelines, such aid may be granted at a rate of 100 % of the costs.
- (196) According to point 14.2, the aid is to be accessible to all eligible natural and legal persons in the area concerned on the basis of objectively defined criteria.
- (197) Pursuant to point 14.3, the total amount of support granted should not exceed EUR 100 000 per beneficiary over any three year period or, in the case of aid granted to SMEs, 50 % of eligible costs, whichever is greater. For the purpose of calculating the amount of aid, the beneficiary is considered to be the person receiving the services.
- (198) The Commission takes the view that, for the measures mentioned below, the provisions of point 14 of the 2000-2006 Guidelines equally apply to aid granted in connection with activities relating to the [primary] production and to the processing and marketing of agricultural products. This follows from the wording of point 2.1 of the 2000-2006 Guidelines and from the fact that point 14 does not itself provide for any restriction in this respect.
- (199) The Commission assumes that such measures contribute to the long-term viability of the sector while producing only very limited effects on competition (second sentence of point 14.1 of the 2000-2006 Guidelines).
- (200) In the Opening Decision, the Commission expressed doubts regarding the compatibility of certain measures with the internal market in the relevant period <sup>(67)</sup>.

## BY 3

- (201) The Verband der Milcherzeuger e.V. (VMB) received funding for the collection of material and technical information of a general nature as well as for the publication and provision of general information on topics related to the dairy industry. The rules about the provision of technical assistance apply to the aid granted.
- (202) The subsidised costs (dissemination of scientific knowledge and the provision of factual information on quality systems — paragraph 32 of this Decision) correspond to the eligible costs laid down in point 14.1.
- (203) The measure was open to all eligible natural and legal persons in the area concerned and the grants were below EUR 100 000 per beneficiary in a three-year period (paragraph 35 in conjunction with paragraph 37 of this Decision). The requirements laid down in points 14.2 and 14.3 are satisfied.
- (204) The conditions set out in point 14 of the 2000-2006 Guidelines are therefore met.

## BY 10

- (205) The rules about the provision of technical assistance apply to the aid granted for the exchange of expertise and knowledge about milk-related topics.
- (206) The subsidised costs incurred by provision of information in the form of comments, lectures and publications (see paragraph 148) correspond to the eligible costs laid down in point 14.1 of the 2000-2006 Guidelines.
- (207) This is a general information measure aimed at the dairy industry, which was open to all eligible natural and legal persons in the area concerned. Total annual expenditure provided by the German authorities for measures BY 3 and BY 10 (see paragraph 41) indicate that the subsidies in any case did not exceed EUR 100 000 per beneficiary per three-year period. The conditions set out in points 14.2 and 14.3 are therefore met.
- (208) The conditions set out in point 14 of the 2000-2006 Guidelines are thus fulfilled.

<sup>(66)</sup> The German language version of the 2000-2006 Guidelines contains an exhaustive list of eligible costs. However, the English version, in which the Guidelines were originally drafted, cites the same eligible costs as examples and not as an exhaustive list. The same is true of the French language version.

<sup>(67)</sup> Opening Decision, paragraphs 235-236: For this purpose, the Commission referred in paragraph 236 of the Opening Decision to the German version of the 2000-2006 Guidelines and considered that, pursuant to point 14.1, aid may be granted only for the dissemination of new methodologies (see footnote 72).



## BW 4

- (209) The measures serve the general and wide dissemination of current scientific knowledge of the properties of milk and dairy products. They are to be considered as technical assistance that benefited the entire dairy sector. The subsidised costs (see paragraph 42) correspond to the eligible costs pursuant to point 14.1.
- (210) The measures were not limited to a particular group, but were made available to all eligible natural and legal persons in the area concerned, based on objectively defined criteria (paragraph 46). The conditions set out in point 14.2 of the 2000-2006 Guidelines are thus fulfilled. The level of aid was lower than the limit of EUR 100 000 per beneficiary for a three-year period laid down in point 14.3 (paragraph 46). The conditions laid down in point 14.3 are fulfilled.
- (211) The conditions set out in point 14 of the 2000-2006 Guidelines are thus fulfilled.

## BB 1

- (212) Over the period 2001-2006, Brandenburg funded consulting fees under the measure known as 'Improving Hygiene'. Areas of focus included animal health, improvement of milk hygiene and the quality of raw milk as well as analysis of performance issues.
- (213) The measure in question thus falls within the scope of point 14 (Provision of technical assistance) of the 2000-2006 Guidelines. The subsidised costs (consulting fees) correspond to the eligible costs pursuant to point 14.1.
- (214) In their communication of 27 February 2015, the German authorities confirmed that, in principle, all milk producers in the federal state had access to the consulting services (complex and special consulting) in question (see paragraph 49). Furthermore, Germany explained in the same communication that the threshold of EUR 100 000 per company for a three-year period was not exceeded under measure BB 1 (see paragraph 49). Therefore, the measure complies with the conditions laid down in points 14.2 and 14.3.
- (215) The conditions set out in point 14 of the 2000-2006 Guidelines are thus fulfilled.

## BB 3

- (216) The Landesvereinigung der Milchwirtschaft Brandenburg-Berlin e. V. (LVMB) and the Landesbauernverband Brandenburg e.V. (LBV) carried out measures related to the provision of information on economic issues and the dissemination of newly acquired information and knowledge regarding dairy production issues. In addition, competitions were organised. These measures constitute technical assistance.
- (217) The subsidised costs (providing information and organising competitions — paragraph 50) correspond to the eligible costs laid down in point 14.1 of the 2000-2006 Guidelines.
- (218) The aid was not restricted to selected groups. Point 14.2 of the 2000-2006 Guidelines is therefore fulfilled.
- (219) In 2006, LVMB awarded EUR 463, collected from the milk levy, to businesses from Brandenburg which distinguished themselves (see paragraph 53). Furthermore, LBV received a grant of EUR 20 000 from state funds in 2006 for the provision of consultancy to milk producers (see paragraph 54). According to Germany, the procedures in other, earlier years were similar (see paragraph 54). The Commission concludes from the above facts that under these two measures the upper threshold of EUR 100 000 per beneficiary over a three-year period cannot have been exceeded in the period 2001-2006. Point 14.3 of the Guidelines is therefore fulfilled.
- (220) Measure BB 3 thus meets the requirements set out in point 14 of the 2000-2006 Guidelines.

## HE 2

- (221) Hessen granted financial support to the Landesvereinigung für Milch und Milcherzeugnisse Hessen e.V. (LVMH) for the measure 'Fortbildung für Erzeuger durch das Innovationsteam' (Training for Producers by the Innovation Team). Under this measure, LVMH provided information in the form of articles and organised training for farmers and farm workers. These activities are to be qualified as technical assistance.

- (222) The eligible costs (paragraph 57) correspond to the eligible costs laid down in the first indent of point 14.1 of the 2000-2006 Guidelines.
- (223) The aid was not restricted to selected groups (paragraph 57). This was also confirmed by LVMH in its comments of 4 February 2014, according to which each farmer or agricultural worker had the opportunity to participate in the training on the same terms (see paragraph 149). Therefore, the requirements laid down in point 14.2 of the Guidelines is satisfied.
- (224) The amount of aid granted was below EUR 100 000 per beneficiary in a three-year period (see paragraph 57). Point 14.3 of the Guidelines is thus also fulfilled.
- (225) Measure HE 2 thus meets the requirements set out in point 14 of the 2000-2006 Guidelines.

#### HE 3

- (226) The nutrition team of LVMH disseminated scientific knowledge in a generally understandable form, organised information events and campaigns and conducted PR activities (not targeted at certain businesses) related to the production, treatment and processing of milk and dairy products.
- (227) In its comments dated 4 February 2014, LVMH remarked that the provision of consumer information and education were the focus of these measures and consumer education was carried out on a neutral level independent from dairy plants. The Commission nonetheless takes the view that measures to promote the dissemination of scientific knowledge and the organisation of campaigns should be considered as technical assistance that benefits the entire dairy sector (see paragraph 173).
- (228) The subsidised costs (paragraph 59) correspond to the eligible costs pursuant to point 14.1.
- (229) Measures were not restricted to a selected group (paragraph 61). The conditions laid down in point 14.2 are fulfilled.
- (230) Grant amounts were below the upper threshold laid down in point 14.3 (see paragraph 61).
- (231) The conditions set out in point 14 of the 2000-2006 Guidelines are thus fulfilled in the case of measure HE 3.

#### HE 9

- (232) Hessen granted financial assistance to LVMH for the measure 'Training of young dairy farmers' (see paragraph 62). Training of young dairy farmers should be considered as technical assistance.
- (233) The eligible costs (paragraph 62) correspond to the eligible costs laid down in the first indent of point 14.1 of the 2000-2006 Guidelines.
- (234) Training courses are open to all producers (paragraph 64). This was also confirmed by LVMH in its comments dated 4 February 2014, according to which each farmer or agricultural worker had the opportunity to participate in the training on the same terms (see paragraph 149). Therefore, the measure is also consistent with the requirements of point 14.2.
- (235) Total expenses in relation to measure HE 9 in the period 2001-2006 amounted to approximately EUR 35 000 (see paragraph 64). Therefore, the upper limit of EUR 100 000 per beneficiary in a three-year period (point 14.3) could not be exceeded.
- (236) The conditions set out in point 14 of the 2000-2006 Guidelines are thus fulfilled in the case of measure HE 9.

#### NI 5

- (237) Lower Saxony granted the Landesvereinigung der Milchwirtschaft Niedersachsen e.V. (LVMN) financial support for participation in fairs and exhibitions and for the preparation of scientific information in a readily comprehensible form (see paragraph 65). Participation in fairs and exhibitions and the preparation of scientific information is to be considered technical assistance.
- (238) The cost of rent and equipment for exhibition halls as well as the cost of publication of factual information are eligible costs pursuant to point 14.1 (first indent).

- (239) According to the German authorities, the measure was centred on sponsoring the LVMN exhibition stand (see paragraph 66), benefiting all dairy plants in Lower Saxony (on average about 17 500 businesses in the period 2001-2006) (see paragraph 67). Thus the measure was open to all dairy plants and the conditions contained in point 14.2 are fulfilled.
- (240) Whilst Germany has not confirmed in its comments that the measure was limited to a maximum of EUR 100 000 per beneficiary over a period of three years, the Commission considers that this upper threshold cannot be exceeded in the case of promoting an exhibition stand in favour of all dairy plants in Lower Saxony. The conditions of point 14.3 are therefore met.
- (241) Measure NI 5 thus meets the requirements set out in point 14 of the 2000-2006 Guidelines.

#### NI 6 (2002-2003)

- (242) Lower Saxony granted financial support for the participation of processing undertakings (dairies) in fairs. Funding the participation of businesses in fairs is to be considered a form of technical assistance.
- (243) German authorities gave assurances that no legally binding commitments had been made <sup>(68)</sup> towards beneficiaries in 2001, i.e. the main examination period. They also indicated that the measure in question had been based on approved State aid No 200/2003 since 26 November 2003 (see paragraph 68). Therefore, the evaluation of the measure in question only covers the period between 1 January 2002 and 26 November 2003.
- (244) The eligible costs (paragraph 68) correspond to the eligible costs laid down in the first indent of point 14.1 of the 2000-2006 Guidelines.
- (245) The German authorities gave assurances that measure NI 6 was accessible to all companies in the area of processing and marketing of dairy products and was awarded according to objective criteria. Moreover, the measure was independent from membership in producer or other agricultural organisations (see paragraph 70). The conditions of point 14.2 of the 2000-2006 Guidelines are therefore met.
- (246) Maximum aid intensity for the measure in question in the relevant period was 48 % (see paragraph 71). According to the German authorities, only one company (Nordmilch eG) received a total amount of aid in excess of EUR 100 000. According to those same authorities, Nordmilch eG does not fall within the definition of an SME. Therefore, aside from the aid granted to Nordmilch eG, the requirements laid down in point 14.3 are met.
- (247) With around 2 500 staff and a turnover of around EUR 1,9 billion, Nordmilch eG was one of the biggest dairy undertakings in Germany <sup>(69)</sup>. Given these figures, it did not fall within the Commission's definition of a small and medium-sized enterprise set out in point 14.3 <sup>(70)</sup>. Pursuant to point 14.3 of the 2000-2006 Guidelines, it should therefore have received a total aid amount not exceeding EUR 100 000 over a period of three years. The aid granted to Nordmilch eG does not therefore meet the requirements laid down in point 14.3 <sup>(71)</sup>.
- (248) Measure NI 6 thus basically meets the requirements set out in point 14 of the 2000-2006 Guidelines.
- (249) In the case of the aid granted to Nordmilch eG in the period 2002-2003, measure NI 6 does not meet the requirements set out in point 14 of the Guidelines.

#### NI 7

- (250) Lower Saxony granted financial assistance for activities undertaken by the LVMN as part of general consumer information campaigns on the use of milk as a foodstuff. General information campaigns about milk constitute aid that benefits the entire dairy sector (see paragraph 173). The rules on the provision of technical assistance in accordance with point 14 of the 2000-2006 Guidelines apply.

<sup>(68)</sup> See footnote 24 of this Decision.

<sup>(69)</sup> Figures: 2009; Source: <http://www.nordmilch.de/unternehmen/geschichte/>. In April 2011, Nordmilch GmbH and Humana Milchindustrie GmbH merged to form DMK Deutsches Milchkontor GmbH.

<sup>(70)</sup> OJ L 107, 30.4.1996, p. 4.

<sup>(71)</sup> In its communication dated 27 February 2015, Germany stated that a recovery of this aid had already been examined (see paragraph 68).

- (251) The subsidised costs (paragraph 72) correspond to the eligible costs pursuant to point 14.1.
- (252) The measure was not limited to a particular group, but supported the entire dairy sector in a general manner (paragraph 75). Therefore, the measure was also consistent with the requirements of point 14.2.
- (253) According to the German authorities, an average amount of EUR 395 was granted per beneficiary under measure NI 7 throughout the period (see paragraph 76). The level of aid was thus significantly lower than the limit specified in point 14.3.
- (254) The conditions set out in point 14 of the 2000-2006 Guidelines are thus fulfilled in the case of measure NI 7.

*NW 4 and NW 5*

- (255) North Rhine-Westphalia granted financial support to the Landesvereinigung der Milchwirtschaft Nordrhein-Westfalen e.V. (LVMNRW) and the Landwirtschaftsverbände Rheinland und Westfalen-Lippe for informative events and actions of the sort of general consumer advocacy and regarding the use of milk and dairy products and their general characteristics (sub-measure NW 4). North Rhine-Westphalia granted further financial support for events related to the exchange of knowledge between milk producers on dairy industry issues (sub-measure NW 5).
- (256) Information events and general consumer information (NW 4) and events organised for the exchange of knowledge between producers (NW 5) constitute a form of State aid which benefits the entire dairy sector (see paragraph 173). Furthermore, such aid should be regarded as selective since it benefits a single sector only (i.e. dairy industry) (see paragraph 175). The measures in question are to be considered as technical assistance.
- (257) The subsidised costs of event organisation and management, consulting, education and training related to issues of the dairy industry (see paragraph 79) correspond to the eligible costs laid down in point 14.1.
- (258) The measures were aimed at all dairy cattle holding farms (see paragraph 81), thus satisfying the conditions laid down in point 14.2.
- (259) Based on the total expenditure for the two measures during the investigation period and the average number of dairy farms in North Rhine-Westphalia, the amounts of aid granted per beneficiary were far below the limit laid down in point 14.3 (see paragraph 81).
- (260) The conditions set out in point 14 of the 2000-2006 Guidelines are thus fulfilled in the case of measure NW 4 and NW 5.

*NW 6*

- (261) North Rhine-Westphalia provided financial support to the Vereinigung der Milchindustrie LVMNRW for the collection, analysis and publication (as communications and market reports) of relevant data related to the dairy market.
- (262) The publication of factual and scientific information in the form of communications and market reports constitutes technical assistance, so point 14 of the 2000-2006 Guidelines applies.
- (263) The subsidised costs (paragraph 82) correspond to the eligible costs pursuant to point 14.1.
- (264) The publications were offered free of charge to anyone, thus fulfilling the conditions laid down in point 14.2.
- (265) Based on the total expenditure for the measure NW 6 during the investigation period and the average number of dairy farms in North Rhine-Westphalia, the amounts of aid granted per beneficiary were far below the limit laid down in point 14.3 (see paragraph 85).
- (266) The conditions set out in point 14 of the 2000-2006 Guidelines are thus fulfilled in the case of measure NW 6.

*RP 1 and SL 2*

- (267) Rhineland-Palatinate and Saarland granted the Milchwirtschaftliche Arbeitsgemeinschaft Rheinland-Pfalz e.V. (MILAG) and the Landesvereinigung der Milchwirtschaft des Saarlandes e.V. (LVMS), respectively, financial support for consumer information, including the dissemination of scientific knowledge, general factual information about products, their nutritional benefits and suggested uses.
- (268) General information campaigns about milk constitute aid that benefits the entire dairy sector (see paragraph 173). The rules on the provision of technical assistance in accordance with point 14 of the 2000-2006 Guidelines apply.
- (269) The costs subsidised under this sub-measure (see paragraph 86) correspond to the eligible costs pursuant to point 14.1.
- (270) According to the German authorities, the measure was not limited to a particular group, but supported the entire dairy sector in a general manner (see paragraph 90). This was also confirmed by MILAG in their comments dated 10 February 2014 (see paragraph 153). The conditions of point 14.2 are therefore met.
- (271) Germany also argued that the total amount of aid granted over a period of three years was far below the upper threshold of EUR 100 000 per beneficiary (see paragraph 91), which satisfies the conditions laid down in point 14.3.
- (272) The conditions set out in point 14 of the 2000-2006 Guidelines are thus fulfilled.

*RP 5 and SL 5*

- (273) Rhineland-Palatinate and Saarland granted the Landeskontrollverband Rheinland-Pfalz e.V. (LKVRP) and LVMS, respectively, financial support for consulting and training programmes for milk producers to improve the hygiene of milking equipment and the quality of delivered milk. Ongoing consulting services were excluded from funding (see paragraph 92). Advising and training milk producers falls within the scope of point 14 (Provision of technical assistance) of the 2000-2006 Guidelines.
- (274) The subsidised costs (see paragraphs 92 and 94) correspond to the eligible costs pursuant to point 14.1.
- (275) According to the German authorities, the offer of consultancy/training services was open to all milk producers in Rhineland-Palatinate/Saarland as membership in the LKVRP/LVMS, respectively, was not required (see paragraph 94) <sup>(72)</sup>. The requirements of point 14.2 are therefore met.
- (276) The average amounts of funding per year were about EUR 197 <sup>(73)</sup> in Rhineland-Palatinate and about EUR 130 in Saarland (see paragraph 98). The upper threshold laid down in point 14.3 could thus not be exceeded.
- (277) The conditions set out in point 14 of the 2000-2006 Guidelines are thus fulfilled in the case of measure in question.

*TH 3 and TH 4*

- (278) Thuringia granted the Landesvereinigung Thüringer Milch e.V. (LVTM) financial support for participation in trade and consumer exhibitions and for organising conferences to disseminate scientific information (sub-measure TH 3, see paragraph 100). In addition, the publication of factual information about producers from the region was subsidised (sub-measure TH 4, see paragraph 101). Participation in exhibitions, the organisation of trade conferences and the publication of factual information constitutes technical assistance within the meaning of point 14 of the 2000-2006 Guidelines.
- (279) The subsidised costs (see paragraphs 100 and 101) correspond to the eligible costs pursuant to point 14.1.

<sup>(72)</sup> This was confirmed by MILAG in connection with measure RP 5 as well, in their comments of 10 February (see paragraph 153).

<sup>(73)</sup> See footnote 79.

- (280) According to Germany, the two sub-measures were not limited to a particular group, but supported the entire dairy sector in a general manner (see paragraphs 105 and 108). The requirements of point 14.2 are therefore met.
- (281) Furthermore, the German authorities also confirmed that the amounts granted as aid did not exceed the upper threshold laid down in point 14.3 (see paragraphs 105 and 109).
- (282) The conditions set out in point 14 of the 2000-2006 Guidelines are thus fulfilled in the case of the measure in question.

*TH 9 and TH 10*

- (283) Thuringia granted the Verein Landvolksbildung Thüringen (VLT) financial support for the training of employees in dairy farms (sub-measure TH 9). Furthermore, Thuringia granted financial support for the Thüringer Landjugendverband e.V. (TLJV) and the Thüringer Melkergemeinschaft e.V. (TMG) for the promotion of professional competitions (sub-measure TH 10) (see paragraph 110).
- (284) Initially, Germany argued that these two sub-measures did not constitute State aid since the payments to the VLT (TH 9), the TLJV and the TMG (TH 10) should be considered as service charges which offset equivalent expenses and therefore no advantage arises (see paragraphs 114 and 117). However, the Commission is of the opinion that, even if there was no advantage to the service provider, training measures on dairy farms and the organisation of professional competitions benefit dairy farms and represent a form of technical assistance pursuant to point 14 of the 2000-2006 Guidelines.
- (285) The subsidised costs (see paragraphs 111 and 112) correspond to the eligible costs in accordance with the provisions of point 14.1.
- (286) According to Germany, the opportunity to participate in training and professional competitions was equally open to all concerned parties who were active in the area concerned, based on objectively defined criteria (see paragraphs 115 and 118). The conditions of point 14.2 are therefore met.
- (287) Germany stated that the cumulative amount of aid under both these sub-measures did not exceed EUR 100 000 over three years (see paragraph 118). The upper threshold laid down in point 14.3 could thus not be exceeded.
- (288) The conditions set out in point 14 of the 2000-2006 Guidelines are thus fulfilled in the case of the measure in question.
- (289) The Commission concludes that measures BY 3, BY 10, BW 4, BB 1, BB 3, HE 2, HE 3, HE 9, NI 5, NI 6, NI 7, NW 4, NW 5, NW 6, RP 1, RP 5, SL 2, SL 5, TH 3, TH 4, TH 9 and TH 10, with the exception of aid provided to Nordmilch eG under measure NI 6 (see paragraph 290), satisfied the relevant requirements laid down in the 2000-2006 Guidelines and were therefore compatible with the internal market over the period 2001-2006.
- (290) The Commission also concludes that the aid granted to Nordmilch eG under measure NI 6 in the period 2002-2003 did not meet the relevant conditions of the 2000-2006 Guidelines and was therefore incompatible with the internal market in the period 2001-2006.

*6.3.2. Provision of technical support in the agricultural sector in the period from 2007*

- (291) For the period from 2007, the provisions on the compatibility of technical support with the internal market were amended.
- (292) The provision of technical support is governed by Chapter IV.K of the 2007-2013 Guidelines.

- (293) Pursuant to point 105 of the 2007-2013 Guidelines, the Commission can declare State aid for the provision of technical support to companies processing and marketing agricultural products compatible with Article 87(3)(c) of the Treaty <sup>(74)</sup> if it fulfils all the conditions of Article 5 of Regulation (EC) No 70/2001. In accordance with paragraph 106 of the same Guidelines, no State aid was approved for large enterprises.
- (294) Article 5(b) of Regulation (EC) No 70/2001 provides that gross aid for participation in fairs and exhibitions must not exceed 50 % of the additional costs incurred for renting, setting up and running the stand. This exemption applies only to the first participation of an enterprise in a particular fair or exhibition.
- (295) Regulation (EC) No 70/2001 was replaced with Regulation (EC) No 800/2008 <sup>(75)</sup> on 29 August 2008. Article 27 of Regulation (EC) No 800/2008 provides that aid to SMEs for participation in fairs is compatible with the common market if the aid intensity does not exceed 50 % of eligible costs and if the eligible costs are limited to those incurred for renting, setting up and running the stand for the first participation of an undertaking in any particular fair or exhibition.
- (296) According to paragraph 106 of the 2007-2013 Guidelines, no State aid was approved for large enterprises under technical assistance.
- (297) In the Opening Decision, the Commission expressed doubts regarding the compatibility of a measure (RP 2) with the internal market in the relevant period <sup>(76)</sup>.

#### *Measure RP 2*

- (298) Under measure RP 2, Rhineland-Palatinate granted financial support to processing and marketing companies for participation in forums to share knowledge between businesses, competitions, exhibitions and fairs. Eligible costs were those incurred in setting up an exhibition stand (see paragraph 125). This support was not limited to the first participation of an undertaking in a particular fair or exhibition. Aid intensity was limited to 10 % of proven costs, but not more than EUR 5 200 per business and event (see paragraph 119).
- (299) The aid intensity of 10 % under measure RP 2 does not exceed the maximum aid intensity value of 50 % laid down in Article 5(b) of Regulation (EC) No 70/2001 and Article 27 of Regulation (EC) No 800/2008.
- (300) The subsidised costs (costs related to setting up an exhibition stand) correspond to the eligible costs in accordance with Article 5(b) of Regulation (EC) No 70/2001 and Article 27 of Regulation (EC) No 800/2008, which state that renting, setting up and running a stand are eligible for aid (see paragraphs 294 and 295). However, these rules state that only the first participation of an undertaking in any particular fair or exhibition is eligible.
- (301) In their comments of 20 September 2013, Germany provided a table containing the number of businesses which were granted subsidies in the period 2003 – 2012 for repeated participation in a particular fair or exhibition, together with the respective aid amounts (see paragraph 123). This table shows that the average funding amounts for repeated participation in a particular fair or exhibition per subsidised company and year was between EUR 294 and EUR 5 113 in the period 2007-2012.
- (302) In its comments dated 13 January 2017, Germany also stated that the two undertakings Hochwald Foods GmbH and MUH Arla eG had received aid under this sub-measure (see paragraph 124).
- (303) MUH Arla came into existence in 2012 as a result of the merger of Milch-Union Hocheifel (MUH) and the Scandinavian dairy conglomerate Arla Foods. In 2011, MUH employed around 800 staff and had a turnover of around EUR 693 million <sup>(77)</sup>.
- (304) The Hochwald group employs more than 1 900 staff and achieved a turnover of around EUR 1,44 billion in 2015 <sup>(78)</sup>.

<sup>(74)</sup> Now Article 107(3)(c) TFEU.

<sup>(75)</sup> On 1 July 2014, Regulation (EC) No 800/2008 was repealed by Regulation (EU) No 651/2014.

<sup>(76)</sup> Opening Decision, paragraph 244.

<sup>(77)</sup> Source: <http://www.arlafoods.de/ubersicht/presse/2012/pressrelease/eu-genehmigt-fusion-der-milch-union-hocheifel-und-arla-836614/>

<sup>(78)</sup> Source: <https://www.hochwald.de/de/unternehmen/zahlen-fakten.html>

- (305) Given these figures, neither MUH Arla eG nor Hochwald Foods GmbH fell within the definition of a small and medium-sized enterprise (SME) set out in point 9 of Chapter II of the 2007-2013 Guidelines <sup>(79)</sup>. In accordance with point 106 of the 2007-2013 guidelines, they should not, therefore, have received any aid (see paragraph 296).
- (306) The requirements of Chapter IV.K. of the 2007-2013 Guidelines, in conjunction with Article 5(b) of Regulation (EC) No 70/2001 and Article 27 of Regulation (EC) No 800/2008 respectively, are thus fulfilled only for cases in which processing and marketing businesses falling under the definition of SMEs received under measure RP 2 aid for the first participation in a particular fair or exhibition.
- (307) The requirements of Chapter IV.K. of the 2007-2013 Guidelines, in conjunction with Article 5(b) of Regulation (EC) No 70/2001 and Article 27 of Regulation (EC) No 800/2008 respectively, are not fulfilled for aid granted under measure RP 2 to undertakings not falling under the definition of SMEs, in particular to MUH Arla eG and Hochwald Foods GmbH (see paragraph 305).
- (308) The requirements of Chapter IV.K. of the 2007-2013 Guidelines, in conjunction with Article 5(b) of Regulation (EC) No 70/2001 and Article 27 of Regulation (EC) No 800/2008 respectively, are also not fulfilled for aid granted under measure RP 2 in respect of repeated participation in a particular fair or exhibition (see paragraph 301).
- (309) The Commission concludes that aid under measure RP 2 met the relevant conditions of the 2007-2013 Guidelines and was therefore compatible with the internal market in the period from 2007 only in the cases referred to in paragraph 306.
- (310) In the cases referred to in paragraphs 307 and 308, aid measure RP 2 did not meet the relevant conditions of the 2007-2013 Guidelines and was therefore not compatible with the internal market in the period from 2007.

#### 6.3.3. State aid for quality products in the period 2001-2006

- (311) Measures to encourage the production and marketing of quality agricultural products implemented between 2001 and 2006 must meet the conditions specified under point 13 of the 2000-2006 Guidelines.
- (312) Point 13.2 contains a non-exhaustive list of eligible activities in this area. Aid may be granted for consultancy and similar support, including technical studies, feasibility and design studies and market research, to be given for activities related to the development of quality agricultural products, including:

- the introduction of quality assurance schemes such as the ISO 9000 or 14000 series, systems based on hazard analysis and critical control points (HACCP) or environmental audit systems,
- the costs of training personnel to apply quality assurance and HACCP systems.

Aid may also be granted to cover the cost of the charges levied by recognised certifying bodies for the initial certification of quality assurance and similar systems.

- (313) Points 3, 4 and 5 of point 13 of the 2000-2006 Guidelines provide for special conditions and limitations. The Commission takes the view that no aid should be granted in respect of routine in-process quality controls and routine product controls undertaken by the manufacturer, irrespective of whether they are undertaken on a voluntary basis or on a compulsory basis as a part of HACCP or similar systems. Aid should only be granted in respect of controls undertaken by or on behalf of third parties, such as the competent regulatory authorities, or bodies acting on their behalf, or independent organisms responsible for the control and supervision of the use of denominations of origin, organic labels, or quality labels.
- (314) The total amount of aid that can be granted for SMEs under this section must not exceed 50 % of eligible costs or EUR 100 000 per beneficiary over a period of three years, depending on which amount is higher (see point 13.2).

<sup>(79)</sup> Point 9 of the 2007-2013 guidelines refers in this context to Annex I to Regulation (EC) No 70/2001, which was replaced on 29 August 2008 by Annex I to Regulation (EC) No 800/2008.



- (315) Baden-Württemberg, Lower Saxony and Thuringia (sub-measures BW 10, BW 11, NI 1 and TH 5) granted financial support for improving the quality of the delivered milk through advice and training of dairy producers, the compilation and updating of databases and checks of dairy producers, parallel with the introduction of the 'Quality Management QM Milk' quality assurance systems (see paragraph 126).
- (316) According to the German authorities, aid intensity amounted to a maximum of 100 % of eligible costs (see paragraph 129).
- (317) In the Opening Decision, the Commission expressed doubts regarding the compatibility of the abovementioned sub-measures with the internal market in the relevant period <sup>(80)</sup>.

*BW 10 and BW 11*

- (318) The two sub-measures were carried out by the Milchprüfing Baden-Württemberg (BW 10) and the Milchwirtschaftlicher Verein Baden-Württemberg (BW 11) in favour of milk-producing agricultural enterprises which took part in the 'QM-Milch' quality assurance system (see paragraphs 131 and 132).
- (319) The execution of audits at dairy farms and the cost of initial certification by a recognised certification body (BW 10) as well as the costs of consultancy tasks in connection with the introduction of the quality assurance system (BW 11) were subsidised (see paragraphs 133 and 134). The subsidised costs thus correspond to the eligible costs laid down in point 13.2 of the 2000-2006 Guidelines.
- (320) Support was not provided for quality and product checks carried out routinely by the manufacturers during the production process, which are excluded in accordance with point 13.3.
- (321) According to the German authorities, the average expenditure was EUR 106 per beneficiary (see paragraph 135), well below the maximum allowable amount under point 13.2 of EUR 100 000 per beneficiary over a period of three years.
- (322) The conditions set out in point 13 of the 2000-2006 Guidelines are thus fulfilled in the case of sub-measures BW 10 and BW 11.

*NI 1*

- (323) Lower Saxony granted the LVMN financial support for the implementation of a quality assurance system for milk producers ('QM-Milch'). Point 13 of the 2000-2006 Guidelines therefore applies.
- (324) The costs of preparatory measures for the implementation of the QM-Milch system (consulting services) as well as the costs for the coordination of the QM-Milch system and the creation of a database were subsidised (see paragraph 137). The subsidised costs thus correspond to the eligible costs laid down in point 13.2 of the 2000-2006 Guidelines.
- (325) Funding amounted to EUR 12,78 per case for consulting services and EUR 35 per farmer within 3 years for farm audits (see paragraph 138), which is well below the upper threshold specified in point 13.2 of the 2000-2006 Guidelines.
- (326) Germany has confirmed that the checks in the farm audits were carried out by or on behalf of third parties where the Landeskontrollverband Niedersachsen acts as an independent supervisory institution (see paragraph 139). This meets the requirements laid down in point 13.3.
- (327) The measure in question thus fulfils the requirements set out in point 13 of the 2000-2006 Guidelines.

*TH 5*

- (328) Thuringia granted the Thüringer Verband für Leistungs- und Qualitätsprüfungen in der Tierzucht (TVLEV) financial support for the introduction of a quality assurance system for milk producers (see paragraph 140). Point 13 of the 2000-2006 Guidelines therefore applies.

<sup>(80)</sup> Opening Decision, paragraph 253.

- (329) According to the German authorities, the measure was introduced in 2004 (see paragraph 140).
- (330) According to Germany, in the period 2004-2006, producers were only subsidised with respect to initial certification. The average aid granted to individual producers amounted to approximately EUR 83 (see paragraph 141).
- (331) The subsidised costs correspond to the costs eligible under point 13.2 and the amount of aid is far below the ceiling set in the same point.
- (332) Measure TH 5 thus fulfils the requirements set out in point 13 of the 2000-2006 Guidelines.
- (333) The Commission concludes that the aid assessed above (BW 10, BW 11, NI 1 and TH 5) did meet the relevant conditions of the 2000-2006 Guidelines and was therefore compatible with the internal market in the period 2001-2006.

#### 6.4. Recovery

- (334) Article 17(1) of Regulation (EU) 2015/1589 states that the powers of the Commission to recover aid are subject to a limitation period of 10 years. According to Article 17(2) of that same Regulation, any action taken by the Commission with regard to unlawful aid interrupts this limitation period.
- (335) Further to Germany's submission of the 2010 annual report on State aid in the agricultural sector, the Commission asked Germany by letter of 28 November 2011 to provide additional information on the scheme. This action by the Commission interrupted the limitation period. In line with the ten-year limitation period referred to in paragraph 334, this Decision therefore relates to the period from 28 November 2001.
- (336) The Commission finds that the aid granted to Nordmilch eG in the period 2002-2003 under measure NI 6 (see paragraph 289) is not compatible with the internal market. This aid must be recovered.
- (337) The Commission also finds that the aid granted under measure RP 2 to undertakings not falling under the definition of SMEs, in particular to MUH Arla eG and Hochwald Foods GmbH (see paragraph 307) and the aid granted in respect of repeated participation in a particular fair or exhibition (see paragraph 308) are not compatible with the internal market. This aid must be recovered.
- (338) Based on the suspensive effect of the formal procedure under Article 108(3) TFEU, the Commission is examining measure RP 2 from 1 January 2007 up to 17 July 2013, the date on which the Commission notified Germany of its decision to initiate proceedings under Article 108(2) TFEU.

#### 7. CONCLUSION

- (339) The Commission finds that Germany has unlawfully implemented the aid schemes in question in question in breach of Article 108(3) of the Treaty on the Functioning of the European Union. This aid is, with the exception of the aid cases mentioned in the following recital, compatible with the internal market (see paragraphs 289, 309 and 333).
- (340) The Commission finds that the aid granted under measure NI 6 to Nordmilch eG and the aid granted under measure RP 2 to MUH Arla eG and Hochwald Foods GmbH, and the aid granted under measure RP 2 in respect of repeated participation in a particular fair or exhibition (see paragraphs 290 and 310) are not compatible with the internal market. This aid must be recovered,

HAS ADOPTED THIS DECISION:

#### Article 1

State aid granted unlawfully by Germany between 28 November 2001 and 31 December 2006 (measures BY 3, BY 10, BW 4, BB 1, BB 3, HE 2, HE 3, HE 9, NI 5, NI 6, NI 7, NW 4, NW 5, NW 6, RP 1, RP 5, SL 2, SL 5, TH 3, TH 4, TH 9, TH 10, BW 10, BW 11, NI 1 and TH 5) or between 1 January 2007 and 17 July 2013 (measure RP 2) in breach of Article 108(3) TFEU is compatible with the internal market, with the exception of that referred to in Article 2.

*Article 2*

State aid granted by Germany in 2002 and 2003 to Nordmilch eG as part of measure NI 6, in breach of Article 108(3) TFEU, is incompatible with the internal market.

The aid granted by Germany between 1 January 2007 and 17 July 2013, in breach of Article 108(3) TFEU, under measure RP 2 to undertakings not falling under the definition of SMEs, in particular to MUH Arla eG and Hochwald Foods GmbH, is incompatible with the internal market.

State aid granted by Germany between 1 January 2007 and 17 July 2013, in breach of Article 108(3) TFEU, under measure RP 2 in respect of repeated participation in a particular fair or exhibition, is incompatible with the internal market.

*Article 3*

Individual aid granted under the scheme referred to in Article 2 does not constitute aid if, at the time it was granted, it met the conditions laid down in a regulation adopted pursuant to Article 2 of Council Regulation (EU) 2015/1588 <sup>(81)</sup> and that regulation was applicable at the time the aid was granted.

*Article 4*

Individual aid granted under the scheme referred to in Article 2 which, at the time the aid is granted, fulfils the conditions laid down in a regulation adopted pursuant to Article 1 of Regulation (EU) 2015/1588 or by any other approved aid scheme, is compatible with the internal market, up to the maximum aid intensities applicable to this type of aid.

*Article 5*

1. The Federal Republic of Germany shall recover from the beneficiaries the aid that was granted in relation to the aid schemes referred to in Article 2 and that is incompatible with the internal market.
2. The amount to be recovered shall bear interest from the date on which it was put at the disposal of the beneficiaries until its actual recovery.
3. The interest shall be calculated on a compound basis in accordance with Chapter V of Regulation (EC) No 794/2004 and Commission Regulation (EC) No 271/2008 <sup>(82)</sup> amending Regulation (EC) No 794/2004.
4. Germany shall cancel all outstanding payments of aid under the schemes referred to in Article 2 with effect from the date of adoption of this Decision.

*Article 6*

1. Recovery of the aid granted under the schemes referred to in Article 2 shall be immediate and effective.
2. Germany shall ensure that this Decision is implemented within four months of the date of notification of the Decision.

*Article 7*

1. Within two months following notification of this Decision, Germany shall submit the following information to the Commission:
  - (a) the list of beneficiaries that have received aid under the schemes referred to in Article 2 and the total amount of aid received by each of them under the schemes;
  - (b) the total amount (principal and recovery interest) to be recovered from each beneficiary;

<sup>(81)</sup> Council Regulation (EU) 2015/1588 of 13 July 2015 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to certain categories of horizontal State aid (OJ L 248, 24.9.2015, p. 1).

<sup>(82)</sup> Commission Regulation (EC) No 271/2008 of 30 January 2008 amending Regulation (EC) No 794/2004 implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty (OJ L 82, 25.3.2008, p. 1).

- (c) a detailed description of the measures already taken or planned to comply with this Decision;
- (d) documents demonstrating that the beneficiaries have been ordered to repay the aid.

2. Germany shall keep the Commission informed of the progress of the national measures taken to implement this Decision until recovery of the aid granted in accordance with the schemes referred to in Article 2 has been completed. Upon request by the Commission, Germany shall immediately submit information on the measures already taken or planned to comply with this Decision. It shall also provide detailed information concerning the amounts of aid and recovery interest already recovered from the beneficiaries.

#### *Article 8*

This Decision is addressed to the Federal Republic of Germany.

Germany is requested to forward a copy of this Decision to the beneficiaries of the aid without delay.

Done at Brussels, 29 May 2017.

*For the Commission*  
Phil HOGAN  
*Member of the Commission*

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# RECOMMENDATIONS

## COMMISSION RECOMMENDATION (EU) 2017/2338

of 16 November 2017

**establishing a common 'Return Handbook' to be used by Member States' competent authorities when carrying out return-related tasks**

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 292 thereof,

Whereas:

- (1) Directive 2008/115/EC of the European Parliament and of the Council <sup>(1)</sup> lays down common standards and procedures in Member States for returning illegally staying third-country nationals.
- (2) It is necessary to ensure that those common standards and procedures are implemented in a uniform way in all Member States, therefore a common 'Return Handbook' providing for common guidelines, best practices and recommendations to be used by Member States' competent authorities when carrying out return-related tasks was established by Commission Recommendation C(2015) 6250 of 1 October 2015 <sup>(2)</sup>. As there are new developments in the area of return of illegally staying third-country nationals, it is necessary to update the Return Handbook.
- (3) Commission Recommendation C(2017) 1600 of 7 March 2017 <sup>(3)</sup> provides guidance on how the provisions of Directive 2008/115/EC should be used for achieving more effective return procedures, and calls on the Member States to take the necessary measures to remove legal and practical obstacles to return. The Return Handbook should therefore take into account that Recommendation.
- (4) The Return Handbook should reflect recent jurisprudence of the Court of Justice of the European Union related to Directive 2008/115/EC.
- (5) The Return Handbook should be addressed to all Member States bound by Directive 2008/115/EC.
- (6) To enhance the uniform implementation of common Union return standards, the Return Handbook should be used as the main tool for performing return-related tasks and for training purposes,

HAS ADOPTED THIS RECOMMENDATION:

1. The Return Handbook set out in the Annex should replace the Return Handbook set out in the Annex to the Commission Recommendation C(2015) 6250.
2. Member States should transmit the Return Handbook to their national authorities competent for carrying out return-related tasks and instruct those authorities to use it as the main tool when performing those tasks.

<sup>(1)</sup> 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, 24.12.2008, p. 98).

<sup>(2)</sup> Commission Recommendation C(2015) 6250 of 1 October 2015 establishing a common 'Return Handbook' to be used by Member States' competent authorities when carrying out return related tasks.

<sup>(3)</sup> Commission Recommendation of C(2017) 1600 of 7 March 2017 on making returns more effective when implementing the Directive 2008/115/EC of the European Parliament and of the Council.

3. The Return Handbook should be used for the purpose of training the personnel involved in return-related tasks as well as experts taking part in the evaluation and monitoring mechanism established by Council Regulation (EU) No 1053/2013 <sup>(1)</sup> to verify application of the Schengen *acquis* in the Member States.

Done at Brussels, 16 November 2017.

*For the Commission*  
Dimitris AVRAMOPOULOS  
*Member of the Commission*

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<sup>(1)</sup> Council Regulation (EU) No 1053/2013 of 7 October 2013 establishing an evaluation and monitoring mechanism to verify the application of the Schengen *acquis* and repealing the Decision of the Executive Committee of 16 September 1998 setting up a Standing Committee on the evaluation and implementation of Schengen (OJ L 295, 6.11.2013, p. 27).

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## FOREWORD

This Return Handbook provides guidance to national authorities competent for carrying out return related tasks, including police, border guards, migration authorities, staff of detention facilities and monitoring bodies.

It covers standards and procedures in Member States for returning illegally staying third-country nationals and is based on Union legal instruments regulating this issue, primarily Directive 2008/115/EC of the European Parliament and of the Council <sup>(1)</sup> (the 'Return Directive'). Return procedures are in practice often linked with other types of procedures (asylum procedures, border control procedures, procedures leading to a right to enter, stay or reside), which are regulated by other relevant Union and national legislation. In those cases, Member States should ensure close cooperation between the different authorities involved in such procedures.

The first version of the Handbook was adopted in October 2015 <sup>(2)</sup>. The current version, revised in 2017, builds upon the Commission Recommendation of 7 March 2017 <sup>(3)</sup> and features additional guidance to national authorities on how the rules of the Return Directive be used to improve the effectiveness of the return systems, while ensuring full observance of fundamental rights.

Beyond appropriate standards and procedures, an effective return system needs to count on a streamlined and well integrated organisation of competences at national level. This means being able to mobilise all the actors involved in return-related procedures (for example law enforcement and immigration authorities, but also the judiciary, child protection authorities, medical and social services, staff of detention facilities) and coordinate their actions, in accordance with their role and remit, to trigger swift and adequate multi-disciplinary responses to manage individual return case. National return systems need to count on the support of a sufficient number of trained and competent staff, who can be mobilised quickly — if needed on a 24/7 basis — particularly in case of an increasing burden in implementing returns, and who can be deployed, if necessary, at the external border of the Union to take immediate measures in response to migratory pressure. For that purpose, they should ensure continuous exchange of operational information with the European Border and Coast Guard Agency and other Member States, and can rely on the technical and operational support that the Agency can provide.

In order for the return systems to be able to respond to challenges, Member States should make the best use of the flexibility provided for by the Return Directive and regularly review and adapt their structures and return capacity to respond to the actual needs to remain effective.

This Handbook does not create any legally binding obligations upon Member States and it does not establish new rights and duties. It bases itself to a large extent on the work conducted by Member States and the Commission within the 'Contact Committee Return Directive 2008/115/EC' in the years 2009-2017 and regroups in a systematic and summarised form the discussions that have taken place within that forum, which do not necessarily reflect a consensus among Member States on the interpretation of the legal acts.

The interpretative part of the Handbook is complemented by guidance on newly arising issues (for example new judgements of the Court of Justice of the European Union, international standards). Only the legal acts on which this Handbook is based on, or refers to, produce legally binding effects and can be invoked before a national jurisdiction. Legally binding interpretations of Union law can only be given by the Court of Justice of the European Union.

## 1. DEFINITIONS

### 1.1. Third-country national

*Legal basis:* Return Directive — Article 3(1); Schengen Borders Code <sup>(4)</sup> — Article 2(5)

*Any person who is not a citizen of the Union within the meaning of Article 17(1) of the Treaty and who is not a person enjoying the right of free movement under Union law, as defined in Article 2(5) of the Schengen Borders Code.*

<sup>(1)</sup> 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, 24.12.2008, p. 98).

<sup>(2)</sup> C(2015) 6250.

<sup>(3)</sup> C(2017) 1600 final.

<sup>(4)</sup> Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code) (OJ L 77, 23.3.2016, p. 1).

The following categories of person are not considered 'third-country nationals':

- Persons who are Union citizens within the meaning of Article 20(1) TFEU (previously Article 17(1) of the Treaty) = persons holding the nationality of an EU Member State <sup>(1)</sup>;
- Persons holding the nationality of EEA/CH;
- *Family members* of Union citizens exercising their right to free movement under Article 21 TFEU or Directive 2004/38/EC of the European Parliament and of the Council <sup>(2)</sup>;
- *Family members* of nationals of EEA/CH enjoying rights of free movement equivalent to Union citizens.

Any other person, including a stateless person <sup>(3)</sup>, is to be considered 'third-country national'.

Further clarification:

- Members of the family of EU/EEA/CH nationals, who therefore have a right of entry and residence with the Union citizen in the host Member State irrespective of their nationality, are:
  - (a) the spouse and, if contracted on the basis of the legislation of a Member State and recognised by the legislation of the host Member State as equivalent to marriage, the partner with whom the EU/EEA/CH citizen has contracted a registered partnership;
  - (b) the direct descendants under the age of 21 or dependants, including those of the spouse or registered partner;
  - (c) the dependent direct relatives in the ascending line, including those of the spouse or registered partner.

In addition to the categories referred to in points (a) to (c), other members of the family can, under certain circumstances, also enjoy the right of free movement under Union law — notably when they have been granted the right of entry and residence under national law enacting Article 3(2) of Directive 2004/38/EC.

- Third-country nationals whose claim to be a family member of a Union citizen enjoying a Union right to free movement under Article 21 TFEU or Directive 2004/38/EC was rejected by a Member State may be considered as third-country national. Such persons may therefore fall in the scope of application of the Return Directive and the minimum standards, procedures and rights foreseen therein will have to be applied. However, as regards a possible appeal against the decision rejecting being a beneficiary of Directive 2004/38/EC, the Commission considers that the person will continue — as a more favourable provision under Article 4 of the Return Directive — to be able to rely on the procedural safeguards provided for in Chapter VI of Directive 2004/38/EC (for example, as regards notification and justification of decision, the time allowed to voluntarily leave the territory, redress procedures).

## 1.2. **Illegal stay**

*Legal basis:* Return Directive — Article 3(2); Schengen Borders Code — Article 6

*The presence on the territory of a Member State, of a third-country national who does not fulfil, or no longer fulfils the conditions of entry as set out in Article 5 of the Schengen Borders Code or other conditions for entry, stay or residence in that Member State.*

This very broad definition covers any third-country national who does not enjoy a legal right to stay in a Member State. Any third-country national physically present on the territory of an EU Member State is either staying legally or illegally. There is no third option.

<sup>(1)</sup> By virtue of a special provision in the UK Accession Treaty, only those British nationals who are 'United Kingdom nationals for European Union purposes' are also citizens of the European Union.

<sup>(2)</sup> Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (OJ L 158, 30.4.2004, p. 77).

<sup>(3)</sup> According to Article 1(1) of the 1954 Convention relating to the Status of Stateless Persons, a stateless person is 'a person who is not considered as a national by any State under the operation of its law'.

Legal fictions under national law which consider persons physically staying in specially designated parts of Member State territory (for example transit areas or certain border areas) as not 'staying in the territory' are irrelevant in this context, since this would undermine the harmonious application of the EU return *acquis*. Member States may, however, decide not to apply certain provisions of the return *acquis* to this category of persons (see section 2 below).

Following the 2016 codification of the Schengen Borders Code (SBC), reference to Article 5 SBC in Article 3(2) of the Return Directive shall be read as reference to current Article 6 SBC.

The following categories of third-country nationals are, for instance, considered as illegally staying in the Member State concerned:

- Holders of an expired residence permit or visa;
- Holders of a withdrawn permit or visa;
- Rejected asylum seekers;
- Asylum applicants who have received a decision ending their right of stay as asylum seeker;
- Persons subject to a refusal of entry at the border;
- Persons intercepted in connection with irregular border crossing;
- Irregular migrants apprehended in Member States' territory;
- Persons intercepted while transiting through a Member State's territory to reach another Member State without legal entitlement;
- Persons enjoying no right to stay in the Member State of apprehension (even though they are holding a right to stay in another Member State);
- Persons present on Member State territory during a period for voluntary departure;
- Persons subject to postponed removal.

The following categories of persons are not considered as illegally staying since they enjoy a legal right to stay (which may only be of temporary nature) in the Member State concerned:

- asylum applicants staying in the Member State in which they enjoy a right to stay pending their asylum procedure,
- stateless persons staying in the Member State in which, according to national law, they enjoy a right to stay during a statelessness determination procedure,
- persons staying in a Member State where they enjoy a formal toleration status (provided such status is considered under national law as 'legal stay'),
- holders of a fraudulently acquired permit for as long as the permit has not been revoked or withdrawn and continues to be considered as valid permit.

Further clarification:

- Persons subject to a pending application for a residence permit may be either legally or illegally staying, depending on whether they hold a valid visa or another right to stay or not.
- The situation of illegal stay does not require a minimum duration of stay or the intention of the third-country national to stay illegally on the territory of a Member State — see judgment of the ECJ in Case C-47/15, *Affum* <sup>(1)</sup> (paragraph 48).
- Applicants for renewal of an already expired permit are illegally staying, unless national law of a Member State provides otherwise (see also section 5.7).

<sup>(1)</sup> Judgement of the Court of Justice of 7 June 2016, *Affum*, Case C-47/15, ECLI:EU:C:2016:408.

- Third-country nationals to whom the return procedure established by the Return Directive had been applied and who are illegally staying in the territory of a Member State without there being any justified ground for non-return (scenario referred to in paragraph 48 of ECJ judgement in Case C-329/11, *Achughbabian* <sup>(1)</sup>) are illegally staying. The special reference made by ECJ in *Achughbabian* relates only to the compatibility of national criminal law measures with the Return Directive. Nothing is said in this judgement on the scope and applicability of the Return Directive, hence the general rule set by Article 2(1) remains applicable: ‘either A or B’, meaning that a person is either staying illegally and the Return Directive applies, or the persons enjoys a right to stay and the Return Directive does not apply.

### 1.3. Return

*Legal basis:* Return Directive — Article 3(3)

*Means the process of a third-country national going back — whether in voluntary compliance with an obligation to return, or enforced — to:*

- (1) *his or her country of origin; or*
- (2) *a country of transit in accordance with Community or bilateral readmission agreements or other arrangements; or*
- (3) *another third country, to which the third-country national concerned voluntarily decides to return and in which he or she will be accepted.*

This definition contains limitations on what can be accepted as ‘return’ and what cannot be accepted as ‘return’ for the purposes of implementing the Return Directive. Passing back an illegally staying third-country national to another Member State cannot be considered ‘return’ under Union law. Such action may, however, be exceptionally possible under bilateral readmission agreements or Dublin rules; it is therefore recommended not to call it ‘return’, but rather ‘passing-back’ or ‘transfer’.

The definition also implies that Member States must only carry out return to a third country in the circumstances exhaustively listed in one of its three indents. Therefore, for instance, it is not possible to remove a returnee to a third country, which is neither the country of origin nor the country of transit, without consent of the returnee.

*Further clarification:*

- ‘Country of origin’ in the first indent refers to the country of nationality of the third-country national; for stateless persons, this can normally be considered to be the country of former habitual residence.
- ‘Country of transit’ in the second indent covers only third countries, not EU Member States.
- ‘Community or bilateral readmission agreements or other arrangements’ in the second indent relates to agreements with third countries only. Bilateral readmission agreements between Member States are irrelevant in this context. Such agreements between Member States may, however, in certain cases allow for passing back of irregular migrants to other Member States under Article 6(3) of the Return Directive (see section 5.5 below).
- The term ‘voluntarily decides to return’ in the third indent is not tantamount to voluntary departure. ‘Voluntary’ in this context refers to the choice of the destination by the returnee. Such voluntary choice of the destination may also happen in the preparation of a removal operation: there may be cases in which the returnee prefers to be removed to another third country rather than to the country of transit or origin.
- Specification of the country of return in the case of removal: if a period for voluntary departure is granted, then it is the returnee’s responsibility to make sure that he/she complies with the obligation to return within the set period and there is in principle no need to specify the country of return. Only if coercive measures have to be used by Member States (removal), then it is necessary to specify to which third country the person will be removed (see section 1.5).

### 1.4. Return decision

*Legal basis:* Return Directive — Articles 3(4) and 6(6)

*An administrative or judicial decision or act, stating or declaring the stay of a third-country national to be illegal and imposing or stating an obligation to return.*

<sup>(1)</sup> Judgment of the Court of Justice of 6 December 2011, *Achughbabian*, Case C-329/11, ECLI:EU:C:2011:807.

The definition of a 'return decision' focuses on two essential elements. A return decision must contain:

- (1) a statement concerning the illegality of the stay; and
- (2) the imposition of an obligation to return.

A return decision may contain further elements, such as an entry ban, a voluntary departure period, designation of the country of return; when the country of return is not mentioned, Member States must ensure that the principle of *non-refoulement* is respected in accordance with Article 5 of the Return Directive.

Member States enjoy wide discretion concerning the form (decision or act, judicial or administrative) in which a return decision may be adopted.

Return decisions can be issued in the form of a self-standing act or decision or together with other decisions, such as a removal order or a decision ending legal stay (see section 12.1 below).

A return decision states the illegality of stay in *the* Member State which issues the decision, while stating the obligation to leave the territories of the EU Member States and Schengen Associated countries. Moreover, it needs to be highlighted that in accordance with Article 11, return decisions may be accompanied by entry bans having an EU-wide effect (binding on all States bound by the Return Directive).

Further clarification:

- The flexible definition of 'return decision' does not preclude the decision imposing the obligation to return from being taken in the form of a criminal judgment and in the context of criminal proceedings — see the judgment of the ECJ in Case C-430/11, *Sagor* <sup>(1)</sup> (paragraph 39).

### 1.5. Removal order

*Legal basis:* Return Directive — Articles 3(5) and 8(3)

*Administrative or judicial decision or act ordering the enforcement of the obligation to return, namely the physical transportation out of the Member State.*

A removal order can either be issued together with a return decision (one-step procedure) or separately (two-step procedure). In those cases in which return decision and removal order are issued together in a one-step procedure, it must be made clear — in those cases in which a period for voluntary departure is granted — that removal will only take place if the obligation to return within the period for voluntary departure has not been complied with.

In view of the obligation of Member States to always respect the principle of *non-refoulement*, removal (physical transportation out of the Member State) cannot happen to an unspecified destination, but only to a specified country of return. The returnee must be made aware of the destination of the removal operation in advance so that he or she can express any reasons for believing that removal to the proposed destination would be in breach of the principle of *non-refoulement* and is able to make use of the right to an appeal. The Commission recommends to mention the country of return in the separate removal decision (two-step procedure), or to mention the country to which the person will be removed in the case of non-compliance with the obligation to return in the combined return and removal decision (one-step procedure), or to inform the third-country national through another decision or act.

### 1.6. Risk of absconding

*Legal basis:* Return Directive — Article 3(7), recital 6

*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.*

<sup>(1)</sup> Judgment of the Court of Justice of 6 December 2012, *Sagor*, Case C-430/11, ECLI:EU:C:2012:777.

The existence (or absence) of a ‘risk of absconding’ is a decisive element for determining whether a period for voluntary departure shall be granted or not, as well as for deciding on the need of detention.

Member States must base their assessment on whether there is a risk of absconding on objective criteria fixed in national legislation. The ECJ judgment in Case C-528/15, *Al Chodor* <sup>(1)</sup>, related to the definition of ‘risk of absconding’ in Article 2(n) <sup>(2)</sup> of the Dublin Regulation, which text is in essence identical to the definition of Article 3(7) of the Return Directive, indirectly confirms this. In this judgment, the ECJ established that such objective criteria must be clearly set in binding provisions of general application and that settled national case-law confirming a consistent administrative practice cannot suffice. The ECJ also concluded that, in the absence of such criteria in legally binding provisions of general application, detention must be declared unlawful.

While Member States enjoy a wide discretion in determining such criteria, they should take into due account the following ones as an indication that an illegally staying third-country national may abscond:

- lack of documentation,
- lack of residence, fixed abode or reliable address,
- failing to report to relevant authorities,
- explicit expression of intent of non-compliance with return-related measures (for instance return decision, measures for preventing absconding),
- existence of conviction for a criminal offence, including for a serious criminal offence in another Member State <sup>(3)</sup>,
- ongoing criminal investigations and proceedings,
- non-compliance with a return decision, including with an obligation to return within the period for voluntary departure,
- prior conduct (i.e. escaping),
- lack of financial resources,
- being subject of a return decision issued by another Member State,
- non-compliance with the requirement to go to the territory of another Member State that granted a valid residence permit or other authorisation offering a right to stay,
- illegal entry into the territory of the EU Member States and of the Schengen Associated countries.

National legislation may establish other objective criteria to determine the existence of a risk of absconding.

According to general principles of Union law, in particular the principle of proportionality, all decisions taken under the Return Directive must be adopted on the basis of an individual assessment of each case. The above list of criteria should be taken into account at any stage during the return procedure as an element in the overall assessment of each individual situation, but it cannot be the sole basis for assuming automatically a risk of absconding, as frequently it will be a combination of several of the above-listed criteria that will provide a basis for concluding the existence of such a risk. Any automatic conclusion, such as that illegal entry or lack of documents mean the existence of a risk of absconding, must be avoided. Such individual assessment must take into account all relevant factors, including the age and the health and social conditions of the persons concerned that may be directly affecting the risk that the third-country national may abscond, and may in certain cases lead to the conclusion that there is no risk of absconding even though one or more of the criteria fixed in national law are fulfilled.

<sup>(1)</sup> Judgment of the Court of Justice of 15 March 2017, *Al Chodor and others*, Case C-528/15, ECLI:EU:C:2017:213.

<sup>(2)</sup> Article 2(n) of Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (OJ L 180, 29.6.2013, p. 31): “risk of absconding” means the existence of reasons in an individual case, which are based on objective criteria defined by law, to believe that an applicant or a third-country national or a stateless person who is subject to a transfer procedure may abscond’.

<sup>(3)</sup> This information may be obtained through the European Criminal Records Information System, established by Council Framework Decision 2009/315/JHA of 26 February 2009 on the organisation and content of the exchange of information extracted from the criminal record between Member States (OJ L 93, 7.4.2009, p. 23), and Council Decision 2009/316/JHA of 6 April 2009 on the establishment of the European Criminal Records Information System (ECRIS) in application of Article 11 of Framework Decision 2009/315/JHA (OJ L 93, 7.4.2009, p. 33). On 19 January 2016, the Commission put forward the proposal COM(2016) 7 final to facilitate the exchange of criminal records of non-EU citizens in the EU.

In addition to the criteria mentioned above that may indicate the existence of a risk of absconding, and without prejudice to the rights of third-country nationals concerned to be heard and to an effective remedy, national legislation may also qualify certain objective circumstances as constituting a rebuttable presumption that there is a risk of absconding (i.e. the third-country national should rebut that, notwithstanding the existence of the circumstances below, such risk does not exist), such as:

- refusing to cooperate in the identification process, using false or forged identity documents, destroying or otherwise disposing of existing documents, or refusing to provide fingerprints;
- opposing violently or fraudulently the return operation;
- not complying with a measure aimed at preventing absconding (see section 6.2),
- not complying with an existing entry ban,
- engaging in unauthorised secondary movement to another Member State.

The Commission recommends providing for such rebuttable presumptions in national legislation.

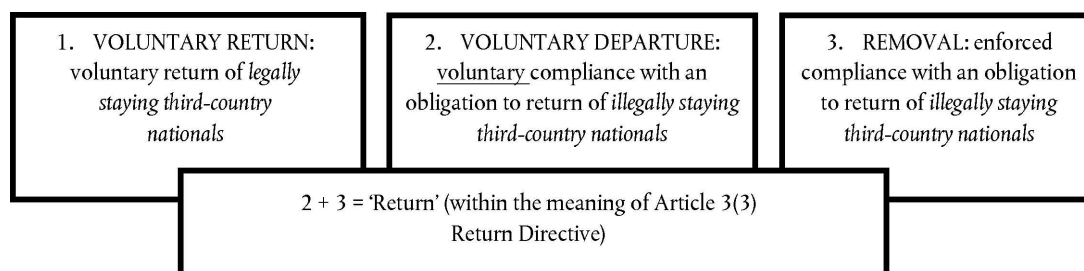
### 1.7. Voluntary departure

*Legal basis:* Return Directive — Article 3(8)

*Compliance with the obligation to return within the time-limit fixed for that purpose in the return decision.*

Voluntary departure in the context of the Union return *acquis* refers to the voluntary compliance with an obligation to return to a third country. The term ‘voluntary departure’ does not cover cases in which *legally* staying third-country nationals decide to go back to their home country based on their own decision. Such ‘truly’ voluntary return (scenario 1 in the below picture) falls outside the scope of the Return Directive, because it concerns legally staying third-country nationals. The departure of illegally staying third-country nationals who have not been detected or apprehended yet (for instance, overstayers) can be considered as covered by the definition of ‘voluntary departure’. These persons are already under an ‘abstract’ obligation to return under the Return Directive and may receive a return decision as well as an entry ban once the authorities obtain knowledge of their illegal stay (at the latest upon exit check — see sections 5.1 and 11.3).

The Return Directive therefore covers only scenarios 2 and 3 below:



Going from the *national* territory of one Member State to the territory of another Member State in accordance with Article 6(2) (see below section 5.4) cannot be considered as voluntary departure. The definition of voluntary departure always requires departure to a third country. Specific rules on transit by land through territories of other Member States in the context of voluntary departure are set out in section 6.4 below.

## 1.8. Vulnerable persons

*Legal basis:* Return Directive — Article 3(9)

*Minors, unaccompanied minors, disabled people, elderly people, pregnant women, single parents with minor children and persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence.*

Contrary to the definition of vulnerable persons used in the asylum *acquis* (see for instance Article 21 of Directive 2013/33/EU of the European Parliament and of the Council <sup>(1)</sup> (the ‘Reception Conditions Directive’) or Article 20(3) of Directive 2011/95/EU of the European Parliament and of the Council <sup>(2)</sup> (the ‘Qualification Directive’), the definition in the Return Directive is drafted as an exhaustive list.

The need to pay specific attention to the situation of vulnerable persons and their specific needs in the return context is, however, not limited to the categories of vulnerable persons expressly enumerated in Article 3(9). The Commission recommends that Member States should also pay attention to other special situations of vulnerability, such as those mentioned in the asylum *acquis* — being a victim of human trafficking or of female genital mutilation, being a person with serious illness or with mental disorders.

The need to pay specific attention to the situation of vulnerable persons should not be limited to the situations expressly referred to by the Return Directive (during the period for voluntary departure, during postponed return and during detention). The Commission therefore recommends that Member States should pay attention to the needs of vulnerable persons at all stages of the return procedure, as part of the assessment of the individual circumstances of each case.

## 2. SCOPE

*Legal basis:* Return Directive — Articles 2 and 4(4)

The scope of the Return Directive is broad and covers any third-country national staying illegally on the territory of a Member State. The following Member States are currently bound by the Return Directive:

- all EU Member States, except UK and Ireland,
- Switzerland, Norway, Iceland and Liechtenstein.

Member States may decide not to apply the Directive to certain categories of third-country nationals:

- ‘border cases’, in accordance with Article 2(2)(a) of the Return Directive (see section 2.1), and
- ‘criminal law cases’, in accordance with Article 2(2)(b) of the Return Directive (see section 2.2).

The decision of a Member State to make use of the derogation and not to apply the Directive to ‘border cases’ or ‘criminal law cases’ must be made clear, in advance, in the national implementing legislation <sup>(3)</sup>, otherwise it can develop no legal effects. There are no specific formal requirements for making known such decision. It is, however, important that it clearly derives — explicitly or implicitly — from the national legislation if and to which extent a Member State makes use of the derogation.

If a Member State has not made public, in advance, its decision to use the derogations under Article 2(2)(a) or (b) of the Return Directive, these provisions cannot be used as a justification for not applying the Return Directive subsequently in individual cases.

<sup>(1)</sup> Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (OJ L 180, 29.6.2013, p. 96).

<sup>(2)</sup> Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (OJ L 337, 20.12.2011, p. 9).

<sup>(3)</sup> Unlike EU Member States, Switzerland, Norway, Iceland and Liechtenstein are not bound by EU directives on the basis of Article 288 TFEU, but only once they have accepted them and according to general public international law principles. Thus, contrary to EU Member States, Switzerland, Norway, Iceland and Liechtenstein are not bound by the ECJ case-law related to the transposition of directives into national law and are free to choose the modalities of the transposition of the obligation set out in the Return Directive (for instance by a direct reference to the text of the Directive) in compliance with their international obligations.



Nothing prevents Member States from limiting the use of the derogation of Article 2(2)(a) or 2(2)(b) of the Return Directive to certain categories of persons (for example, only refusals of entry at air borders or sea borders), provided that this is made clear in the implementing national legislation.

Member States can decide to make use of the derogation at a later stage following the initial transposition of the Return Directive into national law. This must, however, not have disadvantageous consequences with regard to those persons who were already able to avail themselves of the effects of the Return Directive (see the judgment of the ECJ in Case C-297/12, *Filev and Osmani* <sup>(1)</sup>: ‘[...] in so far as a Member State has not yet made use of that discretion [...] it may not avail itself of the right to restrict the scope of the persons covered by that directive pursuant to Article 2(2)(b) thereof with regard to those persons who were already able to avail themselves of the effects of that directive’).

### 2.1. Border cases — Article 2(2)(a)

Persons who have been refused entry and who are present in a transit zone or in a border area of a Member State are frequently subject to special rules in Member States: by virtue of a ‘legal fiction’, these persons are sometimes not considered to be ‘staying in the territory of the Member State’ concerned and specific rules are applied. The Return Directive does not follow this approach and it considers any third-country national physically staying on Member State territory as covered by its scope.

Member States are, however, free to decide not to apply the Directive to ‘border cases’, defined as third-country nationals who:

- are subject to a refusal of entry in accordance with Article 13 of the Schengen Borders Code <sup>(2)</sup>, or
- 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 and who have not subsequently obtained an authorisation or a right to stay in that Member State.

The use of this derogation can be useful, for instance, in the case of frontline Member States experiencing significant migratory pressure, when this can provide for more effective procedures; in such cases, the Commission recommends making use of such derogation.

National procedures for ‘border cases’ must respect the general principles of international law and the fundamental rights of the third-country nationals concerned, as well as the safeguards set by Article 4(4) of the Return Directive (see section 2.2).

Further clarification:

- Article 2(2)(a) implies a direct temporal and spatial link with the crossing of the external border. It therefore concerns third-country nationals who have been apprehended or intercepted by the competent authorities at the very time of the irregular crossing of the external border or near that external border after it has been crossed — see judgment of the ECJ in Case C-47/15, *Affum* (paragraph 72).
- The following categories of persons are for instance covered by the term ‘apprehended or intercepted by the competent authorities in connection with the irregular crossing [...] of the external border’ because there is still a DIRECT connection to the act of irregular border crossing:
  - persons arriving irregularly by boat who are apprehended upon or shortly after arrival,
  - persons arrested by the police after having climbed a border fence,
  - irregular entrants who are leaving the train/bus that brought them directly into the territory of a Member State (without previous stopover in Member State territory).
- The following categories of persons are not covered by the term ‘apprehended or intercepted by the competent authorities in connection with the irregular crossing [...] of the external border’ because there is no more DIRECT connection to the act of irregular border crossing:
  - irregular entrants who are apprehended within the Member State’s territory, within a certain period after irregular entry,
  - irregular migrants apprehended in a border region, unless there is still a direct connection to the act of irregular border crossing,

<sup>(1)</sup> Judgment of the Court of Justice of 19 September 2013, *Filev and Osmani*, Case C-297/12, ECLI:EU:C:2013:569.

<sup>(2)</sup> Following the codification of the Schengen Borders Code in 2016, reference to Article 13 of the Code shall be read as reference to Article 14 of Regulation (EU) 2016/399.

- an irregular migrant leaving a bus coming from a third country, if the bus has already made several stops in EU territory,
  - irregular migrants who, having been expelled at a previous occasion, infringe a still valid entry ban (unless they are apprehended in direct connection with irregular border crossing),
  - irregular migrants crossing an internal border — see judgment of the ECJ in Case C-47/15, *Affum* (paragraph 69), Article 2(2) of the Directive referring to external borders and Article 14 SBC applying at the external borders,
  - illegally staying third-country nationals who are leaving the territories of the Member States and of the Schengen Associated countries — see judgment of the ECJ in Case C-47/15, *Affum* (paragraph 71).
- Practical example of cases covered by the clause ‘and who have not subsequently obtained an authorisation or a right to stay in that Member States’, to whom the derogation does not apply:
- irregular entrants who have been apprehended at the external border and subsequently obtained a right to remain as asylum seeker. Even if — after final rejection of the asylum application — they become again ‘illegally staying’, they must not be excluded from the scope of the Directive as ‘border case’,
  - a third-country national who was subject of a refusal of entry and who is staying in the airport transit zone (and thus may be excluded from the scope of the Directive) is transferred to a hospital for medical reasons and given a short-term national *permit* (and not just a postponement of removal under Article 9(2)(a)) to cover the period of hospitalisation).
- The form, content and legal remedies of decisions issued to third-country nationals excluded from the scope of application of the Return Directive by Article 2(2)(a) are covered by national law.
- Refusals of entry according to Article 14 SBC cover everybody who does not fulfil the entry conditions in accordance with Article 6(1) SBC.
- Persons who are refused entry in an airport transit zone or at a border crossing point situated on Member State territory fall under the scope of the Return Directive (since they are already physically present on the territory). However, Member States can make use of the derogation of Article 2(2)(a) stating that Member States may decide not to apply the Directive to these cases.
- The exceptions for border cases under Article 2(2)(a) only apply to cases of apprehension at the external borders, not at the internal borders — see judgment of the ECJ in Case C-47/15, *Affum*.
- The temporary reintroduction of internal border controls does not re-convert internal borders to external borders. This situation therefore does not affect the scope of application of the Return Directive.
- ‘Border’ and ‘border-like’ cases which may be excluded from the scope of the Directive in accordance with Article 2(2)(a) of the Directive are not the same as the cases mentioned in Article 12(3) of the same Directive (simplified procedure in case of illegal entry): illegal entry (the term used in Article 12(3)) is not synonymous with the ‘border’ and ‘border-like’ cases described in Article 2(2)(a) of the Return Directive. Example: an illegally staying third-country national who is apprehended in the territory of a Member State three months after his/her illegal entry is not covered by Article 2(2)(a) of the Return Directive but may be covered by Article 12(3) of the same Directive.

## 2.2. Special safeguards for ‘border cases’

If Member States opt not to apply the Directive to border cases, they must nevertheless respect of the principle of *non-refoulement* and ensure — in accordance with Article 4(4) of the Return Directive — that the level of protection for affected persons is not less favourable than that set out in the Articles of the Return Directive dealing with:

- limitations on use of coercive measures,
- postponement of removal,
- emergency health care and necessary treatment of the illness, taking into account needs of vulnerable persons, and
- detention conditions.

In addition, it should be highlighted that the safeguards under the Union asylum *acquis* (such as in particular on access to asylum procedure) are by no means waived by the Member States' choice not to apply the Return Directive to border cases. The obligations under the Union asylum *acquis* include in particular an obligation of the Member States to:

- inform third-country nationals who may wish to make an application for international protection on the possibility to do so,
- ensure that border guards and other competent authorities have the relevant information and that their personnel receives the necessary level of training on how to recognise applicants and instructions to inform applicants as to where and how applications for international protection may be lodged,
- make arrangements for interpretation to the extent necessary to facilitate access to the procedure,
- ensure effective access by organisations and persons providing advice and counselling to applicants present at border crossing points, including transit zones, at external borders.

Further clarification:

- Practical application of this provision in case of refusal of entry at the border: there are two possibilities: either the person is physically present in the territory of a Member State after refusal of entry at the border (for instance in an airport transit zone) or the person is not physically present in the territory of a Member State (for instance a person who was refused entry at a land border and who is still physically staying on third-country territory). In the first case, the safeguards of Article 4(4) of the Return Directive shall be applied; in the second case, Article 4(4) does not apply.
- The respect of the principle of *non-refoulement* recognised by Article 4(4)(b) of the Return Directive — and enshrined in Article 19(2) Charter of Fundamental Rights of the European Union ('CFR') as well as Article 3 of the European Convention on Human Rights ('ECHR') — is absolute and must not be restricted under any circumstances, even if foreigners are a threat to public order or have committed a particularly serious crime. Such persons may be excluded from refugee or subsidiary protection status, but they still cannot be returned to a place where they may be tortured or killed.

### 2.3. Criminal law and extradition cases

Member States are free to decide not to apply the Directive to third-country nationals who:

- *are subject to return as a criminal law sanction, according to national law,*
- *are subject to return as a consequence of a criminal law sanction, according to national law, or*
- *are the subjects of extradition procedures.*

Further clarification:

- The criminal law cases envisaged by this provision are those typically considered as crime in the national legal orders of Member States.
  - In C-297/12, *Filev and Osmani*, the ECJ expressly clarified that offences against the provisions of the national law on narcotics and convictions for drug trafficking may be cases to which the derogation is applicable.
  - In C-329/11, *Achughbabian*, the ECJ confirmed that this derogation cannot be used to third-country nationals who have committed only the offence of illegal staying without depriving the Return Directive of its purpose and binding effect.
  - Minor migration-related infringements, such as mere irregular entry or stay, cannot justify the use of this derogation.
- Extradition procedures are not necessarily related to return procedures. The 1957 European Convention on Extradition<sup>(1)</sup> circumscribes extradition to surrendering 'persons against whom the competent authorities of the requesting Party are proceeding for an offence or who are wanted by the said authorities for the carrying out of a sentence or detention order'. However, there may be overlaps and this derogation aims at making clear that Member States have the option not to apply the procedural safeguards contained in the Return Directive when carrying out return in the context of extradition procedures.

<sup>(1)</sup> Council of Europe, *European Convention on Extradition*, 1957.

### 3. MORE FAVOURABLE PROVISIONS

*Legal basis:* Return Directive — Article 4

Even though the Return Directive aims at harmonising return procedures in Member States, it expressly leaves unaffected more favourable provisions contained in bilateral or multilateral international agreements (Article 4(1)).

The Return Directive also leaves unaffected ‘any provision which may be more favourable for the third-country national, laid down in the Community *acquis* relating to immigration and asylum’ (Article 4(2)) as well as ‘the right of the Member States to adopt or maintain provisions that are more favourable to persons to whom it applies provided that such provisions are compatible with this Directive’ (Article 4(3)).

Further clarification:

- Given that the Return Directive aims at providing for common minimum standards regarding the respect of fundamental rights of the individuals in return procedures, ‘more favourable’ must always be interpreted as ‘more favourable for the returnee’ and not more favourable for the expelling/removing State.
- Member States are not free to apply stricter standards in areas governed by the Return Directive: see the judgment of the ECJ in Case C-61/11, *El Dridi* <sup>(1)</sup> (paragraph 33): ‘[...] Directive 2008/115/EC [...] does not however allow those States to apply stricter standards in the area that it governs.’
- Imposing a fine instead of issuing a return decision: the Return Directive does not permit a mechanism being put in place which provides, in the event of third-country nationals illegally staying in the territory of a Member State, depending on the circumstances, for either a fine or removal, since the two measures are mutually exclusive (see judgment of the ECJ in Case C-38/14, *Zaizoune* <sup>(2)</sup>).
- Applying parts of the Return Directive to persons excluded from its scope under Article 2(2)(a) and (b) is compatible with the Directive and can be considered as covered by Article 4(3), as such practice would be a more favourable one for the third-country national concerned.

### 4. SANCTIONS FOR INFRINGEMENTS OF MIGRATION RULES

*Legal basis:* Return Directive — as interpreted by the ECJ in Cases C-61/11, *El Dridi*, C-329/11, *Achughbabian*, C-430/11, *Sagor*, C-297/12, *Filev and Osmani*, C-38/14, *Zaizoune*, C-290/14, *Celaj*, C-47/15, *Affum*.

Member States are free to lay down effective, proportionate and dissuasive sanctions, including imprisonment as a criminal sanction, in relation to infringements of migration rules, provided such measures do not compromise the application of the Return Directive and ensure the full observance of fundamental rights, particularly those guaranteed by the CFR interpreted in accordance with the corresponding provisions of the ECHR. It is for national law to determine which types of infringements of migration rules are to be sanctioned.

Nothing prevents Member States from addressing and taking into account in their national penal law infringements of migration rules committed also in other Member States.

Non-compliance with an entry ban: Member States can adopt criminal law sanctions against illegally staying third-country nationals who have been returned and who re-enter the territory of a Member State in breach of an entry ban. Such criminal sanction is admissible only on the condition that the entry ban issued against the third-country national complies with the provisions of the Directive. Such criminal sanctions shall ensure full observance of fundamental rights and the 1951 Geneva Convention <sup>(3)</sup>, notably Article 31(1) <sup>(4)</sup> (see judgment of the ECJ in Case C-290/14, *Celaj* <sup>(5)</sup>).

- The Return Directive does not preclude imposing penal sanctions, following national rules of criminal procedure, in relation to third-country nationals to whom the return procedures established by the Directive have been unsuccessfully applied and who are illegally staying in the territory of a Member State without there being any justified ground for non-return. Penal sanctions aimed at dissuading such returnees from remaining illegally must ensure full observance of fundamental rights, particularly those guaranteed by the ECHR (see judgment of the ECJ in Case C-329/11, *Achughbabian*, paragraphs 48 and 49) and shall comply with the proportionality principle.

<sup>(1)</sup> Judgment of the Court of Justice of 28 April 2011, *El Dridi*, Case C-61/11 PPU, ECLI:EU:C:2011:268.

<sup>(2)</sup> Judgment of the ECJ of 23 April 2015, *Zaizoune*, Case C-38/14, ECLI:EU:C:2015:260.

<sup>(3)</sup> United Nations, Convention Relating to the Status of Refugees, 1951.

<sup>(4)</sup> Article 31(1) of the Convention Relating to the Status of Refugees: ‘1. The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorisation, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.’

<sup>(5)</sup> Judgment of the Court of Justice of 1 October 2015, *Skerdjan Celaj*, Case C-290/14, ECLI:EU:C:2015:640.

- The Commission recommends that Member States foresee effective, proportionate and dissuasive sanctions in national legislation (for example fines, seizure of documents, reduction/refusal of benefits/allowance, refusal of work permit) in relation to third-country nationals who intentionally obstruct the return process (for example disposing of travel document, providing false identity, preventing identification, repeated refusal to embark), provided that such sanctions do not impair achieving the objective of the Return Directive and ensure full observance of fundamental rights.
- Criminalisation of mere illegal stay: Member States cannot impose imprisonment under national criminal law on the sole ground of illegal stay before or during carrying out return procedures since this would delay return (see judgment of the ECJ in Case C-61/11, *El Dridi*). However, the Return Directive does not prevent Member States from imposing a sentence of imprisonment to punish the commission of offences other than those stemming from the mere fact of illegal stay, including in situations where the return procedures has not yet been completed (see judgment of the ECJ in Case C-47/15, *Affum*, paragraph 65).
- Financial penalties: the imposition of a (proportionate) financial penalty for illegal stay under national criminal law is not as such incompatible with the objectives of the Return Directive since it does not prevent a return decision from being issued and implemented in full compliance with the conditions set out in the Directive (see judgment of the ECJ in Case C-430/11, *Sagor*). National legislation which — in the event of illegal stay — provides for either a fine or removal is incompatible with the Return Directive, since the two measures are mutually exclusive, undermining the effectiveness of the Directive (see judgment of the ECJ in Case C-38/14, *Zaizoune*).
- In accordance with Article 5 of Directive 2009/52/EC of the European Parliament and of the Council <sup>(1)</sup> (the ‘Employers Sanctions Directive’), employers who employ illegally staying third-country nationals without authorisation are liable to pay a financial sanction that shall include the costs of return in those cases where return procedures are carried out. Member States may decide to reflect at least the average costs of return in the financial sanctions.
- Immediate expulsion under national criminal law (in cases which are not excluded from the scope of the Return Directive under Article 2(2)(b) — see section 2.3 above): this is only allowed in so far as the judgement stating this penalty complies with all safeguards of the Return Directive (including on the form of return decisions, legal safeguards and advance consideration of the possibility of voluntary departure) (see judgment of the ECJ in Case C-430/11, *Sagor*).
- House arrest under national criminal law: this is only allowed if guarantees are in place that house arrest does not impede return and that it comes to an end as soon as the physical transportation of the individual concerned out of that Member State is possible (see judgment of the ECJ in Case C-430/11, *Sagor*).

Further clarification:

- ‘Justified reasons for non-return’ may:
  - either be reasons *outside the scope* of influence of the returnee (for example delays in obtaining necessary documentation from third countries caused by bad cooperation of third-country authorities, crisis situation in country of return making safe return impossible, granting of formal postponement of return to certain categories of returnees), or
  - reasons *within the sphere of the returnee*, which are recognised as legitimate or justified by Union or national law (for example, health problems or family reasons leading to postponement of removal, pending appeal procedure with suspensive effect, decision to cooperate with authorities as witness). The mere subjective wish to stay in the EU can never be as such considered a ‘justified reason’.
- ‘Non-justified reasons for non-return’ may be reasons *within the scope of influence* of the returnee which are not recognised as legitimate or justified by Union or national law (for instance lack of cooperation in obtaining travel documents, lack of cooperation in disclosing identity, destroying documents, absconding, hampering removal efforts).

<sup>(1)</sup> Directive 2009/52/EC of the European Parliament and of the Council of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals (OJ L 168, 30.6.2009, p. 24). Denmark, Switzerland, Norway, Iceland and Liechtenstein are not bound by this Directive.

## 5. APPREHENSION AND OBLIGATION TO ISSUE A RETURN DECISION

*Legal basis:* Return Directive — Article 6(1)

*Member States shall issue a return decision to any third-country national staying illegally on their territory.*

Member States are obliged to issue a return decision to any third-country national staying illegally on their territory, unless an express derogation is foreseen by Union law (see list of exceptions described below). Member States are not allowed to tolerate in practice the presence of illegally staying third-country nationals on their territory without either launching a return procedure or granting a right to stay. This obligation on Member States to either initiate return procedures or to grant a right to stay aims at reducing 'grey areas', to prevent exploitation of illegally staying persons and to improve legal certainty for all involved.

Member States must issue a return decision irrespective of whether the third-country national concerned holds a valid identity or travel document, and regardless of whether readmission to a third country is possible.

The validity of return decisions should not be limited in time. Competent national authorities should be able to enforce return decisions without the need to re-launch the procedure after a certain period of time (for example one year), provided that the individual situation of the third-country national concerned has not significantly changed in fact or in law (for example change in legal status, risk of *refoulement*) and without prejudice to the rights to be heard and to an effective remedy.

As a general rule, the relevant criterion for determining the Member State in charge of carrying out return procedures is the place of apprehension. Example: if an irregular migrant has entered the EU via Member State A (undetected), subsequently travelled through Member States B and C (undetected) and was finally apprehended in Member State D, Member State D is in charge of carrying out a return procedure. The temporary reintroduction of internal border controls between Schengen States does not affect this principle. Exceptions to this general rule are set out in sections 5.2, 5.3, 5.4, 5.5 and 5.8 below.

Further clarification:

- An administrative fine under national law for illegal stay may be imposed in parallel with the adoption of a return decision. Such administrative fine cannot, however, substitute the obligation of Member States to issue a return decision and to carry out the removal (see judgment of the ECJ in Case C-38/14, *Zaizoune*).
- Return decisions shall state the obligation that the third-country national concerned must leave the territory of the issuing Member State in order to reach a third country in accordance with the definition of 'return' (see section 1.3) or, in other words, that the third-country national must leave the territories of the EU Member States and of the Schengen Associated countries. Lack of clarity on the obligation incumbent on the third-country national may have the unintended consequence of creating a risk of unauthorised secondary movements.
- Return decisions in accordance with the Return Directive must also be taken when a return procedure is carried out using a readmission agreement: the use of readmission agreements with a third country (covering the relations between EU Member States and third countries) does not affect the full and inclusive application of the Return Directive (covering the relation between removing State and returnee) in each individual case of return. In fact the use of the readmission agreement presumes the issuance of the return decision first.
- National legislation may foresee that a third-country national is obliged to leave the territory of the EU, if his stay is illegal. Such abstract legal obligation does not constitute a return decision. It must be substantiated in each case by an individualised return decision.
- Relevant Union IT systems, such as the Schengen Information System II ('SIS II'), Eurodac and the Visa Information System ('VIS'), should be fully used by the competent national authorities to support the identification and the individual assessment of each case, as well as to facilitate and support cooperation between the Member States in return and readmission procedures.
- Member States should establish efficient and proportionate measures to locate, detect and apprehend third-country nationals who are staying illegally in their territory in view of fulfilling the obligation to issue return decisions. In this respect, it is recalled that Article 13(1) SBC establishes that Member States shall apprehend and subject to return procedures third-country nationals who have crossed the external borders illegally and who have no right to stay in the EU. Article 14 of the Employers Sanctions Directive further provides that Member States shall ensure that effective and adequate inspections are carried out on their territory to control employment of illegally staying third-country nationals.

### Apprehension practices — respect of fundamental rights

The obligation on Member States to issue a return decision to any third-country national staying illegally on their territory is subject to the respect of fundamental rights, including the principle of proportionality (recital 24). The legitimate aim of fighting illegal migration may be balanced against other legitimate State interests, such as general public health considerations, the interest of the State to fight crime, the interest to have comprehensive birth registration, respect for the best interests of the child (expressly highlighted in recital 22), the Geneva Convention (highlighted in recital 23), as well as other relevant fundamental rights recognised by the CFR.

The Commission refers to the considerations set out in the 2012 Fundamental Rights Agency document ‘Apprehension of migrants in an irregular situation — fundamental rights considerations’ (Council document 13847/12) as guidance on how apprehension practices can be carried out in respect of the fundamental rights of the third-country nationals, while ensuring effective return procedures. Member States’ practices that respect this guidance can be considered as not affecting the obligation to issue return decisions to third-country nationals staying illegally under Article 6(1) of the Return Directive:

#### *Access to health:*

Migrants in an irregular situation seeking medical assistance should not be apprehended at or next to medical facilities.

Medical establishments should not be required to share migrants’ personal data with immigration law enforcement authorities for eventual return purposes.

#### *Access to education:*

Migrants in an irregular situation should not be apprehended at or next to the school which their children are attending.

Schools should not be required to share migrants’ personal data with immigration law enforcement authorities for eventual return purposes.

#### *Freedom of religion:*

Migrants in an irregular situation should not be apprehended at or next to recognised religious establishments when practicing their religion.

#### *Birth registration:*

Migrants in an irregular situation should be able to register the birth and should be able to obtain a birth certificate for their children without risk of apprehension.

Civil registries issuing birth certificates should not be required to share migrants’ personal data with immigration law enforcement authorities for eventual return purposes.

#### *Access to justice:*

In the interest of fighting crime, Member States may consider introducing possibilities for victims and witnesses to report crime without fear of being apprehended. To this end, the following good practices may be considered:

- introducing possibilities for anonymous, or semi-anonymous, or other effective reporting facilities,
- offering victims and witnesses of serious crimes the possibility to turn to the police via third parties (such as a migrants ombudsman, specially designated officials; or entities providing humanitarian and legal assistance),
- defining conditions under which victims or witnesses of crime, including domestic violence, could be granted residence permits building upon standards included in Council Directive 2004/81/EC <sup>(1)</sup> and Directive 2009/52/EC,

<sup>(1)</sup> Council Directive 2004/81/EC of 29 April 2004 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities (OJ L 261, 6.8.2004, p. 19).

- considering the need for delinking the immigration status of victims of violence from the main permit holder, who is at the same time the perpetrator,
- developing leaflets in cooperation with labour inspectorates or other relevant entities to systematically and objectively inform migrants apprehended at their work places of existing possibilities to lodge complaints against their employers, building upon Directive 2009/52/EC, and in this context taking steps to safeguard relevant evidence.

Migrants in an irregular situation who seek legal aid should not be apprehended at or next to trade unions, or other entities offering such support.

In addition, the Commission recommends that third-country nationals in an irregular situation who wish to access public services premises which register international protection applications or applications for statelessness status should not be apprehended at or next to such facilities.

### **Special cases:**

#### **5.1. Apprehension in the course of an exit check**

*Legal basis:* Return Directive — Article 6

A return decision may in certain circumstances also be adopted if an illegally staying third-country national is apprehended at the EU external border when leaving the EU territory, following a case-by-case analysis and taking into account the principle of proportionality. This could be justified in cases in which a significant overstay or illegal stay is detected during exit checks. In such cases, Member States could launch a return procedure when acquiring knowledge about the illegal stay and continue the procedure leading to the issuing of a return decision accompanied by an entry-ban in an '*in absentia*' procedure, respecting the procedural safeguards set out in sections 11.3 and 12 below.

Even though in such a specific situation the person is anyhow about to leave the EU, the issuing of a return decision can make sense, since it allows Member States to also issue an entry ban and thus prevent further entry and possible risk of illegal stay.

The Commission calls on Member States to establish procedures for issuing return decisions and — if applicable — entry bans directly at the airport, at other external border crossing points or, for entry bans, *in absentia* (see section 11.3) for such specific cases.

If a third-country national has overstayed his/her visa or permit in a first Member State and leaves the Union via a second/transit Member State, the return decision and entry ban will have to be issued by the second Member State (the 'overstayer' will normally also be 'illegally staying' within the meaning of the Return Directive in the second Member State).

#### **5.2. Holders of a return decision issued by another Member State**

*Legal basis:* Council Directive 2001/40/EC <sup>(1)</sup>

*Reminder/explanation:* The effect of a return decision issued by one Member State in another Member State had been subject of a separate chapter V of the 2005 Commission proposal for the Return Directive ('Apprehension in other Member States'). This chapter, as well as Article 20 of the Commission proposal which foresaw to delete Directive 2001/40/EC was, however, removed during negotiations and Directive 2001/40/EC remained in force. Directive 2001/40/EC expressly enables the recognition of a return decision issued by a competent authority in one Member State against a third-country national present within the territory of another Member State. Article 6 of the Return Directive does not expressly mention the case that a second Member State recognises a return decision issued by a first Member State in accordance with Directive 2001/40/EC. A literal interpretation of Article 6 which would require in such a case the recognising Member State to also issue a full second return decision in accordance with Directive 2008/115/EC would deprive Directive 2001/40/EC of any added value. In order to give an *effet utile* to the continued existence of Directive 2001/40/EC, it was necessary to look for an interpretation which gives a useful meaning to the continued co-existence of the two Directives.

<sup>(1)</sup> Council Directive 2001/40/EC of 28 May 2001 on the mutual recognition of decisions on the expulsion of third-country nationals (OJ L 149, 2.6.2001, p. 34).



If Member State A apprehends a person who is already subject of a return decision issued by Member State B, Member State A has the choice of either:

- (a) issuing a new return decision under Article 6(1) of the Return Directive; or
- (b) passing back the person to Member State B under an existing bilateral agreement in compliance with Article 6(3) of the Return Directive; or
- (c) recognising the return decision issued by Member State B in accordance with Directive 2001/40/EC.

If Member State A recognises the return decision issued by Member State B in accordance with Directive 2001/40/EC, it is still obliged to apply the safeguards related to enforcement of return (removal) foreseen in the Return Directive when enforcing the recognised return decision.

The mutual recognition of return decisions may provide for significant added value in certain constellations — notably in the context of transit of returnees by land (see section 6.4 below). The Commission encourages Member States to make use of the option of mutual recognition, whenever it helps to speed up return procedures and to reduce administrative burden.

### 5.3. Relation with Dublin rules

*Legal basis:* Regulation (EU) No 604/2013 of the European Parliament and of the Council <sup>(1)</sup> (the 'Dublin Regulation') — Articles 19 and 24

Article 6 of the Return Directive does not expressly mention the case in which a second Member State makes use of the possibility offered under the Dublin Regulation to ask a first Member State to take back an illegally staying third-country national. A literal interpretation of Article 6 which would require in such a case that the requesting (second) Member State also issue a full return decision in accordance with Directive 2008/115/EC would deprive the relevant Dublin rules of their added value. The wording of the Dublin Regulation expressly addresses this issue and provides for clear rules articulating the application of the Return Directive and the Dublin Regulation.

The cases in which the third-country national has applied for asylum and obtained a right to stay as asylum seeker in the second Member State fall outside the scope of the Return Directive, since the third-country national has a right to stay as asylum seeker and cannot therefore be considered as staying illegally in the second Member State.

On the other hand, the cases in which the third-country national has not applied for asylum and has not obtained a right to stay as asylum seeker in the second Member State fall within the scope of the Return Directive. The following situations <sup>(2)</sup> could be envisaged:

- (a) The third-country national has a status as asylum seeker in the first Member State (on-going procedure, not yet a final decision): the Dublin Regulation applies on the basis of the underlying principle that every third-country national lodging an application for asylum in one of the Member States should have his/her needs for international protection fully assessed by one Member State. A Member State cannot return that third-country national to a third country; instead, it may send him/her to the Member State responsible under Dublin Regulation in order to have his/her claim examined.
- (b) The third-country national has withdrawn his/her asylum application in the first Member State: if the withdrawal of the application *has led to a rejection* of the application (on the basis of Article 27 or 28 of the recast Asylum Procedures Directive), the rules described below under point (c) (choice between applying Dublin rules or the Return Directive) can be applied. If the withdrawal of the application *has not led to a rejection* of the application, the Dublin Regulation applies (as *lex specialis*), on the basis of the underlying principle that every third-country national lodging an application for asylum in one of the Member States should have his/her needs for international protection fully assessed by one Member State.
- (c) The third-country national has a final decision in the first Member State, rejecting his/her asylum application: a choice can be made between applying the Dublin Regulation or the Return Directive. In the Dublin Regulation, this choice is clearly stipulated in Article 24(4) and the clarification is added that from the moment in which authorities decide to make a Dublin request, the application of the Return Directive and return procedures are suspended and only Dublin rules apply (this also affects rules on detention and on legal remedies).

<sup>(1)</sup> Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (OJ L 180, 29.6.2013, p. 31).

<sup>(2)</sup> The examples provided are simplified for explanatory purposes. In practice every case must be evaluated based on the individual circumstances.

- (d) The third-country national had already been subject to successful return/removal (following rejection or withdrawal of an asylum application) from the first Member State to a third country; should the third-country national re-enter EU territory, the Dublin Regulation stipulates at Article 19(3) that the first Member State can no longer be responsible for the third-country national — therefore no transfer can be foreseen to this Member State. The Return Directive will therefore apply.

Practical examples:

- An applicant for international protection in Member State A travels without an entitlement to a neighbouring Member State B (crossing internal borders) where he/she is apprehended by the police. As a subject to the Dublin Regulation, he/she is transferred back from Member State B to Member State A. Should Member State B in this situation issue a return decision to this person for illegal stay in the territory?
  - Dublin rules prevail. No return decision can be issued by Member State B.
- Is Member State A (in the scenario described above) allowed to issue a return decision itself (together with an entry ban that will be postponed until the completion of the asylum procedure)?
  - No. As long as the person enjoys the right to stay as an asylum seeker in Member State A, his/her stay is not illegal in that Member State within the meaning of the Return and no return decision can be issued by Member State A.
- A third-country national granted international protection by Member State A is illegally staying in Member State B (for example overstaying 90 days). Is the Return Directive applicable in such cases? What will be the procedures if the person refuses to go back voluntary to the first Member State that granted protection?
  - The Dublin Regulation does not contain rules on taking back beneficiaries of international protection. Therefore the 'general regime' foreseen in Article 6(2) of the Return Directive will apply. This implies that Member State B will have to ask the person to go back to Member State A and — if the person does not comply voluntarily — Member State B has to consider issuing a return decision, taking into account all safeguards provided by the Return Directive, including in particular the principle of *non-refoulement*. In certain circumstances, when return/removal to a third country is not possible and 'passing back' the person to another Member State can be qualified as a more favourable measure (see section 3), Member State B may enforce the 'passing-back' of the person to Member State A; the procedures related to the 'passing-back' of illegally staying third-country nationals to another Member State are governed by national law.
- A third-country national who had been fingerprinted following irregular entry into Member State A and who has not requested asylum in Member State A is subsequently apprehended in Member State B. Can Member State B transfer the person back to Member State A in accordance with Dublin rules?
  - No. Since there is not any link to an asylum procedure, the Dublin Regulation does not apply.

#### 5.4. Illegally staying third-country national holding a right to stay in another Member State

Legal basis: Return Directive — Article 6(2)

*Third-country nationals staying illegally on the territory of a Member State and holding a valid residence permit or other authorisation offering a right to stay issued by another Member State shall be required to go to the territory of that other Member State immediately. In the event of non-compliance by the third-country national concerned with this requirement, or where the third-country national's immediate departure is required for reasons of public policy or national security, paragraph 1 shall apply.*

This provision — which replaces a similar rule contained in Article 23(2) and (3) of the Schengen Implementing Convention ("SIC") <sup>(1)</sup> — foresees that no return decision should be issued to an illegally staying third-country national who is holding a valid permit to stay in another Member State. In such cases, the third-country national should in the first place be required to go immediately back to the Member State where he/she enjoys a right to stay. Only if the person does not comply with this request or in cases of risk for public policy or national security, a return decision shall be adopted.

<sup>(1)</sup> Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders (OJ L 239, 22.9.2000, p. 19).

Further clarification:

- The form in which the request ‘to go to the territory of that other Member State immediately’ is issued should be determined in accordance with national law. It is recommended to issue decisions in writing and with reasons. In order to avoid confusion, the decision should not be labelled ‘return decision’.
- Period for going back to other Member State: no general indication can be given regarding the time which should elapse between the request to go to the territory of another Member State until the moment at which a return decision in accordance with Article 6(1) is issued. An appropriate time frame should be chosen in accordance with national law, taking into account the individual circumstances, the principle of proportionality and the fact that the term ‘immediately’ is used in the legal provision. The time between the request to go to the other Member State and the issuing of a return decision under Article 6(1) must not be counted as part of an eventual period for voluntary departure, since such period is an element of the return decision and will start running only with the issuing of a return decision.
- Control of departure to another Member State: Union law does not specify how compliance with the obligation to go back to the other Member State has to be controlled. Member States should make sure, in accordance with national law, that appropriate follow-up is given to their decisions.
- Verification of validity of permits/authorisations issued by another Member State: there is currently no central system for exchanging information between Member States on this issue. Member States are encouraged to cooperate bilaterally and provide without delay relevant information to each other, in accordance with national law and bilateral cooperation arrangement. Existing national contact points (for instance those listed in annex 2 of the Schengen Handbook <sup>(1)</sup>) might also be used for this purpose.
- The term ‘residence permit or other authorisation offering a right to stay’ <sup>(2)</sup> is very broad and covers any status granted or permit issued by a Member State which offers a right to legal stay, and not just an acceptance of temporary postponement of return/removal.

The term covers the following:

- long-term visa (it clearly offers a right to stay),
- temporary humanitarian permit (in so far as such permit offers a right to stay and not just a mere postponement of return),
- an expired residence permit based on a still valid international protection status (the status of international protection is not dependent on validity of the paper demonstrating it),
- a valid visa in an invalid (expired) travel document — according to relevant Union legislation, it is not allowed to issue a visa with a validity going beyond the validity of the passport. The case of a valid visa in an expired passport should therefore never appear in practice. If this case nevertheless arises, the third-country national concerned should not be unduly penalised. For detailed guidance on the relevant Visa rules see the updated Visa Handbook — part II, Point 4.1.1 and 4.1.2 <sup>(3)</sup>.

The term does not cover the following cases:

- an expired residence permit based on an expired residence status,
  - counterfeit, false and forged passports or residence permits,
  - paper certifying temporary postponement of removal,
  - toleration (in so far as toleration does not imply a legal right to stay).
- As a general rule no removal to other Member States: if a third-country national does not agree to go back voluntarily in accordance with Article 6(2) to the Member State of which he/she holds a permit, Article 6(1) becomes applicable and a return decision, providing for direct return to a third country shall be adopted. It is not possible to pass back the person to the other Member State with force, unless an existing bilateral agreement

<sup>(1)</sup> Commission Recommendation C(2006) 5186 of 6 November 2006 establishing a common ‘Practical Handbook for Border Guards (Schengen Handbook)’ to be used by Member States’ competent authorities when carrying out the border control of persons, and subsequent amendments.

<sup>(2)</sup> This term is a broad ‘catch-all’ provision, which covers also those cases that are expressly excluded from the definition of ‘residence permit’ under Article 2(16)(b)(i) and (ii) of the SBC.

<sup>(3)</sup> Commission Decision C(2010) 1620 of 19 March 2010 establishing the Handbook for the processing of visa applications and the modification of issued visas, and subsequent amendments.

between Member States which was already in force on 13 January 2009 (see section 5.5) provides expressly for this possibility or in certain circumstances when return/removal to a third country is not possible and the Member State that issued the permit agrees to take the person back.

- No issuing of EU entry bans when using Article 6(2): when passing back an illegally staying third-country national to another Member State under Article 6(2), no EU entry ban can be issued under Article 11, because Article 11 applies only in connection with the issuing of a return decision and does not apply in cases in case of a 'passing-back' to another Member State. Moreover, it is pointless from a practical point of view to issue an EU entry ban in a situation where the person will continue to legally stay in another Member State.
- Immediate departure required for reasons of public policy or national security: in the exceptional circumstances addressed by Article 6(2)(second phrase) (second case), the person *shall* be immediately made subject of a return decision and removed to a third country. The Member State where the person enjoys the right to stay should be informed about this fact.

Practical example:

- What provisions of the Return Directive should be applied with regard to third-country nationals detected in Member State A, who possess a valid residence permit issued by Member State B and at the same time are subject of an SIS alert (entry ban) initiated by Member State C?
- Member State A should apply Article 6(2) of the Directive and ask the person to go back to Member State B. As regards the co-existence of an entry ban issued by Member State C and a residence permit issued by Member State B, this must be clarified bilaterally between the Member State issuing the alert (C) and the Member State which had issued the permit (B) in accordance with Article 25(2) Schengen Implementing Convention.

#### **5.5. Illegally staying third-country national covered by existing bilateral agreements between Member States**

*Legal basis:* Return Directive — Article 6(3)

- An indicative list of existing bilateral readmission agreements between Member States can be found at: <http://rsc.eui.eu/RDP/research/analyses/ra/>

*Member States may refrain from issuing a return decision to a third-country national staying illegally on their territory if the third-country national concerned is taken back by another Member State under bilateral agreements or arrangements existing on the date of entry into force of this Directive (i.e. 13 January 2009). In such a case the Member State which has taken back the third-country national concerned shall apply paragraph 1.*

This provision foresees — as an exception and in the form of a 'standstill clause' — the possibility for Member States to pass back irregular migrants to other Member States under bilateral agreements or arrangements existing on 13 January 2009.

*Historic reminder/explanation:* this provision was included into the text of the Return Directive at a late stage of negotiations following a strong request from certain Member States which insisted that the Directive should not oblige them to change well-established practices of taking/passing back illegally staying third-country nationals to other Member States under bilateral agreements.

The principle upon which the Return Directive is based is direct return of illegally staying third-country nationals from the EU to third countries. Article 6(3) of the Directive therefore lays down an exception that concerns solely the obligation of the Member States on whose territory the third-country national is present to issue a return decision, that obligation then falling to the Member State that takes him back. It does not lay down an exception to the scope of the Return Directive additional to those set by Article 2(2) — see judgment of the ECJ in Case C-47/15, *Affum* (paragraphs 82-85).

Further clarification:

- Subsequent use of bilateral agreements between Member States A-B and B-C: the Return Directive, notably Article 6(3), does not expressly interdict 'domino' taking back under existing bilateral arrangements. It is, however, important that in the end a full return procedure in accordance with the Directive will be carried out by one Member State. Since this kind of subsequent procedures is cost intensive for administrations and involves additional discomfort for the returnee, Member States are encouraged to refrain from applying this practice.

- No EU-wide entry bans when using Article 6(3): when passing back an illegally staying third-country national to another Member State under Article 6(3) no EU entry ban can be issued under Article 11, since Article 11 applies only in connection with the issuing of a return decision and does not apply in case of mere ‘passing back’ to another Member State. Moreover, it is pointless from a practical point of view to issue an EU entry ban in a situation in which the person does not yet leave the EU. As regards the possibility to issue purely national entry bans in exceptional circumstances under Article 25(2) SIC, see section 11.8.
- Decision to transfer the third-country national to another Member State: such decision constitutes one of the measures provided for by the Return Directive to bring the illegal stay to an end and is a stage preparatory to removal from the territory of the Union. Member States must therefore adopt such decision with diligence and speedily, so that the transfer to the Member State responsible for the return procedure takes place as soon as possible — see judgment of the ECJ in Case C-47/15, *Affum* (paragraph 87).
- Since the notion of ‘return’ under the Return Directive always implies return to a third country, it is recommended to call this kind of national decision ‘transfer decision’ or ‘passing-back decision’ and not to call it ‘return decision’.
- Standstill clause: Article 6(3) is an express ‘standstill’ clause. Member States may only use the option offered by Article 6(3) in relation to bilateral readmission arrangements that entered into force before 13 January 2009. Existing agreements which were renegotiated or renewed after 13 January 2009 may continue to be covered by Article 6(3) if the renegotiated/renewed agreement is an amendment of the already existing agreement and clearly labelled as such. If the renegotiated/renewed agreement is an *aliud* (an entirely new agreement with different substance), then Article 6(3) would not cover it anymore.
- Readmission agreements between Schengen Member States and the UK: for the purposes of interpreting Article 6(3), the UK is to be considered as a Member State.

#### **5.6. Illegally staying third-country national benefiting from humanitarian (or other) permit/authorisation**

*Legal basis:* Return Directive — Article 6(4)

*Member States may at any moment decide to grant an autonomous residence permit or other authorisation offering a right to stay for compassionate, humanitarian or other reasons to a third-country national staying illegally on their territory. In that event no return decision shall be issued. Where a return decision has already been issued, it shall be withdrawn or suspended for the duration of validity of the residence permit or other authorisation offering a right to stay.*

Member States are free — at any moment — to grant a permit or right to stay to an illegally staying third-country national. In this event, any pending return procedures shall be closed and an already issued return decision or removal order must be withdrawn or suspended, depending on the nature of the permit. The same applies in cases in which Member States have to grant a right to stay, for example following the submission of an asylum application.

It is up to Member States to decide which approach (withdrawal or suspension of the return decision) should be applied, taking into account the nature and likely duration of the permit or right to stay which was granted, and the need to ensure effective return procedures. However, according to the judgment of the ECJ in Case C-601/15, *J.N.* <sup>(1)</sup> (paragraphs 75-80), when a Member State grants the right to remain on its territory to a third-country national who applied for international protection and who was already subject to a return decision prior to the application, Member States should suspend the enforcement of the return decision (and not withdraw the decision) until a decision on the application for international protection is taken (see also section 7).

#### **5.7. Illegally staying third-country national subject of a pending procedure renewing a permit/authorisation**

*Legal basis:* Return Directive — Article 6(5)

*If a third-country national staying illegally on the territory of a Member State is the subject of a pending procedure for renewing his or her residence permit or other authorisation offering a right to stay, that Member State shall consider refraining from issuing a return decision, until the pending procedure is finished, without prejudice to paragraph 6.*

Member States are free to refrain from issuing a return decision to illegally staying third-country nationals who are waiting for a decision on the renewal of their permit. This provision is intended to protect third-country nationals who were legally staying in a Member State for a certain time and who — because of delays in the procedure leading to a renewal of their permit — temporarily become illegally staying. This provision refers to a pending procedure for

<sup>(1)</sup> Judgment of the Court of Justice of 15 February 2016, *J.N.*, Case C-601/15 PPU, ECLI:EU:C:2016:84.

renewal of a residence permit in the Member State of apprehension only (‘that Member State’). Member States are encouraged to make use of this provision also in cases in which it is likely that the application for renewal will be successful and to provide the persons concerned at least with the same treatment as the one offered to returnees during a period for voluntary departure or during postponed return.

This provision does not cover pending procedures for renewal of a residence permit in another Member State. The fact that a person is subject to a pending procedure for renewal of a residence permit in another Member State may, however, in specific circumstances justify postponement of return in accordance with Article 9(2) or the application of more favourable measures in accordance with Article 4(3).

#### 5.8. Special rules in legal migration directives on readmission between Member States in cases of intra-Union mobility

*Legal basis:* Directive 2014/66/EU of the European Parliament and of the Council <sup>(1)</sup> (the ‘Intra-Corporate Transfers Directive’) — Article 23; Council Directive 2003/109/EC <sup>(2)</sup> (the ‘LTR Directive’) (amended by Council Directive 2011/51/EU <sup>(3)</sup>) — Articles 12 and 22; Council Directive 2009/50/EC <sup>(4)</sup> (the ‘Blue Card Directive’) — Article 18

The above-quoted Directives contain special rules on readmission between Member States in cases of intra-EU mobility of certain categories of third-country nationals (intra-corporate transfers, holders of EU Blue Cards, long-term residents). These provisions are to be considered as *leges speciales* (more specific rules) which have to be followed in the first place in those cases expressly covered by the said Directives.

### 6. VOLUNTARY DEPARTURE

*Legal basis:* Return Directive — Article 7(1)

*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 promotion of voluntary departure is one of the key objectives of the Return Directive. Unless there are reasons to conclude that this would undermine the purpose of return, voluntary departure in compliance with an obligation to return is preferable to removal for the threefold reason that it is a more dignified, safer and frequently more cost-effective return option.

During the period for voluntary departure, the third-country national concerned is under the obligation to return, although this obligation cannot be enforced until the expiry of such period, or if a risk of absconding or a risk to public policy, public security or national security emerge, or an application for legal stay is dismissed as manifestly unfounded or fraudulent (see section 6.3). Member States are encouraged to provide the possibility of voluntary departure to the largest possible number of returnees and to refrain from doing so in those cases in which there is a risk that this might hamper the purpose of the return procedure.

The last sentence of Article 7(1) allows Member States to decide to subject access to a period for voluntary departure to an application by the third-country nationals. In such case, information about the possibility to apply for a period for voluntary departure must be given individually to the third-country nationals concerned. General information sheets for the public (for example an announcement of the possibility of submitting such application on the website of the immigration offices or printing adds and posting them on information panels in the premises of the local immigration authorities) may be helpful but needs to be complemented with individualised information. Such information should be provided to minors in a child-sensitive and age- and context-appropriate manner, and particular attention should be paid to the situation of unaccompanied minors.

Member States may also decide to grant a period for voluntary departure upon application for certain categories of illegally staying third-country nationals (for example those whose application for legal stay is rejected as manifestly unfounded or fraudulent) or for or obtaining support (for instance reintegration assistance), and to grant it without prior application in other cases.

<sup>(1)</sup> Directive 2014/66/EU of the European Parliament and of the Council of 15 May 2014 on the conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer (OJ L 157, 27.5.2014, p. 1).

<sup>(2)</sup> Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents (OJ L 16, 23.1.2004, p. 44).

<sup>(3)</sup> Directive 2011/51/EU of the European Parliament and of the Council of 11 May 2011 amending Council Directive 2003/109/EC to extend its scope to beneficiaries of international protection (OJ L 132, 19.5.2011, p. 1).

<sup>(4)</sup> Council Directive 2009/50/EC of 25 May 2009 on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment (OJ L 155, 18.6.2009, p. 17).

The Commission recommends granting a period for voluntary departure following a request by the third-country nationals concerned, while ensuring that the necessary information for submitting an application is duly and systematically provided to the third-country nationals.

Assisted voluntary return programmes: while the Return Directive does not require Member States to establish an assisted voluntary return programme, its recital 10 affirms that ‘in order to promote voluntary return, Member States should provide for enhanced return assistance and counselling and make best use of relevant funding possibilities’. Member States are therefore strongly encouraged to make assisted voluntary return programmes available throughout the procedures, as part of the efforts to promote a more humane and dignified return and, in general, to increase the effectiveness of return. To facilitate access to such schemes and to ensure that an informed decision is taken by the third-country nationals concerned, Member States should ensure adequate dissemination of information on voluntary return and assisted voluntary return programmes, also in cooperation with national authorities who may be in direct contact with third-country nationals (for example education, social and health services), non-governmental organisations and other bodies. When providing such information to minors, this should be done in a child-sensitive and age- and context-appropriate manner. National programmes should follow the Non-binding Common Standards for Assisted Voluntary Return (and Reintegration) Programmes implemented by Member States<sup>(1)</sup> developed by the Commission in cooperation with the Member States, and endorsed by the JHA Council in its Conclusions of 9-10 June 2016<sup>(2)</sup>.

The *Return Expert Group (REG)* of the European Migration Network (EMN) aims at facilitating improved practical cooperation among States and stakeholders in the field of return, assisted voluntary return and reintegration programmes. It should be a key tool for the gathering and sharing of information and Member States are encouraged to make active use of it.

Further clarification:

- The time frame of 7-30 days constitutes a general principle. It is binding for Member States to fix a period which respects this frame, unless specific circumstances of the individual case justify an extension in accordance with Article 7(2) of the Return Directive (see section 6.1).
- Granting 60 days as a general rule would be incompatible with the harmonisation and common discipline provided for by the Return Directive to have a frame of 7-30 days, therefore it cannot be justified as more favourable provision under Article 4(3). However, periods between 30-60 days (exceeding the range harmonised by paragraph 1) which may be granted only in the presence of specific circumstances (referred to in paragraph 2) are covered by Article 7(2) of the Return Directive.
- In line with the requirements deriving from the right to be heard, as recognised Article 41(2) CFR, Member States should provide the returnee with a possibility to specify individual circumstances and needs to be taken into account when determining the period to be granted, both in cases where the period for voluntary departure is determined *ex officio* and in cases in which the period is fixed following an application by the returnee.
- Although the Return Directive prohibits to forcibly return an illegally staying third-country national during the period for voluntary departure, it does not prevent Member States from launching the necessary administrative procedures during that period in view of the possible enforcement of a return decision (for example establishing contacts with the authorities of third countries for obtaining travel documents, organising the logistics for the removal operation).

Based on an individual assessment of the situation of the third-country national, and taking particularly into account the prospect of return and the willingness of the third-country national to cooperate with the competent authorities, the Commission recommends that Member States grant the shortest period for voluntary departure that is needed to organise and carry out the return. A period longer than seven days should be granted only when the third-country national actively cooperates in the return process.

### 6.1. Extended period for voluntary departure

*Legal basis:* Return Directive — Article 7(2)

*Member States shall, where necessary, extend the period for voluntary departure by an appropriate period, taking into account the specific circumstances of the individual case, such as the length of stay, the existence of children attending school and the existence of other family and social links.*

<sup>(1)</sup> Council document 8829/16.

<sup>(2)</sup> Council document 9979/16.

There is no pre-fixed maximum time limit for the extension of the period for voluntary departure and each individual case should be treated on its own merits in accordance with national implementing legislation and administrative practice. Member States enjoy a wide margin of discretion in determining whether the extension of the period for voluntary departure would be 'appropriate'. Taking into account the reference in the text to children attending school, extensions of the period for voluntary departure until the end of the semester or of the school year, or for up to one school year, may be granted provided that this is in the child's best interests and that all relevant circumstances of the case are duly taken into account.

An extension of the period beyond 30 days can be granted from the outset (the point of time when the return decision is issued), if justified by the individual assessment of the circumstances of the case. It is not necessary to first issue a 30-day period and to subsequently extend it.

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

The three subcases mentioned in Article 7(2) (length of stay, children attending school, family links) should be expressly respected in national implementing legislation and administrative practice. Member States' administrative rules can be more detailed and also provide for other reasons for extension, but should not be less precise, undermining harmonisation.

## 6.2. Obligations pending voluntary departure

*Legal basis:* Return Directive — Article 7(3)

*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.*

The obligations set out in Article 7(3) of the Return Directive can be imposed where there is a risk of absconding to avoid. If the individual assessment of the case shows that there are no particular circumstances, such obligations are not justified — see judgment of the ECJ in Case C-61/11, *El Dridi*, paragraph 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'. The Commission recommends that Member States use such possibility when there is a risk of absconding to avoid during the period for voluntary departure.

Attention should be paid to the fact that the possibility for Member States to impose certain obligations may be an advantage for the returnee since it may allow the grant of a period for voluntary departure in cases which would not normally otherwise qualify for such treatment.

It is not possible to give a generally applicable figure of what amount constitutes an 'adequate financial guarantee'. In any case the proportionality principle should be respected, that is to say the amount should take into account the individual situation of the returnee. Current Member State practice foresees amounts varying from around EUR 200 to EUR 5 000.

If that is required in an individual case, the obligations mentioned in Article 7(3) can also be imposed in a cumulative manner.

When imposing obligations under Article 7(3), Member States should take into account the individual situation of the returnee and ensure full respect of the proportionality principle. Member States shall avoid imposing obligations which can de facto not be complied with (for example if a person does not possess a passport, he/she will not be able to submit it).

## 6.3. Counter-indications

*Legal basis:* Return Directive — Article 7(4)

*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.*



Member States are free to refrain from granting a period for voluntary departure in those cases — exhaustively listed in Article 7(4) of the Return Directive — in which there is a ‘counter-indication’, i.e. when the third-country national poses a risk of absconding (see section 1.6) or a risk to public order, public security or national security (for example previous convictions for serious criminal offences committed also in other Member States), and when a request for legal stay (for example asylum application, request or renewal of permit) has been dismissed as manifestly unfounded or fraudulent.

When, on the basis of an individual assessment, it can be established that such ‘counter-indications’ exist in a specific case, a period for voluntary departure should not be granted and a period shorter than 7 days should be granted only if it does not prevent national authorities from carrying out removal.

Member States may, however, change their assessment of the situation at any moment (a previously non-cooperating returnee may change attitude and accept an offer for assisted voluntary return) and grant a period for voluntary departure even though there was initially a risk of absconding.

Further clarification:

- It is not possible to exclude in general all illegal entrants from the possibility of obtaining a period for voluntary departure. Such generalising rule would be contrary to the definition of risk of absconding, the principle of proportionality and the obligation to carry out a case-by-case assessment, undermining the *effet utile* of Article 7 (promotion of voluntary departure).
- It is possible to exclude under Article 7(4) third-country nationals who submitted abusive applications. Article 7(4) expressly covers manifestly unfounded or fraudulent applications. Abusive applications normally involve a higher degree of reprehensible behaviour than manifestly unfounded applications, therefore Article 7(4) should be interpreted as also covering abusive applications.
- It is also possible to exclude persons who pose a risk to public policy, public security or national security. In Case C-554/13, *Zh. and O.* (<sup>1</sup>), the ECJ clarified in this respect that Member States essentially retain the freedom to determine the requirements of the concept of public policy in accordance with their national needs. The concept of ‘risk of absconding’ is distinct from that of ‘risk to public policy’. The concept of ‘risk to public policy’ presupposes the existence, in addition to the perturbation of the social order which any infringement of the law involves, of a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. A Member State cannot deem a third-country national to pose a risk to public policy on the sole ground that that national is suspected, or has been criminally convicted, of an act punishable as a criminal offence under national law. 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 third-country national concerned committed the alleged criminal offence is also relevant for a case-by-case assessment which has to be carried out in any case.

#### 6.4. Practical compliance — transit by land

*Annex 39 to the Schengen Handbook, ‘Standard form for recognising a return decision for the purposes of transit by land’*

*Map of participating Member States (available as EMN ad hoc query, return, 2015, at the EMN Europa website)*

*Reminder/explanation:* a returnee who intends to leave the territory of the EU by land within the period for voluntary departure does not have any valid visa or other permission to transit through another Member States to his/her country of return, therefore running the risk of being apprehended/stopped by the police on the way and being subject of a second return decision issued by the transit Member State. This runs contrary to the policy objective of the Return Directive to ensure effective return, including through voluntary departure.

Issuing a transit visa to the returnee would be an inappropriate and inadequate solution, since granting a visa to illegally staying third-country nationals who are obliged to leave would be contrary to EU rules on visa. Moreover transit Member States do not seem to have any incentive to issue such kind of visa (risk that persons may abscond and/or cause removal costs) and would in practice therefore frequently refuse issuing the visa. Providing for a ‘European laissez-passer’ for the returnee does not offer a solution either: in the absence of a clearly defined legal nature and legal effects of such a ‘laissez-passer’, the returnee would — strictly legally speaking — still be considered as illegally staying in the transit Member State and might therefore be subject of a new return decision in accordance with Article 6(1).

(<sup>1</sup>) Judgment of the Court of Justice of 11 June 2015, *Zh. and O.*, Case C-554/13, ECLI:EU:C:2015:377.

One way of avoiding the problem is to promote direct return to third countries by air. This may, however, be expensive and unpractical for the returnee.

An approach expressly recommended by the Commission is for the transit Member States to recognise return decisions issued by the first Member State using Annex 39 to the Schengen Handbook 'Standard form for recognising a return decision for the purposes of transit by land' (issued by the Commission in September 2011, following consultations with concerned Member States at technical level and discussion within the Migration-Expulsion Working Party of the Council of the European Union).

According to this approach, the transit Member State may recognise the return decision, including the period for voluntary departure, granted by the first Member State and will let the returnee transit on the basis of the recognised decision and the recognised period for voluntary departure. This approach has the advantage that the transit Member State is not obliged to issue a new return decision and that it can ask the first Member State to reimburse all cost related to removal if something goes wrong and the returnee needs to be removed at the cost of the transit State (in application of Council Decision 2004/191/EC <sup>(1)</sup>).

Those Member States which are still reluctant to use this voluntary option (either as sending or receiving Member State) are encouraged to join in and to inform Commission and other Member States about their participation.

Further clarification:

- Form of recognition: the very broad and general wording of Directive 2001/40/EC provides for discretion as regards the practical modalities (procedural details) for mutual recognition in accordance with practical needs and national legislation. The form proposed in Annex 39 of the Schengen Handbook is one possible but not the exclusive way to proceed.
- Legally speaking, all relevant elements of the return decision issued by Member State A are recognised by Member State B, including recognition of the statement that the third-country national is illegally staying and enjoys a period for voluntary departure — with effect for the territory of the recognising Member State B.
- The recognising Member State enjoys three different 'safeguards', namely:
  - (1) use of the standard form of Annex 39 is made on a voluntary basis only; this always leaves Member States with the option not to recognise a return decision issued by another Member State in a specific individual case;
  - (2) the first Member State may only grant a period for voluntary departure in accordance with Article 7 of the Return Directive if there is no 'counter-indication', such as a risk of absconding. The assessment of the personal situation of returnees in accordance with Article 7 which has to be carried out by the first Member State may be a helpful reassurance for the recognising transit Member State;
  - (3) if something goes wrong and the returnee needs to be removed at the cost of the transit State, all cost related to removal can be charged to the first Member State in application of Council Decision 2004/191/EC.

### 6.5. Practical compliance — transit by air

Council Directive 2003/110/EC <sup>(2)</sup> on assistance in cases of transit for the purpose of removal by air provides for a legal frame on cooperation between the competent authorities at Member States' airports of transit with regard to both escorted and unescorted removal by air. The term 'unescorted removal' in this Directive (which was adopted five years before the Return Directive) can be interpreted as also covering 'voluntary departure' within the meaning of the Return Directive <sup>(3)</sup>. The Commission recommends to make systematic use of Directive 2003/110/EC when organising transit by air in the context of voluntary departure (see also section 7.2).

<sup>(1)</sup> Council Decision 2004/191/EC of 23 February 2004 setting out the criteria and practical arrangements for the compensation of the financial imbalances resulting from the application of Directive 2001/40/EC on the mutual recognition of decisions on the expulsion of third-country nationals (OJ L 60, 27.2.2004, p. 55).

<sup>(2)</sup> Council Directive 2003/110/EC of 25 November 2003 on assistance in cases of transit for the purposes of removal by air (OJ L 321, 6.12.2003, p. 26).

<sup>(3)</sup> NB: this interpretation does not imply that unescorted removal is synonymous with voluntary departure. The term unescorted removal may also cover cases of forced return (removal) without police escort.

## 6.6. Recording of voluntary departure

Currently there is no central EU system for keeping track of voluntary departure. In cases of transit by land of returnees in accordance with the recommendation set out in Annex 39 to the Schengen Handbook, a confirmation is faxed back from the border guard to the Member State that issued the return decision. In other cases, returnees sometimes report back via Member States' consulates in third countries. Sometimes departure is also registered by border guards conducting exit checks. The absence of a central Union system for keeping track of voluntary departure creates a gap, both in terms of enforcement verification and in terms of statistics. The Commission proposal for a Regulation on the use of the Schengen Information System for the return of illegally staying third-country nationals <sup>(1)</sup> aims at addressing this situation.

In the short term, Member States should put in place means to verify whether a third-country national has left the Union, including within the period for voluntary departure and without assistance, to ensure an effective follow up in case of non-compliance. Member States are encouraged to make best use of the available information channels and for this purpose:

- (1) Systematically encourage those returnees who are granted a period for voluntary departure to inform the authorities who had issued the return decision (and entry ban) about their successful departure. The returnee may signal his departure to the border guard upon departure, at the consular representation of a Member State in his country of origin following return, or even in writing with sufficient proof in annex. In order to enhance this practice, an information sheet may be systematically attached to the return decision or to the travel document, containing the name and other identifiers of the third-country national, instructions and contact details of the issuing authority, so that the border guard could stamp it at exit and send it back as proof of departure to the issuing authority. Such information sheet could also specify the benefits for the returnee of informing the authorities about successful departure.
- (2) Ask border guards conducting exit checks to enquire — when they become aware of the exit of an irregular migrant — whether the returnee is subject of a return decision accompanied by a period for voluntary departure and, if this is the case, to systematically inform the authorities who issued the return decision about departure.
- (3) Use Annex 39 (see section 6.4) for confirming the departure of illegally staying third-country nationals transiting by land through the territory of a Member State other than the one that issued the return decision.

Member States should also consider establishing contacts with airline companies to obtain information on whether the third-country nationals that returned unescorted were present on board of the airplane at the moment of expected departure.

## 7. REMOVAL

*Legal basis:* Return Directive — Article 8(1)-(4)

1. *Member States shall take all necessary measures to enforce the return decision if no period for voluntary departure has been granted in accordance with Article 7(4) or if the obligation to return has not been complied with within the period for voluntary departure granted in accordance with Article 7.*
2. *If a Member State has granted a period for voluntary departure in accordance with Article 7, the return decision may be enforced only after the period has expired, unless a risk as referred to in Article 7(4) arises during that period.*
3. *Member States may adopt a separate administrative or judicial decision or act ordering the removal.*
4. *Where Member States use — as a last resort — coercive measures to carry out the removal of a third-country national who resists removal, such measures shall be proportionate and shall not exceed reasonable force. They 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 third-country national concerned.*

The Return Directive fixes an objective ('enforce the return decision') which should be achieved in an effective and proportionate manner with 'all necessary measures', whilst leaving the concrete modalities (the 'how') up to Member States' legislation and administrative practices — see judgment of the ECJ in Case C-329/11, *Achughbabian*, paragraph 36: '[...] the expressions "measures" and "coercive measures" contained therein refer to any intervention which leads, in an effective and proportionate manner, to the return of the person concerned'.

<sup>(1)</sup> COM(2016) 881 final.

Irrespective of the duties of third-country nationals to cooperate on their identification and to request the necessary documents to their national authorities, the obligation on the Member States to take 'all necessary measures' also include to timely request to the third country of readmission to deliver a valid identity or travel document, or to request accepting the use of the European Travel Document for Return <sup>(1)</sup> if foreseen by the agreements or arrangements in force with the third country, in order to allow for the physical transportation of the third-country national out of the Member State. The use of the European Travel document for Return should be further promoted in negotiations and application of bilateral and EU readmission agreements and other arrangements with third countries. Administrative procedures with third countries aimed at preparing the removal operation (for example obtaining the necessary travel documents and authorisations) can be launched during the period for voluntary departure, without putting at risk the third-country national concerned (see also section 6).

To reduce the impact of potential abuses, in particular those related to unfounded, multiple and 'last-minute' asylum applications, as well as unfounded appeals against asylum or return-related decisions made with the sole purpose of delaying or frustrating the enforcement of return decisions, the Commission recommends that Member States take measures to organise proceedings for the examination of applications for international protection in an accelerated or, where appropriate, border procedures, in accordance with Directive 2013/32/EU of the European Parliament and of the Council <sup>(2)</sup> (the 'Asylum Procedures Directive').

Borderline between voluntary departure and removal: return is a very broad concept and covers the process of going back to a third country in compliance (voluntary or enforced) with an obligation to return. Removal is much narrower. It means enforcement of the obligation to return, namely the physical transportation out of the Member State. The ECJ has already highlighted in Case C-61/11, *El Dridi*, (paragraph 41) and Case C-329/11, *Achughbabian*, that the Return Directive foresees a 'gradation of measures' ranging from voluntary to enforced. In practice there are frequently cases which contain both elements of forced return (detention) and of voluntariness (subsequent voluntary travelling without need of physical force). Member States are encouraged to use — at all stages of the procedure — the least intrusive measures. If returnees who are subject of removal/detention change their attitude and show willingness to cooperate and to depart voluntarily, Member States are encouraged and entitled to show flexibility.

Enforcement of a return decision after the rejection of an application for international protection: in the judgment of Case C-601/15, *J.N.* (paragraphs 75-76, 80), the ECJ established that, following the rejection at first instance of an asylum application, the enforcement of a previously issued return decision must be resumed at the stage in which it was interrupted, and that return procedures should not start afresh: '[...] the principle that Directive 2008/115/EC must be effective requires that a procedure opened under that directive, in the context of which a return decision, accompanied [...] by an entry ban, has been adopted, can be resumed at the stage at which it was interrupted, as soon as the application for international protection which interrupted it has been rejected at first instance [...]. In this regard it follows both from the duty of sincere cooperation of the Member States, deriving from Article 4(3) TEU and referred to in paragraph 56 of the judgment in *El Dridi* [...], and from the requirements for effectiveness [...], that the obligation imposed on the Member States by Article 8 of that directive, in the cases set out in Article 8(1), to carry out the removal must be fulfilled as soon as possible [...]. That obligation would not be met if the removal were delayed because, following the rejection at first instance of the application for international protection, a procedure [...] could not be resumed at the stage at which it was interrupted but had to start afresh.'

Imprisonment as a criminal law measure for illegal stay can never be 'a necessary measure' within the meaning of Article 8(1) of the Return Directive (see section 4). In line with Article 6 CFR on the right to liberty, interpreted in the light of Article 5 ECHR, deprivation of liberty in the return context is only permitted for the purpose of removal under Article 15 of the Return Directive — see judgment of the ECJ in Case C-329/11, *Achughbabian* (paragraph 37): '[...] the imposition and implementation of a sentence of imprisonment during the course of the return procedure provided for by Directive 2008/115/EC does not contribute to the realisation of the removal which that procedure pursues, namely the physical transportation of the person concerned outside the Member State concerned. Such a sentence does not therefore constitute a "measure" or a "coercive measure" within the meaning of Article 8 of Directive 2008/115/EC'.

Member States shall take due account of the state of health of third-country nationals when implementing the Return Directive in accordance with Article 5(c); moreover, when enforcing return decisions in application of Article 8(1) of the

<sup>(1)</sup> Regulation (EU) 2016/1953 of the European Parliament and of the Council of 26 October 2016 on the establishment of a European travel document for the return of illegally staying third-country nationals, and repealing the Council Recommendation of 30 November 1994 (OJ L 311, 17.11.2016, p. 13).

<sup>(2)</sup> Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (OJ L 180, 29.6.2013, p. 60).

Directive, they shall act with due respect for the dignity and physical integrity of the third-country nationals. In full respect of the right to health, and taking into account that the Directive does not impose an obligation to conduct systematic medical checks or to issue a 'fit-to-fly' declaration in relation to all third-country nationals subject to removal, the Commission recommends that Member States take measures to prevent potential abuses related to false medical claims presented by the third-country nationals that would result in unduly preventing or suspending removal on medical grounds (see also section 12.4), for instance by ensuring that qualified medical personnel appointed by the relevant national authority is available to provide an independent and objective medical opinion on the specific case.

### 7.1. Removal by air

*Legal basis:* Return Directive — Article 8(5); Common Guidelines on security provisions for joint removals by air annexed to Council Decision 2004/573/EC <sup>(1)</sup>; Regulation (EU) 2016/1624 of the European Parliament and of the Council <sup>(2)</sup> — Article 28(3)

*In carrying out removals by air, Member States shall take into account the Common Guidelines on security provisions for joint removals by air annexed to Decision 2004/573/EC.*

According to the Return Directive, Member States shall take into account the Common Guidelines on security provisions for joint removals by air annexed to Decision 2004/573/EC in the context of all removals by air, and not just — as originally foreseen by that Decision — in the context of joint removals.

Some parts of these Guidelines are by their nature designed to be taken into account for joint flights only, such as the rules related to the role and distribution of tasks of organising and participating Member States, hence they cannot be taken account in a purely national context. However, all other parts of the Guidelines (see the most relevant extracts in the box below) should be taken into account also in purely national removal operations.

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#### COMMON GUIDELINES ON SECURITY PROVISIONS FOR JOINT REMOVALS BY AIR

(extracts)

##### 1. PRE-RETURN PHASE

###### 1.1.2. Medical condition and medical records

*The organising Member State and each participating Member State shall ensure that the returnees for whom they are responsible are in an appropriate state of health, which allows legally and factually for a safe removal by air. Medical records shall be provided for returnees with a known medical disposition or where medical treatment is required. These medical records shall include the results of medical examinations, a diagnosis and the specification of possibly needed medication to allow for necessary medical measures. [...]*

###### 1.1.3. Documentation

*The organising Member State and each participating Member State shall ensure that for each returnee valid travel documents and other necessary additional documents, certificates or records are available. An authorised person shall keep the documentation until arrival in the country of destination [...].*

###### 1.2.3. Use of private-sector escorts

*When a participating Member State makes use of private-sector escorts, the authorities of that Member State shall provide for at least one official representative on board the flight.*

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<sup>(1)</sup> Council Decision 2004/573/EC of 29 April 2004 on the organisation of joint flights for removals from the territory of two or more Member States, of third-country nationals who are subjects of individual removal orders (OJ L 261, 6.8.2004, p. 28).

<sup>(2)</sup> Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard and amending Regulation (EU) 2016/399 of the European Parliament and of the Council and repealing Regulation (EC) No 863/2007 of the European Parliament and of the Council, Council Regulation (EC) No 2007/2004 and Council Decision 2005/267/EC (OJ L 251, 16.9.2016, p. 1).

#### 1.2.4. Skills and training of escorts

Escorts assigned on board the joint flights shall have received prior special training in order to carry out these missions; they must be provided with the necessary medical support depending on the mission.

[...]

#### 1.2.5. Code of conduct for escorts

The escorts shall not be armed. They may wear civilian dress, which shall have a distinctive emblem for identification purposes. Other duly accredited accompanying staff shall also wear a distinctive emblem.

The members of the escort shall be strategically positioned in the aircraft in order to provide optimum safety. Moreover, they shall be seated with the returnees for whom they have responsibility.

#### 1.2.6. Arrangements regarding the number of escorts

The number of escorts shall be determined on a case-by-case basis following an analysis of the potential risks and following mutual consultation. It is recommended in most cases that they are at least equivalent to the number of returnees on board. A back-up unit shall be available for support, where necessary (e.g. in cases of long-distance destinations).

### 2. PRE-DEPARTURE PHASE IN DEPARTURE OR STOPOVER AIRPORTS

#### 2.1. Transportation to the airport and stay in the airport

As regards transportation to and stay in the airport the following shall apply:

- (a) in principle, the escorts and the returnees should be at the airport at least three hours before departure;
- (b) returnees should be briefed regarding the enforcement of their removal and advised that it is in their interest to cooperate fully with the escorts. It should be made clear that any disruptive behaviour will not be tolerated and will not lead to the aborting of the removal operation;

[...]

#### 2.2. Check-in, boarding and security check before take-off

The arrangements as regards check-in, boarding and security checking before take-off shall be as follows:

- (a) the escorts of the Member State of the present location are responsible for checking in and for assisting in passing control areas;
- (b) all returnees shall undergo a meticulous security search before they board a joint flight. All objects that could be a threat to the safety of individuals and to the security of the joint flight shall be seized and placed in the luggage hold;
- (c) the returnee's luggage shall not be placed in the passengers cabin. All luggage placed in the hold shall undergo a security check and be labelled with the owner's name. Anything that is considered as dangerous according to the rules of the International Civil Aviation Organisation (ICAO) shall be removed from luggage;
- (d) money and valuable objects shall be placed in a transparent covering labelled with the owner's name. The returnees shall be informed about the procedure regarding objects and money that have been put aside;

[...]

### 3. IN-FLIGHT PROCEDURE

[...]

#### 3.2. Use of coercive measures

Coercive measures shall be used as follows:

- (a) coercive measures shall be implemented with due respect to the individual rights of the returnees;
- (b) coercion may be used on individuals who refuse or resist removal. All coercive measures shall be proportional and shall not exceed reasonable force. The dignity and physical integrity of the returnee shall be maintained. As a consequence, in case of doubt, the removal operation including the implementation of legal coercion based on the resistance and dangerousness of the returnee, shall be stopped following the principle 'no removal at all cost';

- (c) any coercive measures should not compromise or threaten the ability of the returnee to breathe normally. In the event that coercive force is used, it shall be ensured that the chest of the returnee remains in upright position and that nothing affects his or her chest in order to maintain normal respiratory function;
- (d) the immobilisation of resisting returnees may be achieved by means of restraints that will not endanger their dignity and physical integrity;
- (e) the organising Member State and each participating Member State shall agree on a list of authorised restraints in advance of the removal operation. The use of sedatives to facilitate the removal is forbidden without prejudice to emergency measures to ensure flight security;
- (f) all escorts shall be informed and made aware of the authorised and forbidden restraints;
- (g) restrained returnees shall remain under constant surveillance throughout the flight;
- (h) the decision temporarily to remove a means of restraint shall be made by the head or deputy-head of the removal operation.

### 3.3. Medical personnel and interpreters

The arrangements with regard to medical personnel and interpreters shall be as follows:

- (a) at least one medical doctor should be present on a joint flight;
- (b) the doctor shall have access to any relevant medical records of the returnees and shall be informed before departure about returnees with particular medical dispositions. Previously unknown medical dispositions, which are discovered immediately before departure and which may affect the enforcement of the removal, should be assessed with the responsible authorities;
- (c) only a doctor may, after a precise medical diagnosis has been made, administer medication to the returnees. Medicine required by a returnee during the course of the flight shall be held on board;
- (d) each returnee shall be able to address the doctor or the escorts directly, or via an interpreter in a language in which he or she can express him- or herself;
- (e) the organising Member States shall ensure that appropriate medical and language staff are available for the removal operation.

### 3.4. Documentation and monitoring of removal operation

#### 3.4.1. Recording and observers from third parties

Any video- and/or audio-recording or monitoring by third-party observers on joint flights shall be subject to prior agreement between the organising Member State and the participating Member States.

[...]

## 5. ARRIVAL PHASE

On arrival:

[...]

- (c) the organising Member State and each participating Member State shall hand over the returnees, for whom they are responsible, to the authorities of the country of destination, with their luggage and any items that were seized prior to boarding. The lead representatives of the organising and participating Member States will be responsible for handing over the returnees to the local authorities upon arrival. The escorts will not normally leave the aircraft;
- (d) where appropriate and feasible, the organising and participating Member States should invite consular staff, immigration liaison officers or advance parties of the Member States concerned to facilitate the handover of the returnees to the local authorities insofar as this is consistent with national practices and procedure;
- (e) the returnees shall be free of handcuffs or any other restraint when handed over to the local authorities;
- (f) the handover of returnees shall take place outside the aircraft (either at the bottom of the gangway or in adequate premises of the airport, as considered appropriate). As far as possible the local authorities shall be prevented from coming on board the aircraft;
- (g) the time spent at the airport of destination should be kept to a minimum;
- (h) it is the responsibility of the organising Member State and each participating Member State to have in place contingency arrangements for escorts and representatives (and returnees whose readmission has not been permitted) in the event that the departure of the aircraft is delayed following disembarkation of the returnees. These arrangements should include the provision of overnight accommodation, if necessary.

## 6. FAILURE OF THE REMOVAL OPERATION

*In the event that the authorities of the country of destination refuse entry to the territory, or the removal operation has to be aborted for other reasons, the organising Member State and each participating Member State shall take responsibility, at its own cost, for the return of the returnees, for whom they are responsible, to their respective territories.*

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Further clarification:

- Escorting of returnees by airline security personnel or hired outside personnel is in principle compatible with Article 8 of the Return Directive. Member States have, however, an overall responsibility for the conduct of the removal operation (issuing of removal order and proportionate use of coercive measures/escorting). Section 1.2.3 of the above Guidelines provide: 'When a Member State makes use of private-sector escorts, the authorities of that Member State shall provide for at least one official representative on board the flight'. It results that Member States have a general obligation to maintain a supervising role in all cases of 'outsourcing' of removal and that the use of airline security personnel for escorting purposes is not excluded, but must be authorised and flanked by at least one Member State's official.
- Collecting return operations (third-country authorities sending a plane to EU for repatriating their nationals under their supervision): Member States have an overall responsibility for the conduct of the removal operation until the hand-over to the authorities of the country of destination has been completed and the aircraft has left EU soil. The respect of fundamental rights as well as a proportionate use of means of constraint in accordance with the common EU standards set out above must, however, be ensured during the whole removal operation. For supervision purposes, a Member State representative shall observe the phase of the removal which is carried out by the country of destination. In accordance with Article 28(3) of Regulation (EU) 2016/1624 on the European Border and Coast Guard ('European Border and Coast Guard Regulation'), the European Border and Coast Guard Agency can provide assistance with the organisation of collecting return operations. During such operations, the participating Member States and the Agency shall ensure the respect of fundamental rights, of the principle of *non-refoulement* as well as the proportionate use of coercive measures. For this purpose, at least a representative of a Member State taking part to the operation and a forced-return monitor (either from a participating Member State or from the pool established according to Article 29 of the Regulation) must be present on board during the entire operation until arrival at the country of destination.

## 7.2. Transit by air

*Legal basis:* Directive 2003/110/EC

- *Transit request for the purpose of removal by air: Annex to Directive 2003/110/EC*
- *List of central authorities under Article 4(5) of Directive 2003/110/EC for receiving transit requests (available as EMN ad hoc query, return, 2015, at the EMN Europa website)*

Directive 2003/110/EC defines detailed measures on assistance between the competent authorities at Member State airports of transit with regard to unescorted and escorted removals by air. It provides for a set of rules aimed at facilitating the transit of persons subject to removal in an airport of a Member State other than the Member State which has adopted and implemented the removal decision. To that end, it defines under which conditions the transit operations may take place and indicates what measures of assistance the requested Member State should provide. Requests for assistance shall be made by means of the standard form, attached to Directive 2003/110/EC. These requests shall be sent to the central authorities of Member States nominated for this purpose.

## 7.3. Joint removal operations by air

*Legal basis:* Decision 2004/573/EC

- *List of national authorities responsible for organising and/or participating in joint flights under Article 3 of Decision 2004/573/EC (available as EMN ad hoc query, return, 2015, at the EMN Europa website).*

Decision 2004/573/EC addresses in particular the identification of common and specific tasks of the authorities responsible for organising or participating in these operations. Common Guidelines on security provisions for joint removals by air are annexed to this Council Decision. According to Article 8(5) of the Return Directive, those Guidelines have to be taken into account for any removal by air, including purely national operations (see section 7.1).



#### 7.4. Return operations coordinated by the European Border and Coast Guard Agency

*Legal basis:* Regulation (EU) 2016/1624 — Article 28

One of the tasks of the European Border and Coast Guard Agency is to provide — subject to Union return policy and in particular subject to the Return Directive as key piece of the Union return legislation — assistance for organising and carrying out return operations of the Member States. The role of the Agency in return issues and its compliance with fundamental rights has been strengthened by the European Border and Coast Guard Regulation in 2016.

There is a clear added value in performing return operations coordinated by the Agency and Member States are encouraged to make ample use of this option.

Return operations coordinated by the Agency are subject to forced-return monitoring (see section 8).

#### 8. FORCED-RETURN MONITORING

*Legal basis:* Return Directive — Article 8(6)

— *List of national forced-return monitoring bodies: EMN ad hoc query, return, 2015, at the EMN Europa website; overview by the European Union Agency for Fundamental Rights ('FRA') of national forced-return monitoring bodies is available at: <http://fra.europa.eu/en/theme/asylum-migration-borders/forced-return>*

*Member States shall provide for an effective forced-return monitoring system.*

Forced-return monitoring is an important tool which may serve the interest of both the returnee and the enforcing authorities as an inbuilt control mechanism for national day-to-day return practices. Effective monitoring may help to de-escalate. It allows quickly identifying and correcting possible shortcomings. It also protects enforcing authorities — who may sometimes be subject of unjustified criticism from media or NGOs — by providing unbiased and neutral reporting.

The Return Directive does not prescribe in detail how national forced-return monitoring systems should look like. It leaves wide margin of discretion to Member States. Based on the wording of the Directive and its context, some orientation can, however, be given:

- (1) forced-return monitoring should be understood as covering all activities undertaken by Member States in the respect of removal — from the preparation of departure, until reception in the country of return or in the case of failed removal until return to the point of departure. It does not cover post-return monitoring, i.e. the period following reception of the returnee in a third country;
- (2) monitoring systems should include involvement of organisations/bodies different and independent from the authorities enforcing return (*nemo monitor in res sua*);
- (3) public bodies, such as a national Ombudsman or an independent general inspection body, may act as monitor. However, it seems problematic to assign a monitoring role to a subsection of the same administration which also carries out return/removals;
- (4) the mere existence of judicial remedies in individual cases or national systems of the supervision of the efficiency of national return policies cannot be considered as a valid application of Article 8(6) of the Return Directive;
- (5) there is no automatic obligation on the Member States to finance all costs incurred by the monitor (such as staff costs), but Member States are obliged that — overall — a forced return monitoring system is up and running (*effet utile*);
- (6) Article 8(6) of the Return Directive does not imply an obligation to monitor each single removal operation. A monitoring system based on spot checks and monitoring of random samples may be considered sufficient as long as the monitoring intensity is sufficiently close to guarantee overall efficiency of monitoring;
- (7) Article 8(6) of the Return Directive does not imply a subjective right of a returnee to be monitored.

Monitoring of return operations coordinated by the European Border and Coast Guard Agency:

- Article 28(6) of the European Border and Coast Guard Regulation establishes that ‘Every return operation shall be monitored in accordance with Article 8(6) of Directive 2008/115/EC [...] on the basis of objective and transparent criteria and shall cover the whole return operation from the pre-departure phase until the hand-over of the returnees in the third country of return’. It means that every forced-return operation that is coordinated by the Agency and involves technical and operational reinforcement provided by one or more Member States shall be subject to monitoring in accordance with the national rules and modalities transposing Article 8(6) of the Return Directive.
- Without prejudice to the reporting obligations provided for by national law, forced-return monitors have to report after each operation to the Agency’s Executive Director, to the Fundamental Rights Officer and to the competent national authorities of all the Member States taking part in the operation.

## 9. POSTPONEMENT OF REMOVAL

*Legal basis:* Return Directive — Article 9

1. *Member States shall postpone removal:*
  - (a) *when it would violate the principle of non-refoulement; or*
  - (b) *for as long as a suspensory effect is granted in accordance with Article 13(2).*
2. *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.*
3. *If a removal is postponed as provided for in paragraphs 1 and 2, the obligations set out in Article 7(3) may be imposed on the third-country national concerned.*

The Return Directive imposes two absolute bans: Member States are not allowed to remove a person if this would violate the principle of *non-refoulement*, and they are also not allowed to carry out removal for as long as suspensory effect has been granted to a pending appeal.

In other cases Member States may postpone removal for an appropriate period taking into account the specific circumstances of the individual case. The catalogue of possible reasons is open and allows Member States to react flexibly to any newly arising or newly discovered circumstances justifying postponement of removal. The concrete examples listed in the Return Directive (physical or mental state of the person concerned, technical reasons, such as lack of availability of appropriate transport facilities) are indicative examples. Member States may provide also for further cases in their national implementing legislation and/or administrative practice.

Further clarification:

- Difference between period for voluntary departure and postponement of removal: Article 7 of the Return Directive (voluntary departure) provides for a ‘period of grace’ in order to allow for an orderly and well prepared departure; it only relates to those returnees who are expected to comply voluntarily with a return decision. Article 9 of that Directive (postponement of removal) relates to those cases in which the obligation to return must be enforced by the State because voluntary departure is not possible or was not granted.
- Legal status pending postponed removal: pending suspended removal the returnee benefits from the safeguards listed in Article 14 of the Return Directive (written confirmation of postponed obligation to return and some basic safeguards, such as access to emergency healthcare and necessary treatment of the illness, and family unity — see section 13 of this Handbook). The returnee is, however, not considered to be legally staying in a Member State, unless a Member State decides — in application of Article 6(4) of the Return Directive — to grant a permit or a right to legal stay to the third-country national.
- Designation to reside at a specific place pending postponed removal: Article 9(3) contains an express reference to the possibilities listed in Article 7(3) to prevent absconding (see section 6.2), including the possibility to impose an obligation to stay at a certain place.

## 10. RETURN OF UNACCOMPANIED MINORS

The Return Directive also applies to minors, including unaccompanied minors and provides for specific safeguards that need to be respected by the Member States. Such safeguards therefore apply to any individual under the age of 18 (i.e. a minor) who arrives on the territory of the Member States unaccompanied by an adult responsible for him or her and for as long as the minor is not effectively taken into the care of such person (including minor who was left unaccompanied after entry into the territory of the Member States). In some Member States adolescents below the age of 18 are authorised to act in their own right in return (and asylum) procedures; however, the safeguards of the Return Directive are binding on Member States in relation to all minors up to the age of 18.

Durable solutions are crucial to establish normality and stability for all minors in the long term. Return is one of the options to be examined when identifying a durable solution for unaccompanied minors and any Member State's action must take into account as key consideration the best interests of the child. Before deciding to return an unaccompanied minor, and in accordance with Article 12(2) of the Convention on the Rights of the Child <sup>(1)</sup>, the minors concerned must be heard, either directly or through a representative or an appropriate body, and an assessment of the best interests of the child shall always be carried out on an individual basis, including on the particular needs, on the current situation in the family and on the situation and reception conditions in the country of return. Such assessment should systematically look at whether return to the country of origin, including reunification with the family, is in the minor's best interests.

The assessment should be carried out by the competent authorities on the basis of a multidisciplinary approach, involving the minor's appointed guardian and/or the competent child protection authority. Member States should also carry out a periodic re-assessment of the best interests of the child in the light of the developments of the individual case.

Member States are encouraged to consider the interpretative and operational guidance provided by the joint UNHCR-Unicef guidelines on the determination of the best interests of the child <sup>(2)</sup>, the General Comment No 14 of the UN Committee on the rights of the child to have his or her best interests taken as a primary consideration <sup>(3)</sup>, the UNHCR guidelines on determining the Best Interests of the Child <sup>(4)</sup> and the Field Handbook for the Implementation of UNHCR Best Interest Determination Guidelines <sup>(5)</sup>.

The minors' right to be heard in return proceedings involving or affecting them is an integral part of any best interests assessment (see Article 12 of the Convention on the Rights of the Child) and must be respected as a fundamental right recognised as a general principle of EU law, enshrined in the CFR. It includes giving due weight to the minors' views, taking into account their age and maturity and any communication difficulties they may have in order to make this participation meaningful, and the respect for the minor's right to express his or her views freely (for further guidance, see section 12.1).

Definition of unaccompanied minor: the Return Directive does not define the term unaccompanied minor. Taking into account that unaccompanied minors in many cases are or have been asylum seekers, it is recommended to use the definition provided in the most recent asylum directives, notably Article 2(e) of the recast Reception Conditions Directive: 'a minor who arrives on the territory of the Member States unaccompanied by an adult responsible for him or her whether by law or by the practice of the Member State concerned, and for as long as he or she is not effectively taken into the care of such a person; it includes a minor who is left unaccompanied after he or she has entered the territory of the Member States'.

Refraining from issuing return decisions to unaccompanied minors: Article 6(4) of the Return Directive expressly allows Member States to grant at any moment an authorisation or right to stay in accordance with national law to illegally staying third-country nationals. This general rule also applies to minors. Hence, Member States that do not return/remove third-country minors staying illegally on their territory, or are restrained from removing the unaccompanied minor based on an assessment of the best interests of the child, are free to grant an authorisation or right to stay (for example a temporary permit to stay until the age of 18).

<sup>(1)</sup> United Nations, Convention on the Rights of the Child, 1989.

<sup>(2)</sup> UNHCR-Unicef, *Safe and Sound*, 2014, available at: <http://www.refworld.org/docid/5423da264.html>

<sup>(3)</sup> United Nations, *General comment No 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (Art. 3, para. 1)\**, 2013, available at: [http://www2.ohchr.org/English/bodies/crc/docs/GC/CRC\\_C\\_GC\\_14\\_ENG.pdf](http://www2.ohchr.org/English/bodies/crc/docs/GC/CRC_C_GC_14_ENG.pdf)

<sup>(4)</sup> UNHCR, *Guidelines on Determining the Best Interests of the Child*, 2008, <http://www.unhcr.org/4566b16b2.pdf>

<sup>(5)</sup> UNHCR, *Field Handbook for the Implementation of UNHCR BID Guidelines*, 2011, available at: <http://www.refworld.org/pdfid/4e4a57d02.pdf>

Article 6(1) of the Return Directive obliges Member State to say either 'A' (grant a permit or a legal right to stay) or 'B' (carry out return procedures) (see section 5). Member States should therefore establish clear rules on the legal status of unaccompanied minors, allowing either to issue return decisions and carry out returns, or to grant them a right to stay in accordance with national law. Member States should seek to ensure the availability of status determination procedures for those unaccompanied minors who are not returned. This is a straightforward approach, aimed at reducing 'grey areas' and improving legal certainty for all actors involved. In the light of the above, in order to be compatible with the Return Directive, the situation of unaccompanied minors in Member States that, following an assessment of the best interests of the child, do not return or remove third-country minors, should be framed in legal terms as either granting a (temporary) permit or a right to stay (for example until they reach the age of 18) in application of Article 6(4) of the Directive, or issuing a return decision and postponing the removal in accordance with Articles 6 and 9 of the Return Directive.

### 10.1. Assistance by appropriate bodies

*Legal basis:* Return Directive — Article 10(1)

*Before deciding to issue a return decision in respect of an unaccompanied minor, 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.*

*Historic reminder/explanation:* Article 10(1) was not contained in the Commission proposal. It was inserted in the text during the negotiations and it is directly inspired by Guideline 2(5) of the Council of Europe 'Twenty Guidelines on forced return' <sup>(1)</sup>, which provides that 'Before deciding to issue a removal order in respect of a separated child, assistance — in particular legal assistance — should be granted with due consideration given to the best interests of the child'.

Nature of the 'appropriate bodies': the 'appropriate body' should be separated from the enforcing authority and could be a governmental body (possibly a separate service if within the same ministry), a non-governmental body, or a combination of both, providing for multidisciplinary cooperation between government-supported and non-governmental guardian systems and/or child-protection bodies. Bodies responsible for the care and protection of children shall comply with the standards established in the areas of safety, health, suitability of staff and competent supervision. The different roles and responsibilities of the actors must be clear and transparent in particular for the unaccompanied minor to allow for his/her active involvement and effective participation in all matters concerning him/her.

Nature of the 'assistance': assistance should cover legal assistance but must not be limited to it. Other aspects expressly mentioned by the Return Directive — such as provision of necessary medical assistance and healthcare, contact with family, access to basic education —, to support the realisation of the rights of the child as set out in the UN Convention on the rights of the child should also be addressed. Specific emphasis should be given to the need to discuss with the minor in advance and throughout any processes and procedures, as well as all decisions affecting him/her. Minors should be informed in a child-sensitive and age- and context- appropriate manner on their rights, on procedures and on services available for their protection.

Timing of the 'assistance': the assistance by appropriate bodies should start at the earliest point in time, and it shall start before issuing a return decision. That implies a timely age assessment based on the benefit of the doubt. Assistance should be a continuous and stable process, including during the return phase. It may also cover the post-return phase, to ensure adequate follow-up of return. If needed, a transfer of guardianship from the Member State to the country of return in line with Article 10(2) of the Return Directive should be achieved.

Age assessment: the Return Directive contains no provisions on age assessment. Based on a systematic interpretation of the Union immigration and asylum *acquis*, the Commission recommends to refer to the provisions of Article 25(5) of the Asylum Procedures Directive, as well as to take into account related documents developed for instance by the European Asylum Support Office <sup>(2)</sup>.

<sup>(1)</sup> Council of Europe, *Twenty Guidelines on Forced Return*, 2005.

<sup>(2)</sup> European Asylum Support Office, *Age assessment practice in Europe*, 2014, available at: <https://www.easo.europa.eu/sites/default/files/public/EASO-Age-assessment-practice-in-Europe.pdf> A new guidance document is being prepared.

Continuity of assistance in asylum and return procedures: Although the legal basis between the guardianship provided for to asylum seekers and the 'assistance' required for unaccompanied minors/children in the return process differ, close links between the requirements laid down in the asylum *acquis* and in the Return Directive exist and continuity of assistance in asylum and return procedures should be sought.

- Provision of mere guardianship is not sufficient to comply with the obligation to provide assistance to minors, since 'assistance by appropriate bodies' means more than mere guardianship.

## 10.2. Return to a family member, a nominated guardian or adequate reception facilities

*Legal basis:* Return Directive — Article 10(2)

*Before removing an unaccompanied minor from the territory of a Member State, the 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.

Among the options provided for by Article 10(2) of the Return Directive, it is recommended that the return to family members should be the preferred one, unless this is manifestly not in the child's best interests. Member States should therefore undertake efforts to establish the identity and nationality of the unaccompanied minor and to trace family members. Return to a guardian or an adequate reception facility can be an acceptable alternative under certain conditions.

The Commission recommends that Member States put in place appropriate reintegration measures targeting unaccompanied minors who return to their country of origin, and ensure prompt access to such measures both before departure and after arrival in the third country of return.

*Further clarification:*

- Family tracing: Member States should launch procedures for tracing the parents or family members of unaccompanied minors as soon as possible, involving the appointed guardian and/or a person responsible for child protection. To facilitate family tracing as well as for identifying a guardian or an adequate facility in view of return, the competent national authorities should take measures to work in cooperation with consular services, liaison officers, child protection bodies, international organisations and NGOs in the country of return, making full use of existing cross-border cooperation channels.
- Voluntary departure of minors: in principle, Article 10(2) only applies to situations where the minor is removed and not situations where the minor is leaving the Member State voluntarily. Taking into account the Member States' obligation deriving from the requirement to take into due account the best interests of the child, it is recommended to also assess the situation in the family and the situation and reception conditions in the country of return in cases of voluntary departure.
- The adequacy of reception facilities in the country of return needs to be assessed on a case-by-case basis, taking into account the individual circumstances and the age of the returned minor. A mere reception by the border police in the country of return without any necessary follow-up measures or flanking measures cannot be considered as 'adequate reception'. Member State should pay particular attention to availability of appropriate housing, access to healthcare and education in the country of return. Member States shall respect Article 20 of the UN Convention on the Rights of the Child and are encouraged to meet the UN Guidelines for the alternative care of children <sup>(1)</sup>.

## 11. ENTRY BANS

*Legal basis:* Return Directive — Article 3(6) and Article 11

*'Entry ban' means an administrative or judicial decision or act prohibiting entry into and stay on the territory of the Member States for a specified period, accompanying a return decision.*

*Return decisions shall be accompanied by an entry ban:*

- (a) if no period for voluntary departure has been granted; or
- (b) if the obligation to return has not been complied with.

<sup>(1)</sup> United Nations, *Guidelines for the alternative care of children*, 2010, available at: <http://www.refworld.org/docid/4c3acd162.html>

*In other cases return decisions may be accompanied by an entry ban.*

*The length of the entry ban shall be determined with due regard to all relevant circumstances of the individual case and shall not in principle exceed five years. It may however exceed five years if the third-country national represents a serious threat to public policy, public security or national security.*

The return-related entry bans foreseen in the Return Directive are intended to have preventive effects and to foster the credibility of Union return policy by sending a clear message that those who disregard migration rules in EU Member States will not be allowed to re-enter any EU Member State for a specified period of time.

The Directive obliges Member States to issue an entry ban in two ‘qualified’ cases: (i) no period for voluntary departure granted; and (ii) obligation to return not complied with.

In all other cases, return decisions may be accompanied by an entry ban.

The length of the entry ban must be determined with due regard to all relevant circumstances of the individual case. In principle it should not exceed five years. Only in cases of serious threat to public policy, public security or national security, the entry ban may be issued for a longer period.

The rules on return-related entry bans under the Return Directive leave unaffected entry bans issued for other purposes not related to migration, such as entry bans to third-country nationals who have committed serious criminal offences or for whom there is a clear indication that there is an intention to commit such an offence (see Article 24(2) of Regulation (EC) No 1987/2006 of the European Parliament and of the Council<sup>(1)</sup> (the ‘SIS II Regulation’)) or entry bans constituting a restrictive measure adopted in accordance with Chapter 2 of Title V TEU, including measures implementing travel bans issued by the United Nations Security Council.

### 11.1. EU-wide effect

An entry ban prohibits entry into the territory of all the Member States: the wording of recital 14 of the Return Directive and a systematic comparison of all the linguistic versions of the Directive (in particular the English and French texts) make clear that an entry ban prohibits entry and stay on the territory of all Member States. The Danish version, which uses the singular (*ophold på en medlemsstats*), contains an evident translation mistake. The EU-wide effect of an entry ban is one of the key European added values of the Directive. The EU-wide effect of an entry ban must be clearly stated in the entry ban decision issued to a third-country national.

Entry bans are binding on all Member States bound by the Return Directive, that is to say all Member States (except the United Kingdom and Ireland) plus the Schengen Associated countries (Switzerland, Norway, Iceland and Liechtenstein).

Informing other Member States about issued entry bans: it is essential to inform other Member States about all entry bans which have been issued. Entering an entry ban alert into the SIS in application of Article 24(3) of the SIS II Regulation is the main — but not the exclusive — means for informing other Member States about the existence of an entry ban and for ensuring their successful enforcement. Member States should therefore ensure that entry ban alerts are systematically entered in the SIS. As regards those Member States which have no access to SIS, information exchange may be achieved through other channels (for example, bilateral contacts).

Purely national entry bans: it is not compatible with the Return Directive to issue purely national migration-related entry bans. National legislation must foresee that entry bans issued in connection with return decisions prohibit entry and stay in all Member States, for instance by setting an obligation to systematically enter all such entry bans into the SIS. However, in the case of a third-country national subject of an entry ban issued by Member State A who has a residence permit issued by Member State B, where Member State B does not want to revoke this permit, and following an Article 25 SIC consultation referred to in Article 11(4) of the Return Directive, Member State A shall withdraw the EU-wide entry ban, but may put the third-country national on its national list of alerts under Article 25(2) last sentence SIC (*lex specialis*) (see also section 11.8).

<sup>(1)</sup> Regulation (EC) No 1987/2006 of the European Parliament and of the Council of 20 December 2006 on the establishment, operation and use of the second generation Schengen Information System (SIS II) (OJ L 381, 28.12.2006, p. 4).

### 11.2. Use of SIS II

Registration of entry bans in SIS: according to currently applicable legislation, Member States may register alerts related to entry bans issued in accordance with the Return Directive in the SIS, but are not obliged to do so. However, in order to give full effect to the European dimension of entry bans issued under the Return Directive, Member States should systematically do so.

Relation between the 3-year review of alerts entered into the SIS (under Article 112 SIC and Article 29 SIS II Regulation) and the length of the entry ban fixed under the Return Directive: the review of alerts entered into the SIS is a procedural requirement aimed at making sure that alerts are only kept for the time required to achieve the purpose for which they were entered. It does not impact the substantive decision of the Member States to determine the length of an entry ban in accordance with the provisions of the Return Directive. If at the moment of the 3-year review an entry ban imposed under the Return Directive is still in force (for example the ban was imposed for a period of 5 years and was not withdrawn in the meantime), Member States may maintain the alert in the SIS for the remaining two-year period if the alert is still necessary in view of the applicable assessment criteria, notably Article 11 of the Return Directive read in conjunction with Article 112(4) SIC or Article 29(4) of the SIS II Regulation.

### 11.3. Procedural issues

Issuance of entry bans upon departure at the border in an *in absentia* procedure (for example in cases of visa overstayers presenting themselves to the border control at the airport briefly before departure): nothing prevents Member States from launching a return procedure when acquiring knowledge about the visa overstay and to issue a return decision (see section 5.1) accompanied by an entry ban in an *in absentia* procedure if:

- (1) national administrative law provides for the possibility of *in absentia* procedures; and
- (2) those national procedures are in compliance with general principles of Union law and with fundamental rights as enshrined in the CFR, and in particular the right to be heard and the right to an effective remedy and a fair trial.

Issuance of an entry ban to returnees who have not complied with the obligation to return within the period for voluntary departure at the moment of departure: an entry ban shall be imposed at a later stage (for instance upon departure) as an ancillary and subsequent element of an already issued return decision if the returnee has not complied with the obligation to return, within the period for voluntary departure.

Presence on Member State territory: illegal stay is an essential prerequisite for issuing a return decision and an accompanying entry ban. A Member State cannot issue a return decision and an accompanying entry ban to persons who are not staying on its territory. In a situation in which a person has absconded (for example after receiving a negative decision on an asylum application) but can still be assumed to be present on the territory of the Member State concerned, a return decision (including an entry ban) may be adopted in an *in absentia* procedure under national law.

Illegal stay in the past: Member States cannot issue a return decision and an accompanying entry ban in accordance with the Return Directive to persons who are not present on their territory, including third-country nationals who had previously (in the past) stayed illegally and who returned to a third country before their illegal stay was detected. If such persons re-enter a Member State and measures under the Return Directive (return decision, entry ban) are adopted, the previous illegal stay(s) may be taken into account as an aggravating circumstance when determining the length of the entry ban. Previous illegal stay in *other* Member States may also be taken into account as an aggravating circumstance when determining the length of the entry ban.

### 11.4. Reasons for issuing entry bans

The Return Directive obliges Member States to issue an entry ban in two 'qualified' cases:

- (1) no period for voluntary departure has been granted; or
- (2) the obligation to return has not been complied with.

In all other cases (all return decisions adopted under the Return Directive which do not fall under the two 'qualified' cases) return decisions may be accompanied by an entry ban. This implies that an entry ban may also be foreseen even if the person departed voluntarily. However Member States enjoy discretion in this respect and are encouraged to exercise this discretion in a way which encourages voluntary departure.

### 11.5. Length of entry bans

The length of the entry ban shall be determined in accordance with national law transposing the Return Directive with due regard to all relevant circumstances of the individual case. When determining the length of the entry ban, particular account should be taken of aggravating or mitigating circumstances known to the issuing authority, such as whether:

- the third-country national has already been the subject in the past of a return decision or removal order,
- the third-country national has already received in the past voluntary departure and/or reintegration assistance,
- the third-country national has entered without authorisation the territory of a Member State while an entry ban was still in force,
- the third-country national has cooperated or has shown unwillingness to cooperate in the return procedure,
- the third-country national has shown willingness to depart voluntarily.

As a general rule, the length of the entry ban must not exceed 5 years. When determining the concrete length of the entry ban, Member States are bound to carry out an individual examination of all relevant circumstances and to respect the principle of proportionality. A Member State might envisage varying timeframes for typical case categories, such as 3 years as a general standard rule, 5 years in aggravating circumstances (for instance repeated infringements of migration law) and 1 year in mitigating circumstances (for example infringements committed out of negligence only) as general guidance for its administration, but it must be assured that each case will be assessed individually in accordance with the principle of proportionality. Member States may lay down in their national laws or administrative regulations the general criteria which will be taken into account for individually determining the length of the entry ban in accordance with Article 11(2) of the Return Directive.

Serious threat to public policy, public security or national security: in cases of serious threat to public policy, public security or national security, entry bans may be issued for a period longer than 5 years. Factors which may be taken into account by Member States for determining such threat may be criminal offences as well as serious administrative offences (for example repeated use of false identity documents, repeated and deliberate violations of migration law). None of these factors can, however, be considered as constituting automatically and per se a public order threat: Member States are always bound to carry out an individual examination of all relevant circumstances and respect the principle of proportionality.

The Return Directive gives no definition as to the exact meaning of this term and the ECJ case law on the use of this term in other migration directives and in the free movement context does *not* directly apply in the Return Directive context since the issues at stake and the context are different. Nevertheless some considerations contained in ECJ case-law (in particular on horizontal concepts such as proportionality and *effet utile* of directives) may provide some steer: in Section 3 of the communication on *guidance for better transposition and application of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States* <sup>(1)</sup>, the Commission provided for detailed guidance relating to the interpretation of the notion of public policy and public security in the free movement context. Moreover, comparative information on the interpretations given to this term by Member States in the migration context may be taken from the results of the *EMN ad hoc query (140) on the understanding of the notions of 'public policy' and 'public security'*. In paragraph 48 of its judgment in Case C-554/13, *Zh. and O.*, which dealt with the notion of 'public policy' in the Return Directive's context (see section 6.3), the ECJ expressly confirmed that analogies may be made with its case-law on Directive 2004/38/EC (judgment of the ECJ in Case C-430/10, *Gaydarov* <sup>(2)</sup>, paragraph 32).

The length of public order entry bans: the length of public order entry bans needs to be individually determined, taking into account the seriousness of the offences committed by the third-country nationals, the linked risks to public policy, public security or national security and the individual situation of the persons concerned. The principle of proportionality must be respected in any case. A systematic issuing of life-long entry bans in all public order cases, without taking into account the circumstances of the individual case (for example gravity of the offences, risks) is contrary to the Directive. A Member State might envisage varying timeframes for typical case categories, such as 10 years as a general

<sup>(1)</sup> COM(2009) 313 final.

<sup>(2)</sup> Judgment of the Court of Justice of 17 November 2011, *Gaydarov*, Case C-430/10, ECLI:EU:C:2011:749.



standard rule for public order cases and 20 years in particularly serious circumstances. Member States should provide for the possibility to review the entry ban decision, in particular the existence of the conditions justifying it, either *ex officio* or following an application by the person concerned.

Further clarification:

No unlimited entry bans: the length of the entry ban is a key element of the entry ban decision. It must be determined *ex officio* in advance in each individual case. The ECJ expressly confirmed this in its judgment of Case C-297/12, *Filev and Osmani* (paragraphs 27 and 34): 'It must be noted that it clearly follows from the terms "[t]he length of the entry ban shall be determined" that Member States are under an obligation to limit the effects in time of any entry ban in principle to a maximum of five years independently of an application made for that purpose by the relevant third-country national. [...] Article 11(2) of Directive 2008/115/EC must be interpreted as precluding a provision of national law [...] which makes the limitation of the length of an entry ban subject to the making by the third-country national concerned of an application seeking to obtain the benefit of such a limit'.

The moment at which the clock starts ticking: the Return Directive does not expressly lay down the starting point from which the period of application of the entry ban is to be calculated. However, the ECJ in Case C-225/16, *Ouhrami* <sup>(1)</sup> provided clarity on this issue.

The ECJ clarified that the determination of the starting point for an entry ban cannot be left to the discretion of each Member State, as this would undermine the objective of the Return Directive and the purpose of the entry bans. The ECJ concluded that 'it thus follows from the wording, general scheme and objective of Directive 2008/115/EC that the period of application of the entry ban does not begin to run until the date on which the person concerned has actually left the territory of the Member States' (paragraph 53). Indeed, if an entry ban were to apply before the actual departure of the third-country national, its duration would be unduly reduced.

The ECJ therefore decided that 'the starting point of the duration of an entry ban [...] must be calculated from the date on which the person concerned actually left the territory of the Member States' (paragraph 58).

Member States should put in place means to confirm and verify the actual date of departure of third-country nationals (see sections 6.4 and 6.6) to ensure that entry bans start applying at the moment in which they actually leave the territory of the Member States.

## 11.6. Withdrawal, shortening and suspension of entry bans

*Legal basis:* Return Directive — Article 11(3)

*Subparagraph 1: Member States shall consider withdrawing or suspending an entry ban where a third-country national who is the subject of an entry ban issued in accordance with paragraph 1, second subparagraph, can demonstrate that he or she has left the territory of a Member State in full compliance with a return decision.*

The possibility to suspend or withdraw an entry ban in those cases in which a returnee has left the territory of a Member State in full compliance with a return decision (notably within the granted period for voluntary departure) should be used as an incentive to encourage voluntary departure. Member States shall provide for a possibility in their national legislation and administrative practice to apply for withdrawal or suspension of an entry ban in these circumstances. An effort should be made to make such procedures easily accessible for the returnee and practically operational. Different possibilities exist for allowing the returnee to provide evidence as regards his/her departure from EU territory, such as: an exit stamp in the returnee's passport, data in national border data systems or reporting back of the returnee at a consular representation of a Member State in a third country.

Shortening of entry bans: Member States are also free to shorten an existing entry ban in the circumstances addressed by Article 11(3) of the Return Directive. The possibility for Member States to withdraw an entry ban under Article 11(3) can be interpreted as covering also a partial withdrawal (i.e. shortening) of an entry ban.

*Subparagraph 2: Victims of trafficking in human beings who have been granted a residence permit pursuant to Directive 2004/81/EC shall not be subject of an entry ban without prejudice to paragraph 1, first subparagraph, point (b), and provided that the third-country national concerned does not represent a threat to public policy, public security or national security.*

Victims of trafficking who had been previously granted a residence permit in accordance with Directive 2004/81/EC should not receive an entry ban, unless the person concerned did not comply with an obligation to return within a period for voluntary departure or if the person concerned represents a threat to public policy. This rule only applies to periods of illegal stay *immediately* following a legal stay covered by Directive 2004/81/EC and it does not create a life-long exemption for previous holders of such permits.

<sup>(1)</sup> Judgment of the Court of Justice of 26 July 2017, *Ouhrami*, Case C-225/16, ECLI:EU:C:2017:590.

*Subparagraph 3: Member States may refrain from issuing, withdraw or suspend an entry ban in individual cases for humanitarian reasons.*

Member States are free not to issue entry bans in individual cases, notably in the compulsory cases foreseen by Article 11(1)(a) and (b) of the Return Directive, only for humanitarian reasons; such reasons need to be determined at national level. Member States are also allowed to withdraw or suspend existing entry bans for humanitarian reasons.

This optional clause gives Member States the possibility to make use of it in accordance with their national legislation and administrative practice.

*Subparagraph 4: Member States may withdraw or suspend an entry ban in individual cases or certain categories of cases for other reasons.*

Member States are free to withdraw or suspend existing entry bans for reasons other than humanitarian reasons, to be determined at national level.

In cases of humanitarian catastrophes (such as earthquakes, other natural disasters or armed conflicts) in third countries which may lead to a mass influx of displaced persons, formal procedures for withdrawal of entry bans in individual cases may take too long and are not feasible. Therefore the possibility exists to provide for a horizontal suspension or withdrawal of existing entry bans related to the concerned groups of persons.

A need to withdraw entry bans validly issued under the Return Directive may also arise in relation to third-country nationals who could later establish that they are enjoying the right of free movement under Union law, for example by becoming members of the family of EU/EEA/CH nationals falling under Article 21 TFEU or Directive 2004/38/EC.

#### 11.7. Sanctions for non-respect of entry ban

Non-respect of an entry ban should be taken into consideration by Member States when considering the length of a further entry ban. In this context, recital 14 of the Return Directive expressly provides that ‘The length of the entry ban should be determined with due regard to all relevant circumstances of an individual case and should not normally exceed five years. In this context, particular account should be taken of the fact that the third-country national concerned has already been the subject of more than one return decision or removal order or has entered the territory of a Member State during an entry ban’.

The Return Directive allows Member States to provide for further sanctions under national administrative law (for instance, a fine), subject to the *effet utile* of the Directive and the relevant case-law of the ECJ in this regard. When doing so, Member States should make no difference between entry bans issued by their own national authorities and by those issued by authorities of other Member States, as this would undermine the harmonised concept of an EU-wide entry ban established by the Return Directive.

Member States can adopt criminal law sanctions against illegally staying third-country nationals who did not comply with a valid entry ban following their return (judgment of the ECJ in Case C-290/14, *Celaj*, see section 4).

Article 11(5) of the Return Directive clarifies that the provisions on return-related entry bans apply without prejudice to the right to international protection under EU asylum *acquis*: this implies that previously issued entry bans under the Return Directive cannot justify the return or penalisation of third-country nationals authorised to enter or stay in the EU as asylum seeker or as beneficiary of international protection — see judgment of the ECJ in Case C-290/14, *Celaj* (paragraph 32). Such entry bans should be suspended (pending ongoing asylum procedures) or withdrawn (once international protection has been granted).

#### 11.8. Consultation between Member States

*Legal basis:* Return Directive — Article 11(4); Schengen Implementing Convention — Article 25

*Where a Member State is considering issuing a residence permit or other authorisation offering a right to stay to a third-country national who is the subject of an entry ban issued by another Member State, it shall first consult the Member State having issued the entry ban and shall take account of its interests in accordance with Article 25 of the Convention implementing the Schengen Agreement.*

Article 25 Schengen Implementing Convention provides that:

1. Where a Member State considers issuing a residence permit, it shall systematically carry out a search in the Schengen Information System. Where a Member State considers issuing a residence permit to an alien for whom an alert has been issued for the purposes of refusing entry, it shall first consult the Member State issuing the alert and shall take account of its interests; the residence permit shall be issued for substantive reasons only, notably on humanitarian grounds or by reason of international commitments.

Where a residence permit is issued, the Member State issuing the alert shall withdraw the alert but may put the alien concerned on its national list of alerts.

- 1a. Prior to issuing an alert for the purposes of refusing entry within the meaning of Article 96, the Member States shall check their national records of long-stay visas or residence permits issued.
2. Where it emerges that an alert for the purposes of refusing entry has been issued for an alien who holds a valid residence permit issued by one of the Contracting Parties, the Contracting Party issuing the alert shall consult the Party which issued the residence permit in order to determine whether there are sufficient reasons for withdrawing the residence permit.

If the residence permit is not withdrawn, the Contracting Party issuing the alert shall withdraw the alert but may nevertheless put the alien in question on its national list of alerts.

3. Paragraphs 1 and 2 shall apply also to long-stay visas.

Article 25 SIC is a directly applicable provision and can be applied by Member States without transposing national legislation.

Only the Member State issuing the entry ban (Member State A) can lift the entry ban. If another Member State (Member State B) decides to issue a residence permit to the same person or not to withdraw an existing one (after having carried out consultation with the Member State which had issued the entry ban), Member State A is obliged to withdraw the alert (Article 25(2) SIC), although it may put the third-country national on its national list of alerts. The reasons underlying an existing entry ban issued by Member State A, as well as the interests of this Member State, must be considered and taken into account by Member State B before issuing a residence permit or deciding not to withdraw it (for instance for family reunification purposes). In order to allow Member State B to properly take into account the underlying reasons for the entry ban, it is essential that Member State A provides the relevant information to Member State B in due time.

Those Member States which do not yet fully apply Schengen rules and therefore cannot (yet) directly apply Article 25 SIC, should nevertheless follow the spirit of Article 11(4) of the Return Directive and contact — if they become aware (through whatever source of information including information from the applicant) that a person is subject of an entry ban issued by another Member State — the authorities which issued the entry ban. Before issuing a residence permit to the person, the Member State should seek to 'take account of the interest' of the Member State which issued the entry ban.

### 11.9. 'Historic' entry bans

'Historic' entry bans issued before 24 December 2010 have to be adapted in line with the standards fixed in Article 11 of the Return Directive — i.e. maximum of 5 year, individual assessment, obligation to withdraw/consider withdrawing in specific circumstances — if they develop effects for the period after 24 December 2010 and if they are not yet in line with the substantive safeguards of Article 11.

Adaptation should take place either upon application of the concerned person at any moment or *ex officio* at the earliest possible moment, and in any case not later than at the occasion of the regular (3-year) review of entry bans foreseen for SIS alerts.

In the judgment of Case C-297/12, *Filev and Osmani* (paragraphs 39-41 and 44), the ECJ expressly clarified: 'In that regard, it is important to note from the outset that that directive does not include a provision providing for transitional arrangements in relation to entry-ban decisions taken before it became applicable. None the less, it follows from the Court's settled case-law that new rules apply immediately, except in the event of a derogation, to the future effects of a situation which arose under the old rules [...]. It follows that Directive 2008/115/EC is applicable to those effects which occur after the date of its applicability in the Member State concerned of entry-ban decisions taken under national rules which were applicable before that date. [...] It follows that Article 11(2) of Directive 2008/115/EC precludes a continuation of the effects of entry bans of unlimited length made before the date on which Directive 2008/115/EC became applicable, [...] beyond the maximum length of entry ban laid down by that provision, except where those entry bans were made against third-country nationals constituting a serious threat to public order, public security or national security'.

## 12. PROCEDURAL SAFEGUARDS

### 12.1. Right to good administration and right to be heard

The right to good administration is a fundamental right recognised as a general principle of EU law and enshrined in the CFR, which forms an integral part of the EU legal order. This right includes the right of every person to be heard before any individual measure which would affect him or her adversely or which significantly affect his or her interests is taken, which is also inherent in respect for the rights of the defence, another general principle of EU law.

In the judgments of Cases C-383/13, *G & R* <sup>(1)</sup>, and C-249/13, *Boudjlida* <sup>(2)</sup>, the ECJ provided important clarification on the right to be heard in relation to return and detention decisions. These judgements imply that Member States must always comply with the safeguards below when taking decisions related to return (i.e. return decision, entry-ban decisions, removal decisions, detention order) even though this may not be expressly specified in the relevant articles of the Return Directive:

- (1) the right of every person to be heard, before any individual measure which would affect him or her adversely is taken;
- (2) the right of every person to have access to his or her file, to analyse all the evidence relied on against him or her which serves to justify a decision by the competent national authority, while respecting the legitimate interests of confidentiality and of professional and business secrecy;
- (3) the right of every person to have recourse to a legal adviser prior to the adoption of a return decision, provided that the exercise of that right does not affect the due progress of the return procedure and does not undermine the effective implementation of the Directive; this does not entail an obligation upon Member States to bear the costs of that assistance;
- (4) the obligation of the administration to pay due attention to the observations by the person concerned and examine carefully and impartially all the relevant aspects of the individual case;
- (5) the obligation of the administration to give reasons for its decisions.

Member States enjoy a significant margin of discretion on how to grant the right to be heard in practice: the non-respect of this right renders a decision invalid only insofar as the outcome of the procedure would have been different if the right was respected (judgment of the ECJ in Case C-383/13, *G & R*, paragraph 38).

Moreover, a Member State authority may fail to hear a third-country national specifically on the subject of a return decision where, after that authority has determined that the third-country national is staying illegally in the national territory within a preceding asylum procedure which fully respected that person's right to be heard, it is contemplating the adoption of a return decision (judgment of the ECJ in Case C-166/13, *Mukarubega* <sup>(3)</sup>). The logic set out in *Mukarubega* is as follows: 'The right to be heard before the adoption of a return decision cannot be used in order to reopen indefinitely the administrative procedure, for the reason that the balance between the fundamental right of the person concerned to be heard before the adoption of a decision adversely affecting that person and the obligation of the Member States to combat illegal immigration must be maintained'.

This logic can also be applied in different case constellations, such as those mentioned in Article 6(6) of the Return Directive (decision on ending of legal stay combined with return decision) and it entails that a repetitive assessment of the risk of breach of the principle of *non-refoulement* is not required if the respect of that principle was already assessed in previous procedures, if the assessment is final and if there is no change in the individual situation of the third-country national concerned. In the same vein, a repetitive assessment of other elements that could be invoked in order to prevent return should be obviated. Member States should take measures to avoid such repetitive assessments, for instance by merging in one procedural step, to the extent possible, the administrative hearings of the competent national authorities for different purposes (for example renewal or granting of a residence permit, determination of the right to enter the territory of a Member State, final negative decision on an application for international protection), provided that the right to be heard is fully respected. In this context, innovative tools such as for instance video-conferencing could also be developed for this purpose. Member States must ensure that the application of such measures does not result in a prejudice for the respect of procedural safeguards, and should pay particular attention to persons in need of special procedural guarantees, in particular minors (see below).

<sup>(1)</sup> Judgment of the Court of Justice of 10 September 2013, *G. and R.*, Case C-383/13 PPU, ECLI:EU:C:2013:533.

<sup>(2)</sup> Judgment of the Court of Justice of 11 December 2014 *Boudjlida*, Case C-249/13, ECLI:EU:C:2014:2431.

<sup>(3)</sup> Judgment of Court of Justice of 6 November 2014, *Mukarubega*, Case C-166/13, ECLI:EU:C:2014:2336.

The right to be heard includes a right to be heard on the possible application of Articles 5 and 6(2) to (5) of the Return Directive and on the detailed arrangements for return, such as the period allowed for voluntary departure and whether return is to be voluntary or forced. The authority must, however, not warn the third-country national, prior to the hearing, that it is contemplating adopting a return decision, or disclose information on which it intends to rely as justification for that decision, or allow a period of reflection, provided that the third-country national has the opportunity effectively to present his point of view on the subject of the illegality of his stay and the reasons which might, under national law, justify that authority refraining from adopting a return decision (see judgment of the ECJ in Case C-249/13, *Boudjlida*).

The procedural safeguards of Articles 12 and 13 of the Return Directive should be applied to all decisions related to return and must not be limited to the three types of decisions mentioned in Article 12(1) of that Directive.

The minor's right to be heard in return procedures involving or affecting them must be respected. In accordance with Article 12 of the Convention on the Rights of the Child, and taking into account the General Comment No 12 of the UN Committee on the rights of the child on the right of the child to be heard <sup>(1)</sup>, the minors concerned must be heard, either directly or through a representative or an appropriate body; the right to express their views freely must be respected and due weight must be given to the minors' views, in accordance with their age and maturity and taking into account any communication difficulties they may have, in order to make their participation meaningful.

To ensure in practice the respect of the right of the minor to be heard, the measures adopted by Member States should be guided by the following key principles:

- expressing views is a choice and not an obligation,
- the right to be heard should not be subject to any age limits or other arbitrary restrictions, either in law or in practice,
- a minor should be heard in an environment that is appropriate to his/her needs,
- the means used to give effect to the right to be heard should be adapted to the level of understanding and ability to communicate and should take into account the circumstances of the case,
- in full consideration of the need to protect minors from harm, a minor should not be interviewed more often than necessary,
- facilitating the expression of views may require special measures for a minor in particularly vulnerable situations, including the provision of interpretation and translation services.

Collection of information on smuggling: in line with the priorities established in the *EU Action Plan against Migrant Smuggling 2015-2020* <sup>(2)</sup>, and in particular the need to improve gathering and sharing of information, the Commission recommends that Member States put in place adequate mechanisms in order to ensure systematic information gathering from third-country nationals apprehended in an irregular situation, in full respects of fundamental rights and EU asylum *acquis*. When granting the right to be heard before adopting a return decision, Member States are encouraged to invite returnees to share the information that they may have in relation to *modus operandi* and routes of smuggling networks, as well as links with trafficking in human beings and other crimes, and on financial transfers. Information obtained in this context should be collected and exchanged between relevant (immigration, border, police) authorities and agencies, both at national and EU level in accordance with national law and best practices exchanged in relevant EU fora.

## 12.2. Decisions related to return

The Return Directive expressly regulates a number of different decisions related to return, that is:

- (1) return decisions (Article 3(4) and Article 6(1));
- (2) decisions on voluntary departure period as well as extension of such period (Article 7);

<sup>(1)</sup> United Nations, *General Comment No 12 (2009): The right of the child to be heard*, 2009, available at: <http://www.refworld.org/docid/4ae562c52.html>

<sup>(2)</sup> COM(2015) 285 final.

- (3) removal decisions (Article 8(3));
- (4) decisions on postponement of removal (Article 9);
- (5) decisions on entry bans as well as on suspension or withdrawal of entry ban (Article 11);
- (6) detention decisions as well as prolongation of detention (Article 15).

Most of the above decisions are ancillary to the return decision and should normally be adopted together with the return decision in one administrative act: return decisions may include a period for voluntary departure (Article 7), an entry ban (Article 11) and — possibly but not necessarily — a decision ordering the removal (in case of non-compliance with a period for voluntary departure).

Subsequent changes of these ancillary decisions are possible in certain cases:

- an entry ban may be imposed at a later stage as an ancillary and subsequent element of an already issued return decision if the person has not complied with the obligation to return within the period for voluntary departure (Article 11(1)(b)),
- an already issued entry ban may be withdrawn or suspended (Article 11(3-5)),
- an already granted period for voluntary departure may be extended (Article 7(2)),
- an already executable return decision (or removal order) may be postponed (Article 9).

Article 6(6) of the Return Directive confirms a general principle allowing Member States to combine several different decisions (including decisions not directly related to return) within one administrative or judicial act, provided that the relevant safeguards and provisions for each individual decision are respected. Decisions on ending of legal stay (such as the final rejection of an asylum application, the withdrawal of a visa or the non-renewal of a residence permit) may therefore be adopted either separately or together with a return decision in a single administrative or judicial act.

Member States should act with due diligence and without delay to take a decision on the legal status of third-country nationals (see judgment of the ECJ in Case C-329/11, *Achughbadian* (paragraph 31): '[...] the competent authorities are required, in order to prevent the objective of Directive 2008/115/EC [...] from being undermined, to act with diligence and take a position without delay on the legality or otherwise of the stay of the person concerned'). Member States are therefore encouraged to adopt return decisions together with decisions on the ending of a legal stay in one single administrative or judicial act. When this is not possible (for example the authority responsible for the refusing the renewal of a residence permit is not entitled to issue return decisions), Member States should put in place swift and effective procedures involving the competent authorities to ensure that information is swiftly exchanged and return decisions are issued without delay following the decision on the termination of the legal stay — without prejudice to the right to grant an authorisation or right to stay in accordance with Article 6(4) of the Return Directive.

Concrete examples:

- If a Member State decides to cancel a visa and to issue the third-country national with a time limit of 7 days to depart voluntarily from the territory of the Member State, is that decision a return decision in the context of the Return Directive? Or is it covered by other EU rules concerning visas?
  - Such decision may consist of two components: a visa revocation decision and a return decision within the meaning of the Return Directive. If the visa is cancelled with immediate effect, the third-country national will be illegally staying within the meaning of Article 3(2) of the Return Directive, hence Article 6 of the Directive (obligation to issue a return decision) applies. The cancellation of the visa may — in parallel — be subject of an appeal in accordance with visa rules contained in the Visa Code<sup>(1)</sup> (the possibility of adopting several decisions together with a return decision is expressly foreseen by Article 6(6) of the Return Directive).

<sup>(1)</sup> Regulation (EC) No 810/2009 of the European Parliament and of the Council of 13 July 2009 establishing a Community Code on Visas (Visa Code) (OJ L 243, 15.9.2009, p. 1).

- If a third-country national is encountered on the territory with the required visa but does not (or no longer) meet the conditions for stay (Article 6 SBC), it would seem that the Member State can issue a return decision. Would this return decision (perhaps accompanied by an entry ban) automatically mean that the visa is no longer valid?
- According to Article 34(2) of the Visa Code ‘a visa shall be revoked where it becomes evident that the conditions (i.e. SBC entry conditions) for issuing it are no longer met’. The authorities issuing a return decision must also make sure that the visa is revoked. Both decisions can, however, be done within one administrative act. Issuing a return decision and letting the person depart with his/her valid (uniform) visa must be avoided.
- Can a decision rejecting an asylum application also impose an obligation to return?
- Yes. The final rejection of an asylum request and a return decision may be issued within one act in accordance with Article 6(6) of the Return Directive. Such a combined act consists, strictly logically speaking, of two subsequent and interrelated decisions, separated by a ‘logical moment’.

### 12.3. Form of decisions and translation

*Legal basis:* Return Directive — Article 12(1)-(3)

1. *Return decisions and, if issued, entry-ban decisions and decisions on removal shall be issued in writing and give reasons in fact and in law as well as information about available legal remedies. The information on reasons in fact may be limited where national law allows for the right to information to be restricted, in particular in order to safeguard national security, defence, public security and for the prevention, investigation, detection and prosecution of criminal offences.*

A written decision is the basic cornerstone of the procedural safeguards provided for in the Return Directive. It is not possible to waive this requirement. The information provided to the returnee should, however, not be limited to references to the available legal remedies: Member States are encouraged to also provide other information concerning practical means of compliance with the decision. It is recommended that the returnee should be given information as to whether, for instance, the Member State may contribute to the transportation costs, the returnee could benefit from an assisted voluntary return programme or an extension of the deadline to comply with the return decision may be obtained. The returnee should also be informed of the obligation to leave the territory of the EU Member States and Schengen Associated countries, as well as of the consequences of not complying with the obligation to return in order to encourage such a person to depart voluntarily.

In accordance with Article 6(2) second subparagraph of the Employers Sanctions Directive, returnees shall be informed about their right under the said Directive to claim back payment of outstanding remuneration from their employer as well as about available complaint mechanisms. This information could also be included in or attached to the return decision.

2. *Member States shall provide, upon request, a written or oral translation of the main elements of decisions related to return, as referred to in paragraph 1, including information on the available legal remedies in a language the third-country national understands or may reasonably be presumed to understand.*

The request to receive a translation may be formulated by the returnee or his/her legal representative. The Member State is free to choose whether a written or oral translation is provided, while ensuring that the third-country national can understand the context and content. It is not possible to require a fee for providing a translation since this would undermine the spirit of the provision, which is to provide the returnee with the necessary information to allow him/her to fully understand his/her legal situation and eventually comply with the return decision.

It is up to national implementing legislation and administrative practice to decide what language the third-country national is reasonably presumed to understand. This assessment may be done in the same way and according to the same criteria as in asylum procedures (Article 12 of the Asylum Procedures Directive, Article 22 of the recast Qualification Directive and Article 5 of the Reception Conditions Directive), while taking into account that, due to the complexity of asylum procedures, the requirements for translation in this area may be higher than in the area of return. The asylum *acquis* requires Member States to make all reasonable efforts to provide for a translation into a language that the person concerned actually understands and the non-availability of interpreters may only be a valid reason in cases of extremely rare languages for which there is an objective lack of interpreters. A situation in which translators into the relevant language exist, but are not available for reasons internal to the administration, is not a justified reason for not providing a translation.

The possibility to use templates in order to rationalise the work of the administration is not limited to the scope of application of 12(3) (see below). As long as the template allows providing for an individualised translation of the decision in a language which the person understands or may reasonably be presumed to understand, such translation complies with Article 12(2) of the Return Directive and there is no need to use the derogation of Article 12(3).

3. *Member States may decide not to apply paragraph 2 to third-country nationals who have illegally entered the territory of a Member State and who have not subsequently obtained an authorisation or a right to stay in that Member State.*

*In such cases decisions related to return, as referred to in paragraph 1, shall be given by means of a standard form as set out under national legislation.*

*Member States shall make available generalised information sheets explaining the main elements of the standard form in at least five of those languages which are most frequently used or understood by illegal migrants entering the Member State concerned.*

The use of a standard form for return under Article 12(3) of the Return Directive is a derogation to the general rule, which can only be used in those cases in which a third-country national has illegally entered the territory of a Member State.

The use of a standard form in such cases is an option for Member States. Attention must be paid to the fact that the illegal entry cases covered by Article 12(3) of the Return Directive are not always the same as the 'border cases' described in Article 2(2)(a) of that Directive — see section 2.1. An illegally staying third-country national who is apprehended in the territory of a Member State three months after illegal entry is not covered by the exception of Article 2(2)(a) of the Return Directive but may still be covered by the exception of Article 12(3).

Illegal crossing of the internal borders: paragraph 3 applies to third-country nationals 'who have illegally entered the territory of a Member State and who have not subsequently obtained an authorisation or a right to stay in that Member State'. In the specific context of this provision of the Return Directive, the term 'illegal entry' may also cover cases in which an illegally staying third-country national entered from another Member State in non-compliance with the conditions for entry and stay applicable in that Member State. Attention should be paid to the fact that in these specific cases (entry from another Member State) Article 6(2) or 6(3) of the Return Directive may be applicable.

Article 12(3) contains no derogation regarding the applicable legal remedies. The legal remedies mentioned in Article 13(1) of the Return Directive therefore have to be provided for also when the standard form mentioned in Article 12(3) is used.

#### 12.4. Legal remedies

*Legal basis:* Return Directive — Article 13(1) and (2)

1. *The third-country national concerned shall be afforded an effective remedy to appeal against or seek review of decisions related to return, as referred to in Article 12(1), before a competent judicial or administrative authority or a competent body composed of members who are impartial and who enjoy safeguards of independence.*

Effective remedies should be provided as regards all decisions related to return. The term 'decisions related to return' should be understood broadly, covering decisions on all issues regulated by the Return Directive, including return decisions, decisions granting or extending a period for voluntary departure, removal decisions, decisions on postponement of removal, decisions on entry bans as well as on suspension or withdrawal of entry bans (see section 12.2). The remedies applicable in case of detention decisions as well as prolongation of detention are regulated in more detail in Article 15 of the Return Directive concerning detention (see section 14).

Nature of reviewing body: in line with Article 6 and 13 ECHR and Article 47 CFR, the appeal body must in substance be an independent and impartial tribunal. Article 13(1) of the Return Directive is closely inspired by CoE Guideline 5.1 and it should be interpreted in accordance with relevant European Court of Human Rights ('ECtHR') case-law. In line with this case-law, the reviewing body can also be an administrative authority provided that this authority is composed of members who are impartial and who enjoy safeguards of independence and that national provisions provide for the possibility to have the decision reviewed by a judicial authority, in line with the standards set by Article 47 CFR on the right to an effective remedy.



Several safeguards exist to counter the risk of an eventual abuse of the possibility to appeal: Article 13 does not provide for an automatic suspensive effect in all circumstances (paragraph 2) and free legal assistance may be limited if the appeal is unlikely to succeed (paragraph 4). Attention should also be paid to the general principle of Union law of *res judicata*.

The deadlines for lodging appeals against decisions related to return must be set by national law. The Commission recommends that, to avoid possible misuse of rights and procedures, in particular appeals lodged shortly before the scheduled date of removal, Member States provide for the shortest deadline for lodging appeals against return decisions established by national law in comparable situations, provided that it does not represent a disproportionate interference with the right to an effective remedy. Judicial decisions should intervene without undue delays.

2. *The authority or body mentioned in paragraph 1 shall have the power to review decisions related to return, as referred to in Article 12(1), including the possibility of temporarily suspending their enforcement, unless a temporary suspension is already applicable under national legislation.*

Suspensive effect: the appeal body must have the power to suspend the enforcement of a return decision in individual cases. It should be clearly provided for in national legislation that the reviewing body itself (the body reviewing the decision related to return) has the power to suspend the enforcement within the frame of one procedure.

Obligation to grant automatic suspensive effect in case of risk of *refoulement*: ECtHR case-law requires automatic suspensive effect in cases in which there are substantial grounds for believing that the person, if returned, will be exposed to a real risk of ill-treatment contrary to Article 3 ECHR (risk of torture or inhuman or degrading treatment upon return) — see Rule 39, Rules of the ECtHR. Article 13 of the Return Directive — interpreted in conjunction with Articles 5 and 9 of the Return Directive — thus obliges the reviewing body to grant *ipso jure* suspensive effect in line with this requirement if the principle of *non-refoulement* is at stake.

Obligation to grant automatic suspensive effect in case of risk of grave and irreversible deterioration of state of health: in its judgement in Case C-562/13, *Abdida* <sup>(1)</sup> (paragraph 53), the ECJ confirmed: ‘Articles 5 and 13 of Directive 2008/115/EC, taken in conjunction with Articles 19(2) and 47 of the Charter, must be interpreted as precluding national legislation which does not make provision for a remedy with suspensive effect in respect of a return decision whose enforcement may expose the third-country national concerned to a serious risk of grave and irreversible deterioration in his state of health’.

The Commission recommends granting automatic suspensive effect to appeals against return decision only in the compulsory cases mentioned above, to strike the right balance between the right to an effective remedy and the need to ensure the effectiveness of return procedures. When the appeal refers to other reasons (for example procedural shortcomings, respect of family unity, protection of other rights or interests) and when irreparable damage to life or serious risk of grave and irreversible deterioration of the state of health are not at stake, Member State can decide not to grant automatic suspensive effect to appeals. However, the competent national authorities or bodies must in any case retain the power to decide to temporarily suspend the enforcement of a decision in individual cases where deemed necessary for other reasons (for example family life, healthcare or best interests of the child).

## 12.5. Linguistic assistance and free legal aid

*Legal basis:* Return Directive — Article 13(3) and (4); Directive 2013/32/EU (the ‘Asylum Procedures Directive’) — Articles 20 and 21, replacing Article 15(3) to (6) of Council Directive 2005/85/EC <sup>(2)</sup>

3. *The third-country national concerned shall have the possibility to obtain legal advice, representation and, where necessary, linguistic assistance.*

Linguistic assistance implies not only an obligation to provide for a translation of a decision (already covered by Article 12(2) of the Return Directive) but also an obligation to make available assistance by interpreters in order to allow the third-country national to exercise the procedural rights afforded to him/her under Article 13 of the Directive.

<sup>(1)</sup> Judgment of the Court of Justice of 18 December 2014, *Abdida*, Case C-562/13, ECLI:EU:C:2014:2453.

<sup>(2)</sup> Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status (OJ L 326, 13.12.2005, p. 13), repealed by Directive 2013/32/EU.

It should be recalled that in the case *Conka v Belgium* <sup>(1)</sup>, the ECtHR identified the availability of interpreters as one of the factors which affect the accessibility of an effective remedy. The rights of the third-country national to receive linguistic assistance should be granted by Member States in a way which provides the person concerned with a concrete and practical possibility to make use of it (*effet utile* of the provision).

4. Member States shall ensure that the necessary legal assistance and/or representation is granted on request free of charge in accordance with relevant national legislation or rules regarding legal aid, and may provide that such free legal assistance and/or representation is subject to conditions as set out in Article 15(3) to (6) of Directive 2005/85/EC.

Legal assistance and legal representation: paragraph 4 specifies in which cases and under which conditions Member States have to cover the costs for legal advice and representation — referring in essence to the conditions enumerated in the Asylum Procedures Directive. Member States must provide both legal assistance and legal representation free of charge if the conditions foreseen in the Directive and national implementing legislation are met.

The request for free legal assistance and/or legal representation can be made by the returnee or his/her representative at any appropriate moment of the procedure.

Provision of legal advice by administrative authorities: legal advice may in principle be offered also by the administrative authorities responsible for issuing the return decisions, if the information provided for is objective and unbiased (*effet utile*). It is important that the information is provided by a person who acts impartially/independently so as to avoid possible conflicts of interests. This information cannot be provided therefore by the person deciding on or reviewing the case, for instance. A good practice, already in use in some Member States, is to separate between the decision making authorities and those providing legal and procedural information. However, should a Member State decide to allocate the latter responsibility to the decision making authorities, a clear separation of tasks should be ensured for the personnel involved, for instance by creating a separate and independent section in charge only of providing legal and procedural information.

Conditions for free legal assistance/representation — reference to Article 15(3) to (6) of Directive 2005/85/EC: the reference to certain conditions/limitations which Member States may foresee in respect of free legal aid is a dynamic reference and must be read as reference to the current Articles 20 and 21 of the Asylum Procedures Directive currently in force and replacing Directive 2005/85/EC. In accordance with the above-mentioned provisions, Member States may provide that the free legal assistance and representation is only granted:

- where the appeal is considered by a court or tribunal or other competent authority to have tangible prospect of success,
- to those who lack sufficient resources,
- through the services provided by legal advisers or other counsellors specifically designated by national law to assist and represent applicants,
- in first instance appeal procedures and not for further appeals or reviews.

Member States may also:

- impose monetary and/or time limits on the provision of free legal assistance and representation, provided that such limits do not arbitrarily restrict access to this right,
- provide that, as regards fees and other costs, the treatment of applicants shall not be more favourable than the treatment generally accorded to their nationals in matters pertaining to legal assistance,
- demand to be reimbursed wholly or partially for any costs granted if and when the applicant's financial situation has improved considerably or if the decision to grant such costs was taken on the basis of false information supplied by the applicant.

<sup>(1)</sup> Judgment of the European Court of Human Rights of 5 February 2002, *Čonka v Belgium*, application No 51564/99.

Effective remedy against refusal to grant free legal aid: where a decision not to grant free legal assistance and representation is taken by an authority which is not a court or tribunal, Member States shall ensure that the applicant has the right to an effective remedy before a court or tribunal against that decision. The right to an effective remedy and to a fair trial is among the fundamental rights forming an integral part of the European Union legal order and observance of those rights is required even where the applicable legislation does not expressly provide for such a procedural requirement.

### 13. SAFEGUARDS PENDING RETURN

*Legal basis:* Return Directive — Article 14(1)

*Member States shall, with the exception of the situation covered in Articles 16 and 17, ensure that the following principles are taken into account as far as possible in relation to third-country nationals during the period for voluntary departure granted in accordance with Article 7 and during periods for which removal has been postponed in accordance with Article 9:*

- (a) *family unity with family members present in their territory is maintained;*
- (b) *emergency healthcare and essential treatment of illness are provided;*
- (c) *minors are granted access to the basic education system subject to the length of their stay;*
- (d) *special needs of vulnerable persons are taken into account.*

*Historic reminder/explanation:* the Return Directive leaves to Member States the choice of either issuing return decisions to illegally staying third-country nationals or to grant a right to stay. This approach should help reduce grey areas. It may, however, also increase in practice the absolute number of cases in which Member States issue return decisions which cannot be enforced due to practical or legal obstacles for removal (for example delays in obtaining the necessary papers from third countries and *non-refoulement* cases). In order to avoid a legal vacuum for these persons, the Commission had proposed to provide for a minimum level of conditions of stay for those illegally staying third-country nationals for whom the enforcement of the return decision has been postponed or who cannot be removed, by referring to the substance of a set of conditions already laid down in Articles 7 to 10, Article 15 and Articles 17 to 20 of Council Directive 2003/9/EC <sup>(1)</sup> (Reception Conditions Directive), covering — in essence — four basic rights: (1) family unity; (2) healthcare; (3) schooling and education for minors; and (4) respect for special needs of vulnerable persons. Other important rights under the Reception Conditions Directive, such as access to employment and material reception conditions, were not referred to. Following negotiations, in the course of which concerns were expressed that references to the Reception Conditions Directive might be perceived as an ‘upgrading’ of the situation of irregular migrants and thus send a wrong policy message, a ‘self-standing’ list of rights was established.

The scope of situations covered by Article 14(1) is broad: it covers the period for voluntary departure as well as any period for which removal has been formally or *de facto* postponed in accordance with Article 9 of the Return Directive (for example appeal with suspensive effect, possible violation of *non-refoulement* principle, health reasons, technical reasons, failure of removal efforts due to lack of identification). Periods spent in detention are expressly excluded, since the related safeguards are regulated elsewhere (see section 15).

The provision of emergency healthcare and necessary treatment of the illness is a basic minimum right and access to it must not be made dependent on the payment of fees.

Access to education: the limitation of ‘subject to the length of their stay’ should be interpreted restrictively. In cases of doubt about the likely length of stay before return, access to education should be granted rather than not. A national practice where access to the education system is normally only established if the length of the stay is more than fourteen days may be considered acceptable. As regards practical problems, such as cases in which the minor does not have a document proving the education already obtained in other countries or cases in which the minor does not speak any language in which education can be provided in the Member State, appropriate answers need to be found at national level, taking into account the spirit of the Directive and relevant international law instruments such as the 1989 Convention on the Rights of the Child and General Comment No 6 thereto <sup>(2)</sup>. Inspiration may also be drawn from the asylum *acquis* (in particular Article 14 of the Reception Conditions Directive 2013/33/EU).

<sup>(1)</sup> Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers (OJ L 31, 6.2.2003, p. 18).

<sup>(2)</sup> United Nations, *General comment No 6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin*, 2005, available at: <http://www.refworld.org/docid/42dd174b4.html>

Other basic needs: in its judgement in Case C-562/13, *Abdida*, the ECJ found that Member States are obliged to also cover other basic needs to ensure that emergency healthcare and essential treatment of illness are in fact made available during the period in which that Member State is required to postpone removal. It is for the Member States to determine the form in which such provision for the basic needs of the third-country national concerned is to be made.

The logic upon which the ECJ relied to establish this obligation was that the requirement to provide emergency healthcare and essential treatment of illness under Article 14(1)(b) of the Return Directive may be rendered meaningless if there were not also a concomitant requirement to make provision for the basic needs of the third-country national concerned. Based on this logic developed by the ECJ, and in light of the indications provided for in relevant case-law of the ECtHR, it can be derived that enjoyment of the other rights enumerated in Article 14(1) of the Return Directive (such as in particular access to education and taking into account needs of vulnerable persons) also give rise to a concomitant requirement to make provision for the basic needs of the third-country national concerned.

Even though there is no general legal obligation under Union law to make provision for the basic needs of all third-country nationals pending return, the Commission encourages Member States to do so under national law, in order to assure humane and dignified conditions of life for returnees.

### 13.1. Written confirmation

*Legal basis:* Return Directive — Article 14(2)

*Member States shall provide the persons referred to in paragraph 1 with a written confirmation in accordance with national legislation that the period for voluntary departure has been extended in accordance with Article 7(2) or that the return decision will temporarily not be enforced.*

Recital 12 of the Return Directive specifies: 'In order to be able to demonstrate their specific situation in the event of administrative controls or checks, such persons should be provided with written confirmation of their situation. Member States should enjoy wide discretion concerning the form and format of the written confirmation and should also be able to include it in decisions related to return adopted under this Directive'.

*Form of the written confirmation:* Member States enjoy wide discretion. The confirmation can either be a separate paper issued by the national authorities or part of a formal decision related to return. It is important that it allows the returnee to clearly demonstrate — in case of a police control — that he/she is already subject of a pending return decision and that he/she benefits from a period for voluntary departure, a formal postponement of removal or that he/she is subject of a return decision which can temporarily not be enforced. The confirmation should specify, if possible, the length of the period for voluntary departure or the postponement.

In Member States in which data exchange systems allow for the quick verification of the status of irregular migrants in case of police controls on the basis of certain personal data or reference numbers, the written confirmation requirement can be considered as fulfilled if the person is provided with (or already owns) documents or papers containing these personal data or reference numbers.

### 13.2. Situations of protracted irregularity

No obligation to grant a permit to non-removable returnees: Member States are not obliged to grant a permit to returnees once it becomes clear that there is no more reasonable prospect of removal, although they may decide to do so in application of Article 6(4) of the Return Directive (see section 5.6).

In this regard, the ECJ expressly clarified in the judgment of Case C-146/14, *Mahdi* <sup>(1)</sup> (paragraphs 87 and 88): '[...] the purpose of the directive is not to regulate the conditions of residence on the territory of a Member State of third-country nationals who are staying illegally and in respect of whom it is not, or has not been, possible to implement a return decision. [...] However, Article 6(4) of Directive 2008/115/EC enables the Member States to grant an autonomous residence permit or other authorisation offering a right to stay for compassionate, humanitarian or other reasons to a third-country national staying illegally on their territory'.

<sup>(1)</sup> Judgment of the Court of Justice of 5 June 2014, *Mahdi*, Case C-146/14 PPU, ECLI:EU:C:2014:1320.

Criteria to take into account for granting permits: as highlighted above, there is no legal obligation to issue permits to non-removable returnees and Member States enjoy broad discretion. In this context, it is recommended that the assessment criteria that could be taken into account by Member States include both individual (case-related) as well as horizontal (policy-related) elements such as in particular:

- the cooperative/non-cooperative attitude of the returnee,
- the length of factual stay of the returnee in the Member State,
- integration efforts made by the returnee,
- personal conduct of the returnee,
- family links,
- humanitarian considerations,
- the likelihood of return in the foreseeable future,
- need to avoid rewarding irregularity,
- impact of regularisation measures on migration pattern of prospective (irregular) migrants,
- likelihood of secondary movements within Schengen area.

#### 14. DETENTION

The procedural safeguards listed in Articles 12 (form and translation) and Article 13 (effective remedy and free legal aid) of the Return Directive are express manifestations of the fundamental rights to good administration, to be heard, to an effective remedy and to a fair trial, all forming an integral part of the European Union legal order. Observance of those rights is thus required also with regard to detention decisions.

On top of these general requirements, Article 15 of the Return Directive sets out certain requirements specifically applicable in relation to detention decisions.

##### 14.1. Circumstances justifying detention

*Legal basis:* Return Directive — Article 15(1)

*Unless other sufficient but less coercive measures can be applied effectively in a specific case, Member States may only keep in detention a third-country national who is the subject of return procedures in order to prepare the return and/or carry out the removal process, in particular when:*

- (a) *there is a risk of absconding; or*
- (b) *the third-country national concerned avoids or hampers the preparation of return or the removal process.*

*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.*

Imposing detention for the purpose of removal is a serious intrusion into the fundamental right of liberty of persons and therefore subject to strict limitations.

Obligation to impose detention only as a measure of last resort: Article 8(1) of the Return Directive obliges Member States to take 'all necessary measures' to enforce return decisions. The possibility to impose detention is one of the possible measures which may be used by Member States as a measure of last resort. The ECJ has in this context expressly highlighted in its judgment in Case C-61/11, *El Dridi* (paragraph 41), that the Return Directive foresees a 'gradation of the measures to be taken in order to enforce the return decision, a gradation which goes 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'.

An obligation on Member States to apply detention exists only in situations in which it is clear that the use of detention is the only way to make sure that the return process can be prepared and the removal process can be carried out (necessity of detention). Any detention shall be based on an individual assessment and shall be for as short a period as possible, only maintained as long as removal arrangements are in progress and executed with due diligence (proportionality of detention).

Reasons for detention: the sole legitimate objective of detention under the Return Directive is to prepare the return and/or to carry out the removal process, in particular when there is: (1) a risk of absconding; or (2) avoidance or hampering of the preparation of return or the removal process by the returnee. When such reasons for detention exist, and when no less coercive measures can be applied effectively in a specific case (last resort), Member States are entitled and should use detention for the time necessary to ensure that return procedures can be successfully carried out in compliance with the provisions of Article 8 of the Return Directive.

Even though the wording of the Return Directive is phrased as an indicative listing ('in particular'), these two concrete cases cover the main scenarios encountered in practice that justify detention in view of preparing and organising return and carrying out the removal process. The existence of a specific reason for detention — and the non-availability of effective and sufficient less coercive measures — must be individually assessed in each case. A refusal of entry at the border, the existence of a SIS alert for refusal of entry, lack of documentation, lack of residence, absence of cooperation and other relevant indications/criteria need to be taken into account when assessing whether there is a risk of absconding (see section 1.6) that may justify the need for detention.

No detention for public order reasons: the possibility of maintaining or extending detention for public order reasons is not covered by the text of the Return Directive and Member States are not allowed to use immigration detention for the purposes of removal as a form of 'light imprisonment'. The primary purpose of detention for the purposes of removal is to assure that returnees do not undermine the execution of the obligation to return by absconding. It is not the purpose of Article 15 to protect society from persons which constitute a threat to public policy or security. The legitimate aim to protect the society should be addressed by other pieces of legislation, in particular criminal law, criminal administrative law and legislation covering the ending of legal stay for public order reasons. In this respect, the ECJ stated in its judgment on Case C-357/09, *Kadzoev* <sup>(1)</sup> (paragraph 70): 'The possibility of detaining a person on grounds of public order and public safety cannot be based on Directive 2008/115/EC. None of the circumstances mentioned by the referring court (aggressive conduct; no means of support; no accommodation) can therefore constitute in itself a ground for detention under the provisions of that directive'. The past behaviour/conduct of a person posing a risk to public order and safety (for instance non-compliance with administrative law in other fields than migration law or infringements of criminal law) may, however, be taken into account when assessing whether there is a risk of absconding (see section 1.6). If the past behaviour/conduct of the person concerned allows drawing the conclusion that the person will probably not act in compliance with the law and avoid return, this may justify the decision that there is a risk of absconding.

Obligation to provide for effective alternatives to detention: Article 15(1) must be interpreted as requiring each Member State to provide in its national legislation for alternatives to detention; this is also consistent with the terms of recital 16 to the Directive ('[...] if application of less coercive measures would not be sufficient'). In the judgment of Case C-61/11, *El Dridi* (paragraph 39), the ECJ confirmed that '[...] 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 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 detain him'. However, this does not mean that a pre-condition for detention is that a third-country national was already subject to a less coercive measure.

Article 15(1) of the Return Directive requires that less coercive measures must be 'sufficient' and that it should be possible to apply them 'effectively' to the third-country national concerned. This implies that, to comply with the obligation to provide for effective alternatives to detention, Member States must provide in national law for alternatives to detention that can achieve the same objectives of detention (i.e. prevent absconding, avoid that the third-country national avoids or hampers return) while using means that are less intrusive of the right to liberty of the individual. National authorities responsible for taking decisions related to detention and alternatives to detention need to assess whether such less coercive measures would be sufficient and effective in each individual case.

Examples of alternatives to detention include residence restrictions, open houses for families, case-worker support, regular reporting, surrender of ID/travel documents, bail and electronic monitoring. The UNHCR provides some practical examples of good practices <sup>(2)</sup> on alternatives to detention.

<sup>(1)</sup> Judgment of the Court of Justice of 30 November 2009, *Kadzoev*, Case C-357/09 PPU, ECLI:EU:C:2009:741.

<sup>(2)</sup> UNHCR, *Options paper 2: Options for governments on open reception and alternatives to detention*, 2015, available at: <http://www.unhcr.org/protection/detention/5538e53d9/unhcr-options-paper-2-options-governments-open-reception-alternatives-detention.html>

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#### Benefits and risks — alternatives to detention

The benefits of providing for alternatives to detention may include higher return rates (including voluntary departure), improved cooperation with returnees in obtaining necessary documentation, financial benefits (less cost for the State) and less human cost (avoidance of hardship related to detention).

Risks include an increased likelihood of absconding, possible creation of pull factors (alternative detention facilities such as family houses may be perceived as attractive for potential irregular immigrants) and possible social tensions in the neighbourhood of open centres.

Recommendation: The challenge is to find intelligent solutions with an appropriate mix of rewards and deterrents. A complete absence of deterrents may lead to insufficient removal rates. At the same time an overly repressive system with systematic detention may also be inefficient, since the returnee has little incentive or encouragement to cooperate in the return procedure. Member States should develop and use a wide range of alternatives to address the situation of different categories of third-country nationals. Tailored individual coaching, which empowers the returnee to take in hand his/her own return, early engagement and holistic case management focused on case resolution has proven to be successful. A systematic horizontal coaching of all potential returnees, covering advice on possibilities for legal stay/asylum as well as on voluntary/enforced return from an early stage (and not only once forced removal decisions are taken) should be aimed at.

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#### Further clarification:

- Being subject of return procedures: the formal requirement to be 'subject of return procedures' in Article 15(1) of the Return Directive is not synonymous with 'subject of a return decision'. Detention may already be imposed — if all conditions of Article 15 are fulfilled — before a formal return decision is taken, for instance while the preparations of the return decision are under way and a return decision has not yet been issued.

#### Concrete examples:

- An illegally staying third-country national may hide (not disclose) his/her identity in order to avoid removal. Is it legitimate to maintain detention in such circumstances, in order to exercise pressure on the third-country national to cooperate and thus make removal possible?
- This kind of detention is covered by Article 15(1)(b) of the Return Directive, which expressly mentions 'avoids or hampers [...] the removal process' as a reason for detention. Article 15(6)(a) lists 'lack of cooperation' as one of the two cases which may justify an extension of the maximum detention period for 12 months and the overall objective and finality of this kind of detention (*Beugehaft* or *Durchsetzungshaft*) is removal, not penalisation. Any detention for the purpose of removal must respect Article 15(4) of the Return Directive: 'When it appears that a reasonable prospect of removal no longer exists for legal or other considerations or the conditions laid down in paragraph 1 no longer exist, detention ceases to be justified and the person concerned shall be released immediately'. This implies that in those cases in which it becomes clear that there are no more reasonable prospects of removal, detention must be ended — for instance when it becomes clear that the papers to be issued by a third country will come too late or will not be issued at all, even if the detainee would cooperate.
- Is it possible to maintain detention if a returnee submits an asylum application?
- Answer provided by the judgment of the ECJ in the Case C-534/11, *Arslan* <sup>(1)</sup> (paragraphs 49 and 63): 'Article 2(1) of Directive 2008/115/EC [...] does not apply to a third-country national who has applied for international protection within the meaning of Directive 2005/85/EC during the period from the making of the application to the adoption of the decision at first instance on that application or, as the case may be, until the outcome of any action brought against that decision is known. [...] Directives 2003/9/EC and 2005/85/EC do not preclude a third-country national who has applied for international protection within the meaning of Directive 2005/85/EC after having been detained under Article 15 of Directive 2008/115/EC from being kept in detention on the basis of a provision of national law, where it appears, after an assessment on a case-by-case basis of all the relevant circumstances, that the application was made solely to delay or jeopardise the

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<sup>(1)</sup> Judgment of the Court of Justice of 30 May 2013, *Arslan*, Case C-534/11, ECLI:EU:C:2013:343.

enforcement of the return decision and that it is objectively necessary to maintain detention to prevent the person concerned from permanently evading his return'. NB: the above reference to 'national law' relates to national rules on asylum-related detention, transposing — as the case may be — the detention-related requirements of the EU asylum *acquis*.

#### 14.2. Form and initial review of detention

*Legal basis:* Return Directive — Article 15(2)

*Detention shall be ordered by administrative or judicial authorities.*

*Detention shall be ordered in writing with reasons being given in fact and in law.*

*When detention has been ordered by administrative authorities, Member States shall:*

- (a) either provide for a speedy judicial review of the lawfulness of detention to be decided on as speedily as possible from the beginning of detention;*
- (b) or grant the third-country national concerned the right to take proceedings by means of which the lawfulness of detention shall be subject to a speedy judicial review to be decided on as speedily as possible after the launch of the relevant proceedings. In such a case Member States shall immediately inform the third-country national concerned about the possibility of taking such proceedings.*

*The third-country national concerned shall be released immediately if the detention is not lawful.*

Judicial authorities may consist of judges, but need not necessarily be composed of judges. In line with relevant ECtHR case-law, they must have characteristics of independence, impartiality and offer judicial guarantees of an adversarial procedure.

Scope of judicial review: the review must assess all aspects expressly referred to in Article 15 of the Return Directive, taking into account both the questions of law (for example correctness of the detention procedure and of the decision on detention from the procedural/legal point of view) and questions of facts (for example the personal situation of the detainee, family links in the country, guarantees of the departure from the territory, reasonable prospect of removal).

Maximum duration of 'speedy judicial review': the text of the Return Directive is inspired by the wording of Article 5(4) ECHR, which requires a 'speedy judicial review by a Court'. Relevant ECtHR case-law clarifies that an acceptable maximum duration (i.e. a reasonable time) cannot be defined in the abstract. It must be determined in the light of the circumstances of each case, taking into account the complexity of the proceedings as well as the conduct by the authorities and the applicant. Taking a decision within less than one week can certainly be considered a good practice that is compliant with the legal requirement of speediness.

Requirement of written decision also applies to prolongation decisions: the requirement to issue a written decision with reasons also applies to decisions concerning prolongation of detention. In the judgment of Case C-146/14, *Mahdi*, the ECJ expressly clarified (paragraph 44): 'The requirement that a decision be adopted in writing must be understood as necessarily covering all decisions concerning extension of detention, given that (i) detention and extension of detention are similar in nature since both deprive the third-country national concerned of his liberty in order to prepare his return and/or carry out the removal process; and (ii) in both cases the person concerned must be in a position to know the reasons for the decision taken concerning him'.

All the safeguards inherent to the respect of the right to be heard apply to detention decisions and decisions on prolongation of detention. However, the non-respect of this right renders a decision invalid only insofar as the outcome of the procedure would have been different if the right was respected — see case C-383/13, *G & R*: '[...] European Union law, in particular Article 15(2) and (6) of Directive 2008/115/EC, must be interpreted as meaning that, where the extension of a detention measure has been decided in an administrative procedure in breach of the right to be heard, the national court responsible for assessing the lawfulness of that extension decision may order the lifting of the detention measure only if it considers, in the light of all of the factual and legal circumstances of each case, that the infringement at issue actually deprived the party relying thereon of the possibility of arguing his defence better, to the extent that the outcome of that administrative procedure could have been different' (see section 12).

#### 14.3. Regular review of detention

*Legal basis:* Return Directive — Article 15(3)

*In every case, detention shall be reviewed at reasonable intervals of time either on application by the third-country national concerned or ex officio.*



No written review decision required under Article 15(3) first sentence: this was clarified by the ECJ in the judgment of Case C-146/14, *Mahdi* (paragraph 47): 'the provisions of Article 15 of Directive 2008/115/EC do not require the adoption of a written "review measure" [...]. The authorities which carry out the review of a third-country national's detention at regular intervals pursuant to the first sentence of Article 15(3) of the directive are therefore not obliged, at the time of each review, to adopt an express measure in writing that states the factual and legal reasons for that measure'. Member States are, however, free to adopt a written review decision in accordance with national law.

Combined review and prolongation decisions must be adopted in writing: in its judgement on case C-146/14, *Mahdi*, the ECJ clarified (paragraph 48): 'In such a case, the review of the detention and the decision on the further course to take concerning the detention occur in the same procedural stage. Consequently, that decision must fulfil the requirements of Article 15(2) of Directive 2008/115/EC'.

*In the case of prolonged detention periods, reviews shall be subject to the supervision of a judicial authority.*

Meaning of 'prolonged detention': Article 15(3) second sentence of the Return Directive requires an *ex officio* judicial supervision in cases of 'prolonged detention'. This implies the need for action by judicial authorities, also in those cases in which the concerned person does not appeal. Based on a linguistic comparison of the term 'prolonged detention' (German: 'Bei längerer Haftdauer'; French: 'En cas de périodes de rétention prolongées'; Dutch: 'In het geval van een lange periode van bewaring'; Spanish: 'En caso de periodos de internamiento prolongados'; Italian: 'Nel caso di periodi di trattenimento prolungati') it is clear that this term refers in substance to a long period of detention independently of the fact that a formal decision on prolongation was already taken or not. The Commission considers that an interval of 6 months for exercising the first *ex officio* judicial supervision of the detention decision is certainly too long, whilst a three months *ex officio* judicial supervision may be considered at the limit of what might still be compatible with 15(3) of the Directive, provided that there is also a possibility to launch individual reviews upon application if needed.

Powers of the supervising judicial authority: a review mechanism which only examines questions of law and not questions of fact is not sufficient. The judicial authority must have the power to decide both on the facts and legal issues — see judgment of the ECJ in Case C-146/14, *Mahdi* (paragraph 62): '[...] the judicial authority having jurisdiction must be able to substitute its own decision for that of the administrative authority or, as the case may be, the judicial authority which ordered the initial detention and to take a decision on whether to order an alternative measure or the release of the third-country national concerned. To that end, the judicial authority ruling on an application for extension of detention must be able to take into account both the facts stated and the evidence adduced by the administrative authority and any observations that may be submitted by the third-country national. Furthermore, that authority must be able to consider any other element that is relevant for its decision should it so deem necessary [...]'].

#### 14.4. Ending of detention

Legal basis: Return Directive — Article 15(4)-(6)

4. *When it appears that a reasonable prospect of removal no longer exists for legal or other considerations or the conditions laid down in paragraph 1 no longer exist, detention ceases to be justified and the person concerned shall be released immediately.*
5. *Detention shall be maintained for as long a period as the conditions laid down in paragraph 1 are fulfilled and it is necessary to ensure successful removal. Each Member State shall set a limited period of detention, which may not exceed six months.*
6. *Member States may not extend the period referred to in paragraph 5 except for a limited period not exceeding a further 12 months in accordance with national law in cases where regardless of all their reasonable efforts the removal operation is likely to last longer owing to:*
  - (a) *a lack of cooperation by the third-country national concerned; or*
  - (b) *delays in obtaining the necessary documentation from third countries.*

Detention must be ended and the returnee must be released in a number of different situations, such as in particular if:

- there is no more reasonable prospect of removal for legal or other considerations,
- removal arrangements are not properly followed up by the authorities,
- the maximum time limits for detention have been reached.

Furthermore an end should be given to detention on a case-by-case basis if alternatives to detention become an appropriate option.

#### 14.4.1. Absence of reasonable prospect of removal

Absence of reasonable prospect of removal: in the judgment of Case C-357/09, *Kadzoev* (paragraph 67), the ECJ provided a clarifying interpretation of the meaning of ‘reasonable prospect’: ‘Only a real prospect that removal can be carried out successfully, having regard to the periods laid down in Article 15(5) and (6), corresponds to a reasonable prospect of removal. That reasonable prospect does not exist where it appears unlikely that the person concerned will be admitted to a third country, having regard to those periods’.

Absence of a ‘reasonable prospect’ is not the same as ‘impossibility to enforce’: ‘impossibility to enforce’ is a more categorical assertion and more difficult to demonstrate than ‘absence of reasonable prospect’, which refers to certain degree of likelihood only.

Periods of detention which should be taken into account when assessing the ‘reasonable prospect of removal’: given the emphasis put by Article 15 (as well as recital 6) of the Return Directive on a concrete individual case-by-case assessment for determining the proportionality of deprivation of liberty, regard must always be taken of the maximum detention periods for the concerned individual in the specific case. This means that the maximum periods laid down by national law of the concerned Member State are relevant. This also implies that a returnee should not be detained in a Member State if it appears unlikely from the beginning that the person concerned will be admitted to a third country within the maximum detention period allowed under the legislation of that Member State (in the judgment of Case C-357/09, *Kadzoev*, the ECJ referred to the maximum periods under the Directive, since these were the same as the maximum periods under the applicable legislation in the concerned Member State).

The Commission recommends providing for a maximum initial period of detention of six months, which shall be adapted in the light of the circumstances of the case and be reviewed at reasonable intervals of time under the supervision of a judicial authority, and for the possibility to further prolong the detention until 18 months in the cases provided for in Article 15(6) of the Return Directive.

Once the maximum periods of detention have been reached, Article 15(4) of the Return Directive is not applicable any more and the person must in any event be released immediately — see the judgement of the ECJ in Case C-357/09, *Kadzoev* (paragraphs 60 and 61): ‘It is clear that, where the maximum duration of detention provided for in Article 15(6) of Directive 2008/115/EC has been reached, the question whether there is no longer a “reasonable prospect of removal” within the meaning of Article 15(4) does not arise. In such a case the person concerned must in any event be released immediately. Article 15(4) of Directive 2008/115/EC can thus only apply if the maximum periods of detention laid down in Article 15(5) and (6) of the directive have not expired’.

Further clarifications:

- Attention should be paid to the specific situation of stateless persons, who may be unable to benefit from consular assistance by third-countries in view of obtaining a valid identity or travel document. In the light of the judgment of the ECJ on Case C-357/09, *Kadzoev*, Member States should make sure that there is a reasonable prospect of removal that justifies imposing or prolonging detention.
- Is it legitimate to maintain detention if the third-country national for the time being is protected from removal because of the principle of *non-refoulement*?
  - If removal becomes unlikely (for instance because of a likely permanent *non-refoulement* issue), third-country nationals must be released in accordance with Article 15(4) of the Return Directive. If the *non-refoulement* issue is only of limited and temporary nature (for instance a credible diplomatic assurance from the country of return is likely to be issued shortly or the returnee is temporarily in need for vital medical treatment which is not available in country of return), detention may be maintained if there is still a reasonable prospect of removal.

#### 14.4.2. Reaching the maximum period of detention

Article 15(5) and (6) of the Return Directive obliges Member States to fix under national law <sup>(1)</sup> maximum time limits for detention which shall not exceed 6 months (in regular cases) or 18 months (in two qualified cases: lack of cooperation by the returnee or delays in obtaining the necessary documentation from third countries).

The shorter maximum detention periods fixed by national law prevail over the 6/18 months deadline provided for by the Return Directive: in the handling of concrete cases, the maximum periods fixed by national law (in compliance with

<sup>(1)</sup> An overview on the different time-limits applicable under national law can be found at: <http://ec.europa.eu/smart-regulation/evaluation/search/download.do?documentId=10737855> (pages 44-50). This overview reflects the situation of December 2013 and some national rules have changed in the meantime.

the Return Directive) and not the maximum periods fixed by the Return Directive must be applied. This implies that a Member State which has fixed a national maximum of for example 60 days for non-cooperating returnees cannot maintain detention beyond those 60 days, even though Article 15(6) of the Return Directive provides for a frame of up to 18 months.

National law should set a maximum period of detention that allows the competent national authorities to take all the necessary measures to enforce the return decision, hence to finalise the necessary procedures for successfully returning illegally staying third-country nationals and securing readmission in the third country of return. The Commission recommends that Member States use the margins established by Article 15 of the Return Directive, providing for a maximum initial period of detention of six months, and for the possibility to further prolong detention until 18 months in the cases foreseen by Article 15(6) of that Directive. It is recalled that the actual duration of detention must be determined on a case-by-case basis and that the returnee must be released if the conditions for detention (for example, a reasonable prospect of removal) no longer exist.

Examples for reasons justifying/not justifying prolonged detention under Article 15(6):

- An absence of identity documents as such is not sufficient to justify the prolongation of detention — see judgment of the ECJ in Case C-146/14, *Mahdi* (paragraph 73): '[...] the fact that the third-country national concerned has no identity documents cannot, on its own, be a ground for extending detention under Article 15(6) of Directive 2008/115/EC'.
- Non-cooperation in obtaining identity documents may justify the prolongation of detention if there is a causal link between the non-cooperation and non-return — see Judgment of the ECJ in Case C-146/14, *Mahdi* (paragraph 85): '[...] only if an examination of his conduct during the period of detention shows that he has not cooperated in the implementation of the removal operation and that it is likely that that operation lasts longer than anticipated because of that conduct, [...]'].

Further clarifications:

Taking into account periods of detention as an asylum seeker: when calculating the period of detention for the purpose of removal, periods of detention as asylum seeker need not be taken into account, since detention for removal purposes and detention of asylum seekers fall under different legal rules and regimes — see judgment of the ECJ in Case C-357/09, *Kadzoev* (paragraphs 45 and 48): 'Detention for the purpose of removal governed by Directive 2008/115/EC and detention of an asylum seeker in particular under Directives 2003/9/EC and 2005/85/EC and the applicable national provisions thus fall under different legal rules. Consequently, [...] a period during which a person has been held in a detention centre on the basis of a decision taken pursuant to the provisions of national and Community law concerning asylum seekers may not be regarded as detention for the purpose of removal within the meaning of Article 15 of Directive 2008/115/EC'.

Paragraph 47 of the same judgment then adds: 'Should it prove to be the case that no decision was taken on Mr Kadzoev's placement in the detention centre in the context of the procedures opened following his applications for asylum, referred to in paragraph 19 above, so that his detention remained based on the previous national rules on detention for the purpose of removal or on the provisions of Directive 2008/115/EC, Mr Kadzoev's period of detention corresponding to the period during which those asylum procedures were under way would have to be taken into account in calculating the period of detention for the purpose of removal mentioned in Article 15(5) and (6) of Directive 2008/115/EC'.

Taking into account periods of detention pending preparation of a Dublin transfer: the same logic as set out above in relation to periods of detention as asylum seeker applies.

Taking into account periods of detention during which an appeal with suspensive effect is pending: such periods must be taken into account — see judgment of the ECJ in Case C-357/09, *Kadzoev* (paragraphs 53-54): 'The period of detention completed by the person concerned during the procedure in which the lawfulness of the removal decision is the subject of judicial review must [...] be taken into account for calculating the maximum duration of detention laid down in Article 15(5) and (6) of Directive 2008/115/EC. If it were otherwise, the duration of detention for the purpose of removal could vary, sometimes considerably, from case to case within a Member State or from one Member State to another because of the particular features and circumstances peculiar to national judicial procedures, which would run counter to the objective pursued by Article 15(5) and (6) of Directive 2008/115/EC, namely to ensure a maximum duration of detention common to the Member States'.

Taking into account periods of detention for the purpose of removal spent in (another) Member State A, immediately followed by pre-removal detention in Member State B (such a situation may arise for instance in the context of the transfer of a third-country national from Member State A to Member State B under a bilateral readmission agreement covered by Article 6(3) of the Return Directive): the Commission considers that the absolute 18 months threshold of uninterrupted pre-removal detention should not be exceeded, in view of the need to respect the *effet utile* of the maximum time-limit fixed by Article 15(6) of the Return Directive. An exchange of information between Member States on periods of detention already spent in another Member State as well as an eventual possibility for Member State B to refuse transfer from Member State A if Member State A made the request excessively late should be addressed under the relevant bilateral readmission agreements.

Taking into account periods of detention completed before the rules in the Return Directive became applicable: such periods must be taken into account (see judgment of the ECJ in Case C-357/09, *Kadzoev*, paragraphs 36-38).

#### 14.5. Re-detention of returnees

The maximum period of detention prescribed by the Return Directive must not be undermined by re-detaining returnees immediately, following their release from detention.

Re-detention of the same person at a later stage may only be legitimate if an important change of relevant circumstance has taken place (for instance the issuing of necessary papers by a third country or an improvement of the situation in the country of origin, allowing for safe return), if this change gives rise to a 'reasonable prospect of removal' in accordance with Article 15(4) of the Return Directive and if all other conditions for imposing detention under Article 15 of that Directive are fulfilled.

#### 14.6. Application of less coercive measures after ending of detention

Less coercive measures, 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 as long as and to the extent that they can still be considered a 'necessary measure' to enforce return. While there are no absolute maximum time limits foreseen for the application of less coercive measures, the scope and duration of such measures shall be subject to a thorough assessment as to their proportionality.

Moreover, if the nature and intensity of a less coercive measures is similar or equal to deprivation of liberty (for example the imposition of an unlimited obligation to stay at a specific facility, without possibility to leave such facility), it must be considered as a *de facto* continuation of detention and the time limits foreseen in Article 15(5) and (6) of the Return Directive apply.

### 15. DETENTION CONDITIONS

*Legal basis:* Return Directive — Article 16

1. Detention shall take place as a rule in specialised detention facilities. Where a Member State cannot provide accommodation in a specialised detention facility and is obliged to resort to prison accommodation, the third-country nationals in detention shall be kept separated from ordinary prisoners
2. Third-country nationals in detention shall be allowed — on request — to establish in due time contact with legal representatives, family members and competent consular authorities.
3. Particular attention shall be paid to the situation of vulnerable persons. Emergency health care and essential treatment of illness shall be provided.
4. Relevant and competent national, international and non-governmental organisations and bodies shall have the possibility to visit detention facilities, as referred to in paragraph 1, to the extent that they are being used for detaining third-country nationals in accordance with this Chapter. Such visits may be subject to authorisation.
5. Third-country nationals kept in detention shall be systematically provided with information which explains the rules applied in the facility and sets out their rights and obligations. Such information shall include information on their entitlement under national law to contact the organisations and bodies referred to in paragraph 4.

#### 15.1. Initial police custody

Initial police arrest (apprehension) for identification purposes is covered by national law: this is expressly highlighted in recital 17 of the Return Directive: 'Without prejudice to the initial apprehension by law-enforcement authorities,

regulated by national legislation, detention should, as a rule, take place in specialised detention facilities'. This clarifies that during an initial period national law may continue to apply. Even though this is no legal obligation, Member States are encouraged to make sure already at this stage that third-country nationals are kept separated from ordinary prisoners.

Length of the initial apprehension period during which suspected irregular migrants may be kept in police custody: a brief but reasonable time for the purpose of identifying the person under constraint and researching the information enabling it to be determined whether that person is an illegally staying third-country national — see judgment of the ECJ in Case C-329/11, *Achughbabian* (paragraph 31): 'It should be held, in that regard, that the competent authorities must have a brief but reasonable time to identify the person under constraint and to research the information enabling it to be determined whether that person is an illegally-staying third-country national. Determination of the name and nationality may prove difficult where the person concerned does not cooperate. Verification of the existence of an illegal stay may likewise prove complicated, particularly where the person concerned invokes a status of asylum seeker or refugee. That being so, the competent authorities are required, in order to prevent the objective of Directive 2008/115/EC, as stated in the paragraph above, from being undermined, to act with diligence and take a position without delay on the legality or otherwise of the stay of the person concerned'. Even though there is no detailed binding timeframe, the Commission encourages Member States to make sure that a transfer to a specialised detention facility for irregular migrants normally takes place within 48 hours after apprehension (exceptionally, longer periods may be admissible in case of remote geographic locations).

### 15.2. Use of specialised facilities as a general rule

Use of specialised facilities is the general rule: returnees are no criminals and deserve treatment different from ordinary prisoners. The use of specialised facilities is therefore the general rule foreseen by the Return Directive. Member States are required to detain illegally staying third-country nationals for the purpose of removal in specialised detention facilities, and not in ordinary prisons. This implies an obligation on Member States to make sure that sufficient places in specialised detention facilities are available, therefore to bring detention capacity in line with actual needs, while ensuring adequate material detention conditions.

Exceptions to the general rule: the derogation foreseen in Article 16(1) of the Return Directive, which allows Member States to accommodate pre-removal detainees in exceptional cases in ordinary prisons, must be interpreted restrictively. This was expressly confirmed by the judgment of the ECJ in joint Cases C-473/13, *Bero* and C-514/13, *Bouzalmate* <sup>(1)</sup> (paragraph 25): 'The second sentence of [...] Article 16(1) [...] lays down a derogation from that principle, which, as such, must be interpreted strictly (see, to this effect, the judgment in *Kamberaj*, C-571/10, EU:C:2012:233, paragraph 86)'. Full consideration shall be given to fundamental rights when making use of such derogation, giving due consideration to elements such as situations of overcrowding, the need to avoid repeated transfers and possible detrimental effects on the returnee's wellbeing, particularly in the case of vulnerable persons.

Unpredictable peaks in the number of detainees: the derogation foreseen in Article 16(1) of the Return Directive may be applied when unforeseen peaks in the number of detainees caused by unpredictable quantitative fluctuations inherent to the phenomenon of irregular migration (not yet reaching the level of an 'emergency situation' expressly regulated in Article 18 of the Return Directive) cause a problem to place detainees in special facilities in a Member State, which otherwise disposes of an adequate/sufficient number of places in specialised facilities.

Aggressive detainees: in line with the relevant ECtHR case-law, Member States are under the obligation to protect returnees in detention from aggressive or inappropriate behaviour of other detainees. Member States are encouraged to look for practical ways for addressing this challenge within the specialised facilities and without resorting to prison accommodation. Possible solutions might include reserving certain parts/wings of detention centres to aggressive persons, or to have special detention centres reserved for this category of persons.

Absence of special detention facilities in a regional part of a Member State: the absence of special detention facilities in a regional part of a Member State — while in another part of the same Member State they exist — cannot justify per se a stay in an ordinary prison. This was expressly confirmed by the judgment of the ECJ in joint Cases C-473/13, *Bero* and C-514/13, *Bouzalmate* (paragraph 32): 'Article 16(1) of Directive 2008/115/EC must be interpreted as requiring a Member State, as a rule, to detain illegally staying third-country nationals for the purpose of removal in a specialised detention facility of that State even if the Member State has a federal structure and the federated state competent to decide upon and carry out such detention under national law does not have such a detention facility'.

<sup>(1)</sup> Judgment of 17 July 2014, *Bero*, Case C-473/13, and *Bouzalmate*, Case C-514/13, ECLI:EU:C:2014:2095.

Brief detention periods: the fact that detention is likely to last for a brief period only (for example 7 days or less) is not a legitimate reason to resort to prison accommodation.

Detention in closed medical/psychiatric institutions: pre-removal detention in closed medical/psychiatric institutions or together with persons detained on medical grounds is not envisaged by Article 16(1) of the Return Directive and would run contrary to its *effet utile* unless, in light of the medical condition and state of health of the person concerned, the detention in or transfer to a specialised or adapted facility appears necessary in order to provide adequate and constant specialised medical supervision, assistance and care, with a view to avoiding deterioration of the state of health.

### 15.3. Separation from ordinary prisoners

Obligation to keep returnees and prisoners separated is an absolute requirement: the Return Directive provides for an unconditional obligation requiring Member States to ensure that illegally staying third-country nationals are always kept separated from ordinary prisoners when a Member State can exceptionally not provide accommodation in specialised detention facilities.

Ex-prisoners subject to subsequent return: once the prison sentence has come to an end and the person should have been normally released, rules on detention for the purpose of removal start applying, including the obligation under Article 16(1) of the Return Directive to carry out detention in specialised facilities. If the preparation for removal, and possibly the removal itself, is carried out in a period still covered by the prison sentence, prison accommodation can be maintained because this is still covered by the sentence for the previously committed crime. Member States are encouraged to start all the necessary procedures for removal well in advance while persons are still serving their prison sentence in a prison, to ensure that the third-country national can be successfully returned at the latest at the moment in which they are released from prison.

Aggressive detainees: aggressive or inappropriate behaviour of returnees does not justify detaining them together with ordinary prisoners, unless an act of aggression is qualified as crime and a related prison sentence was imposed by a court.

The term 'ordinary prisoners' covers both convicted prisoners and prisoners on remand: this is confirmed by Guideline 10, paragraph 4 of the '20 Guidelines on forced return' of the Committee of Ministers of the Council of Europe (CoE), which explicitly highlights that 'persons detained pending their removal from the territory should not normally be held together with ordinary prisoners, convicted or on remand'. Detainees must therefore also be separated from prisoners on remand.

Agreement by returnee to be detained together with prisoners is not possible: in the judgment of Case C-474/13, *Pham* <sup>(1)</sup> (paragraphs 21 and 22), the ECJ expressly confirmed the following: 'In that regard, the obligation requiring illegally staying third-country nationals to be kept separated from ordinary prisoners, laid down in the second sentence of Article 16(1) of that directive, is more than just a specific procedural rule for carrying out the detention of third-country nationals in prison accommodation and constitutes a substantive condition for that detention, without observance of which the latter would, in principle, not be consistent with the directive. In this context, a Member State cannot take account of the wishes of the third-country national concerned'.

### 15.4. Material detention conditions

*Return Directive — Article 16; CoE Guideline on forced return No 10 ('conditions of detention pending removal'); CPT standards and factsheet on immigration detention; 2006 European Prison Rules*

The Return Directive itself provides for a number of concrete safeguards. Member States are obliged to:

- provide emergency healthcare and essential treatment of illness,
- pay attention to the situation of vulnerable persons, which also implies ensuring, more generally, due consideration of elements such as the age, the disability and the health of the person concerned (including mental health),
- provide detainees with information which explains the rules applied in the facility and sets out their rights and obligations; it is recommended that this information should be given as soon as possible and not later than 24 hours after arrival,
- allow detainees to establish contact with legal representatives, family members and competent consular authorities,
- provide relevant and competent national, international and non-governmental organisations and bodies the possibility to visit detention facilities; this right must be granted directly to the concerned bodies, independently of an invitation from the detainee.

<sup>(1)</sup> Judgment of the Court of Justice of 17 July 2014, *Pham*, Case C-474/13, ECLI:EU:C:2014:2096.

As regards those issues which are not expressly regulated by the Return Directive, Member States need to comply with relevant CoE standards, in particular the 'CPT standards': the Return Directive does not regulate certain material detention conditions, such as the size of rooms, access to sanitary facilities, access to open air, nutrition, during detention. Its recital 17 confirms, however, that detainees must be treated in a humane and dignified manner with respect for their fundamental rights and in compliance with international law. Whenever Member States impose detention for the purpose of removal, this must be done under conditions that comply with Article 4 CFR, which prohibits inhuman or degrading treatment. The practical impact of this obligation on Member States is set out in more detail in particular in:

- (1) the CoE Guideline on forced return No 10 ('conditions of detention pending removal');
- (2) the standards established by the CoE Committee on the Prevention of Torture (CPT standards, document CPT/Inf/E (2002) 1 — Rev. 2013; CPT factsheet on immigration detention, document CPT/Inf(2017)3), addressing specifically the special needs and status of irregular migrants in detention,
- (3) the 2006 European Prison Rules (Recommendation Rec(2006)2 of the Committee of Ministers to Member States) as basic minimum standards on all issues not addressed by the abovementioned standards;
- (4) the UN Standard Minimum Rules for the Treatment of Prisoners (approved by the Economic and Social Council by its resolutions 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977).

These standards represent a generally recognised description of the detention-related obligations which should be complied with by Member States in any detention as an absolute minimum, in order to ensure compliance with ECHR obligations and obligations resulting from the CFR when applying EU law.

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#### **CoE Guideline 10 — Conditions of detention pending removal**

1. *Persons detained pending removal should normally be accommodated within the shortest possible time in facilities specifically designated for that purpose, offering material conditions and a regime appropriate to their legal situation and staffed by suitably qualified personnel.*
  2. *Such facilities should provide accommodation which is adequately furnished, clean and in a good state of repair, and which offers sufficient living space for the numbers involved. In addition, care should be taken in the design and layout of the premises to avoid, as far as possible, any impression of a 'carceral' environment. Organised activities should include outdoor exercise, access to a day room and to radio/television and newspapers/magazines, as well as other appropriate means of recreation.*
  3. *Staff in such facilities should be carefully selected and receive appropriate training. Member States are encouraged to provide the staff concerned, as far as possible, with training that would not only equip them with interpersonal communication skills but also familiarise them with the different cultures of the detainees. Preferably, some of the staff should have relevant language skills and should be able to recognise possible symptoms of stress reactions displayed by detained persons and take appropriate action. When necessary, staff should also be able to draw on outside support, in particular medical and social support.*
  4. *Persons detained pending their removal from the territory should not normally be held together with ordinary prisoners, whether convicted or on remand. Men and women should be separated from the opposite sex if they so wish; however, the principle of the unity of the family should be respected and families should therefore be accommodated accordingly.*
  5. *National authorities should ensure that the persons detained in these facilities have access to lawyers, doctors, non-governmental organisations, members of their families, and the UNHCR, and that they are able to communicate with the outside world, in accordance with the relevant national regulations. Moreover, the functioning of these facilities should be regularly monitored, including by recognised independent monitors.*
  6. *Detainees shall have the right to file complaints for alleged instances of ill-treatment or for failure to protect them from violence by other detainees. Complainants and witnesses shall be protected against any ill-treatment or intimidation arising as a result of their complaint or of the evidence given to support it.*
  7. *Detainees should be systematically provided with information which explains the rules applied in the facility and the procedure applicable to them and sets out their rights and obligations. This information should be available in the languages most commonly used by those concerned and, if necessary, recourse should be made to the services of an interpreter. Detainees should be informed of their entitlement to contact a lawyer of their choice, the competent diplomatic representation of their country, international organisations such as the UNHCR and the International Organisation for Migration (IOM), and non-governmental organisations. Assistance should be provided in this regard.*
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**CPT standards on immigration detention — extracts**

29. (detention facilities). [...] Obviously, such centres should provide accommodation which is adequately-furnished, clean and in a good state of repair, and which offers sufficient living space for the numbers involved. Further, care should be taken in the design and layout of the premises to avoid as far as possible any impression of a carceral environment. As regards regime activities, they should include outdoor exercise, access to a day room and to radio/television and newspapers/magazines, as well as other appropriate means of recreation (e.g. board games, table tennis). The longer the period for which persons are detained, the more developed should be the activities which are offered to them.

The staff of centres for immigration detainees has a particularly onerous task. Firstly, there will inevitably be communication difficulties caused by language barriers. Secondly, many detained persons will find the fact that they have been deprived of their liberty when they are not suspected of any criminal offence difficult to accept. Thirdly, there is a risk of tension between detainees of different nationalities or ethnic groups. Consequently, the CPT places a premium upon the supervisory staff in such centres being carefully selected and receiving appropriate training. As well as possessing well-developed qualities in the field of interpersonal communication, the staff concerned should be familiarised with the different cultures of the detainees and at least some of them should have relevant language skills. Further, they should be taught to recognise possible symptoms of stress reactions displayed by detained persons (whether post-traumatic or induced by socio-cultural changes) and to take appropriate action.

79. Conditions of detention for irregular migrants should reflect the nature of their deprivation of liberty, with limited restrictions in place and a varied regime of activities. For example, detained irregular migrants should have every opportunity to remain in meaningful contact with the outside world (including frequent opportunities to make telephone calls and receive visits) and should be restricted in their freedom of movement within the detention facility as little as possible. Even when conditions of detention in prisons meet these requirements — and this is certainly not always the case — the CPT considers the detention of irregular migrants in a prison environment to be fundamentally flawed, for the reasons indicated above.
82. The right of access to a lawyer should include the right to talk with a lawyer in private, as well as to have access to legal advice for issues related to residence, detention and deportation. This implies that when irregular migrants are not in a position to appoint and pay for a lawyer themselves, they should benefit from access to legal aid.

Further, all newly arrived detainees should be promptly examined by a doctor or by a fully-qualified nurse reporting to a doctor. The right of access to a doctor should include the right — if an irregular migrant so wishes — to be examined by a doctor of his/her choice; however, the detainee might be expected to meet the cost of such an examination.

Notifying a relative or third party of one's choice about the detention measure is greatly facilitated if irregular migrants are allowed to keep their mobile phones during deprivation of liberty or at least to have access to them.

90. The assessment of the state of health of irregular migrants during their deprivation of liberty is an essential responsibility in relation to each individual detainee and in relation to a group of irregular migrants as a whole. The mental and physical health of irregular migrants may be negatively affected by previous traumatic experiences. Further, the loss of accustomed personal and cultural surroundings and uncertainty about one's future may lead to mental deterioration, including exacerbation of pre-existing symptoms of depression, anxiety and post-traumatic disorder.
91. At a minimum, a person with a recognised nursing qualification must be present on a daily basis at all centres for detained irregular migrants. Such a person should, in particular, perform the initial medical screening of new arrivals (in particular for transmissible diseases, including tuberculosis), receive requests to see a doctor, ensure the provision and distribution of prescribed medicines, keep the medical documentation and supervise the general conditions of hygiene.
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**2006 European Prison Rules — Extracts****Accommodation**

- 18.1 The accommodation provided for prisoners, and in particular all sleeping accommodation, shall respect human dignity and, as far as possible, privacy, and meet the requirements of health and hygiene, due regard being paid to climatic conditions and especially to floor space, cubic content of air, lighting, heating and ventilation.



18.2 In all buildings where prisoners are required to live, work or congregate:

- a. the windows shall be large enough to enable the prisoners to read or work by natural light in normal conditions and shall allow the entrance of fresh air except where there is an adequate air conditioning system;
- b. artificial light shall satisfy recognised technical standards; and
- c. there shall be an alarm system that enables prisoners to contact the staff without delay.

#### Hygiene

19.1 All parts of every prison shall be properly maintained and kept clean at all times.

19.2 When prisoners are admitted to prison the cells or other accommodation to which they are allocated shall be clean.

19.3 Prisoners shall have ready access to sanitary facilities that are hygienic and respect privacy.

19.4 Adequate facilities shall be provided so that every prisoner may have a bath or shower, at a temperature suitable to the climate, if possible daily but at least twice a week (or more frequently if necessary) in the interest of general hygiene.

19.5 Prisoners shall keep their persons, clothing and sleeping accommodation clean and tidy.

19.6 The prison authorities shall provide them with the means for doing so including toiletries and general cleaning implements and materials.

19.7 Special provision shall be made for the sanitary needs of women.

#### Clothing and bedding

20.1 Prisoners who do not have adequate clothing of their own shall be provided with clothing suitable for the climate.

20.2 Such clothing shall not be degrading or humiliating.

20.3 All clothing shall be maintained in good condition and replaced when necessary.

20.4 Prisoners who obtain permission to go outside prison shall not be required to wear clothing that identifies them as prisoners.

21. Every prisoner shall be provided with a separate bed and separate and appropriate bedding, which shall be kept in good order and changed often enough to ensure its cleanliness.

#### Nutrition

22.1 Prisoners shall be provided with a nutritious diet that takes into account their age, health, physical condition, religion, culture and the nature of their work.

22.2 The requirements of a nutritious diet, including its minimum energy and protein content, shall be prescribed in national law.

22.3 Food shall be prepared and served hygienically.

22.4 There shall be three meals a day with reasonable intervals between them.

22.5 Clean drinking water shall be available to prisoners at all times.

22.6 The medical practitioner or a qualified nurse shall order a change in diet for a particular prisoner when it is needed on medical grounds.

#### Prison regime

25.1 The regime provided for all prisoners shall offer a balanced programme of activities.

25.2 This regime shall allow all prisoners to spend as many hours a day outside their cells as are necessary for an adequate level of human and social interaction.

25.3 This regime shall also provide for the welfare needs of prisoners.

25.4 Particular attention shall be paid to the needs of prisoners who have experienced physical, mental or sexual abuse.

*Exercise and recreation*

- 27.1 Every prisoner shall be provided with the opportunity of at least one hour of exercise every day in the open air, if the weather permits.
- 27.2 When the weather is inclement alternative arrangements shall be made to allow prisoners to exercise.
- 27.3 Properly organised activities to promote physical fitness and provide for adequate exercise and recreational opportunities shall form an integral part of prison regimes.
- 27.4 Prison authorities shall facilitate such activities by providing appropriate installations and equipment.
- 27.5 Prison authorities shall make arrangements to organise special activities for those prisoners who need them.
- 27.6 Recreational opportunities, which include sport, games, cultural activities, hobbies and other leisure pursuits, shall be provided and, as far as possible, prisoners shall be allowed to organise them.
- 27.7 Prisoners shall be allowed to associate with each other during exercise and in order to take part in recreational activities.

*Freedom of thought, conscience and religion*

- 29.1 Prisoners' freedom of thought, conscience and religion shall be respected.
- 29.2 The prison regime shall be organised so far as is practicable to allow prisoners to practise their religion and follow their beliefs, to attend services or meetings led by approved representatives of such religion or beliefs, to receive visits in private from such representatives of their religion or beliefs and to have in their possession books or literature relating to their religion or beliefs.
- 29.3 Prisoners may not be compelled to practise a religion or belief, to attend religious services or meetings, to take part in religious practices or to accept a visit from a representative of any religion or belief.

*Ethnic or linguistic minorities*

- 38.1 Special arrangements shall be made to meet the needs of prisoners who belong to ethnic or linguistic minorities.
- 38.2 As far as practicable the cultural practices of different groups shall be allowed to continue in prison.
- 38.3 Linguistic needs shall be met by using competent interpreters and by providing written material in the range of languages used in a particular prison.

*Health care*

- 40.3 Prisoners shall have access to the health services available in the country without discrimination on the grounds of their legal situation.
- 40.4 Medical services in prison shall seek to detect and treat physical or mental illnesses or defects from which prisoners may suffer.
- 40.5 All necessary medical, surgical and psychiatric services including those available in the community shall be provided to the prisoner for that purpose.

*Medical and health care personnel*

- 41.1 Every prison shall have the services of at least one qualified general medical practitioner.
- 41.2 Arrangements shall be made to ensure at all times that a qualified medical practitioner is available without delay in cases of urgency.
- 41.3 Where prisons do not have a full-time medical practitioner, a part-time medical practitioner shall visit regularly.
- 41.4 Every prison shall have personnel suitably trained in health care.
- 41.5 The services of qualified dentists and opticians shall be available to every prisoner.

*Duties of the medical practitioner*

- 42.1 *The medical practitioner or a qualified nurse reporting to such a medical practitioner shall see every prisoner as soon as possible after admission, and shall examine them unless this is obviously unnecessary.*
- 42.2 *The medical practitioner or a qualified nurse reporting to such a medical practitioner shall examine the prisoner if requested at release, and shall otherwise examine prisoners whenever necessary.*
- 42.3 *When examining a prisoner the medical practitioner or a qualified nurse reporting to such a medical practitioner shall pay particular attention to:*
- a. observing the normal rules of medical confidentiality;*
  - b. diagnosing physical or mental illness and taking all measures necessary for its treatment and for the continuation of existing medical treatment;*
  - c. recording and reporting to the relevant authorities any sign or indication that prisoners may have been treated violently;*
  - d. dealing with withdrawal symptoms resulting from use of drugs, medication or alcohol;*
  - e. identifying any psychological or other stress brought on by the fact of deprivation of liberty;*
  - f. isolating prisoners suspected of infectious or contagious conditions for the period of infection and providing them with proper treatment;*
  - g. ensuring that prisoners carrying the HIV virus are not isolated for that reason alone;*
  - h. noting physical or mental defects that might impede resettlement after release;*
  - i. determining the fitness of each prisoner to work and to exercise; and*
  - j. making arrangements with community agencies for the continuation of any necessary medical and psychiatric treatment after release, if prisoners give their consent to such arrangements.*

*Health care provision*

- 46.1 *Sick prisoners who require specialist treatment shall be transferred to specialised institutions or to civil hospitals, when such treatment is not available in prison.*
- 46.2 *Where a prison service has its own hospital facilities, they shall be adequately staffed and equipped to provide the prisoners referred to them with appropriate care and treatment.*
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**16. DETENTION OF MINORS AND FAMILIES**

*Legal basis: Return Directive — Article 17*

- 1. Unaccompanied minors and families with minors shall only be detained as a measure of last resort and for the shortest appropriate period of time.*
- 2. Families detained pending removal shall be provided with separate accommodation guaranteeing adequate privacy.*
- 3. Minors in detention shall have the possibility to engage in leisure activities, including play and recreational activities appropriate to their age, and shall have, depending on the length of their stay, access to education.*
- 4. Unaccompanied minors shall as far as possible be provided with accommodation in institutions provided with personnel and facilities which take into account the needs of persons of their age.*
- 5. The best interests of the child shall be a primary consideration in the context of the detention of minors pending removal.*

The Return Directive allows for the detention of unaccompanied minors and of families with minors for the purpose of removal as a measure of last resort and for the shortest appropriate period of time, provided that specific safeguards are duly respected.

In addition to such safeguards set by Article 17 of the Return Directive, the principles of Article 15 of that Directive applicable to the general rules on detention must be respected, notably detention must only be used as a measure of last resort, a viable range of effective alternatives to detention must be available, and an individual assessment of each case must be conducted (see section 14). The best interests of the child must always be a primary consideration in the context of detention of minors and families, Member States are encouraged to involve child protection bodies in all matters related to detention and, where there are grounds for detention, everything possible must be done to ensure that a viable range of effective alternatives to detention for minors (both unaccompanied and with their families) is available and accessible.

The UNHCR <sup>(1)</sup> and the FRA <sup>(2)</sup> provide some examples of good practices on alternatives to detention for unaccompanied minors and families with children.

The Commission recommends that national legislation should not preclude the possibility to place minors in detention, where this is strictly necessary to ensure the execution of a final return decision, and insofar as less coercive measures cannot be applied effectively in the individual case.

The text of Article 17 of the Return Directive corresponds closely to the text of the CoE Guideline 11 'Children and families'. Further concrete guidance can be found in the commentary to this Guideline:

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### CoE Guideline 11 — Children and families

#### Commentary

1. Paragraphs 1, 3 and 5 of this Guideline are inspired from the relevant provisions of the Convention on the Rights of the Child, adopted and opened for signature, ratification and accession by General Assembly Resolution 44/25 of 20 November 1989 and ratified by all the Member States of the Council of Europe. With respect to paragraph 2, it could be recalled that the right to respect for family life granted under Article 8 ECHR also applies in the context of detention.
2. Concerning the deprivation of liberty of children, Article 37 of the Convention on the Rights of the Child provides in particular that 'arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time' (Article. 37(b)). According to Article 20(1) of this Convention, 'A child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State'.
3. Inspiration was also found in para. 38 of the United Nations Rules for the protection of juveniles deprived of their liberty, adopted by General Assembly Resolution 45/113 of 14 December 1990, which apply to any deprivation of liberty, understood as 'any form of detention or imprisonment or the placement of a person in a public or private custodial setting, from which this person is not permitted to leave at will, by order of any judicial, administrative or other public authority' (para. 11, b). According to para. 38: 'Every juvenile of compulsory school age has the right to education suited to his or her needs and abilities and designed to prepare him or her for return to society. Such education should be provided outside the detention facility in community schools wherever possible and, in any case, by qualified teachers through programmes integrated with the education system of the country so that, after release, juveniles may continue their education without difficulty. Special attention should be given by the administration of the detention facilities to the education of juveniles of foreign origin or with particular cultural or ethnic needs. Juveniles who are illiterate or have cognitive or learning difficulties should have the right to special education'.
4. The last paragraph reflects the guiding principle of the Convention on the rights of the child whose Article 3(1) states that 'In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration'. As a matter of course, this also applies to decisions concerning the holding of children facing removal from the territory.

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(1) UNHCR, Options paper 1: Options for governments on care arrangements and alternatives to detention for children and families, 2015, available at: <http://www.unhcr.org/553f58509.pdf>

(2) European Union Agency for Fundamental Rights, European legal and policy framework on immigration detention of children, 2017, available at: [http://fra.europa.eu/sites/default/files/fra\\_uploads/fra-2017-immigration-detention-children\\_en.pdf](http://fra.europa.eu/sites/default/files/fra_uploads/fra-2017-immigration-detention-children_en.pdf)

As regards detention of minors, the CPT standards provide for the following rules which should be respected by Member States whenever they apply — exceptionally and as a measure of last resort — detention:

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**CPT standards related to detention of minors — extracts**

97. *The CPT considers that every effort should be made to avoid resorting to the deprivation of liberty of an irregular migrant who is a minor. Following the principle of the 'best interests of the child', as formulated in Article 3 of the United Nations Convention on the Rights of the Child, detention of children, including unaccompanied and separated children, is rarely justified and, in the Committee's view, can certainly not be motivated solely by the absence of residence status. When, exceptionally, a child is detained, the deprivation of liberty should be for the shortest possible period of time; all efforts should be made to allow the immediate release of unaccompanied or separated children from a detention facility and their placement in more appropriate care. Further, owing to the vulnerable nature of a child, additional safeguards should apply whenever a child is detained, particularly in those cases where the children are separated from their parents or other carers, or are unaccompanied, without parents, carers or relatives.*
98. *As soon as possible after the presence of a child becomes known to the authorities, a professionally qualified person should conduct an initial interview, in a language the child understands. An assessment should be made of the child's particular vulnerabilities, including from the standpoints of age, health, psychosocial factors and other protection needs, including those deriving from violence, trafficking or trauma. Unaccompanied or separated children deprived of their liberty should be provided with prompt and free access to legal and other appropriate assistance, including the assignment of a guardian or legal representative. Review mechanisms should also be introduced to monitor the ongoing quality of the guardianship.*
99. *Steps should be taken to ensure a regular presence of, and individual contact with, a social worker and a psychologist in establishments holding children in detention. Mixed-gender staffing is another safeguard against ill-treatment; the presence of both male and female staff can have a beneficial effect in terms of the custodial ethos and foster a degree of normality in a place of detention. Children deprived of their liberty should also be offered a range of constructive activities (with particular emphasis on enabling a child to continue his or her education).*
100. *In order to limit the risk of exploitation, special arrangements should be made for living quarters that are suitable for children, for example, by separating them from adults, unless it is considered in the child's best interests not to do so. This would, for instance, be the case when children are in the company of their parents or other close relatives. In that case, every effort should be made to avoid splitting up the family.*
131. *Effective complaints and inspection procedures are basic safeguards against ill-treatment in all places of detention, including detention centres for juveniles. Juveniles (as well as their parents or legal representatives) should have avenues of complaint open to them within the establishments' administrative system and should be entitled to address complaints — on a confidential basis — to an independent authority. Complaints procedures should be simple, effective and child-friendly, particularly regarding the language used. Juveniles (as well as their parents or legal representatives) should be entitled to seek legal advice about complaints and to benefit from free legal assistance when the interests of justice so require.*
132. *The CPT also attaches particular importance to regular visits to all detention centres for juveniles by an independent body, such as a visiting committee, a judge, the children's Ombudsman or the National Preventive Mechanism (established under the Optional Protocol to the United Nations Convention against Torture — OPCAT) with authority to receive — and, if necessary, take action on — juveniles' complaints or complaints brought by their parents or legal representatives, to inspect the accommodation and facilities and to assess whether these establishments are operating in accordance with the requirements of national law and relevant international standards. Members of the inspection body should be proactive and enter into direct contact with juveniles, including by interviewing inmates in private.*

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**17. EMERGENCY SITUATIONS**

Legal basis: Return Directive — Article 18

1. *In situations where an exceptionally large number of third-country nationals to be returned places an unforeseen heavy burden on the capacity of the detention facilities of a Member State or on its administrative or judicial staff, such a Member State may, as long as the exceptional situation persists, decide to allow for periods for judicial review longer than those provided for under the third subparagraph of Article 15(2) and to take urgent measures in respect of the conditions of detention derogating from those set out in Articles 16(1) and 17(2).*

2. When resorting to such exceptional measures, the Member State concerned shall inform the Commission. It shall also inform the Commission as soon as the reasons for applying these exceptional measures have ceased to exist.
3. Nothing in this Article shall be interpreted as allowing Member States to derogate from their general obligation to take all appropriate measures, whether general or particular, to ensure fulfilment of their obligations under this Directive.

Scope of possible derogations limited to three provisions: Article 18 provides for a possibility for Member States not to apply three detention-related provisions of the Directive — (i) the obligation to provide for a speedy initial judicial review of detention; (ii) the obligation to detain only in specialised facilities; and (iii) the obligation to provide separate accommodation guaranteeing adequate privacy to families — in emergency situations involving the sudden arrival of large numbers of irregular migrants. Derogations to other rules contained in the Return Directive are not possible.

Transposition into national law is a precondition for a possible application of the emergency clause: Article 18 describes and limits the situations covered, as well as the scope of possible derogations and information obligations to the Commission. If a Member State wishes to have the option to apply this safeguard clause in case of emergency situations, it must have properly transposed it beforehand <sup>(1)</sup> — as a possibility and in line with the criteria of Article 18 — into its national legislation. NB: contrary to safeguard clauses contained in regulations (for example those in the SBC related to the reintroduction of internal border control), safeguard clauses in Directives must be transposed into national law before they can be used.

Member States must inform the Commission when resorting to these measures and when these cease to apply. Such information should be transmitted by means of the usual official channels, i.e. via the Permanent Representation to the Secretariat-General of the European Commission.

#### 18. TRANSPOSITION, INTERPRETATION AND TRANSITIONAL ARRANGEMENTS

Direct effect of the Return Directive in case of insufficient or belated transposition: according to the doctrine developed by the ECJ, provisions of a directive which confer rights on individuals and which are sufficiently clear and unconditional become directly applicable as of the end of the time-limit for the implementation of the Directive. Many of the provisions of the Return Directive fulfil these requirements and have to be directly applied by national administrative and judicial authorities in those cases in which Member States have not transposed (or insufficiently transposed) certain provisions of the Directive. This applies in particular to the provisions related to:

- respect for the principle of *non-refoulement* (Articles 5 and 9 of the Return Directive),
- the requirement that persons to be returned should normally be provided with an appropriate period for voluntary departure of between seven and thirty days (Article 7 of the Return Directive),
- limitations on the use of coercive measures in connection with forced returns (Article 8 of the Return Directive),
- right of unaccompanied minors who are subject of return procedures to receive assistance by appropriate bodies other than the authorities enforcing return and the obligation on Member States to make sure that unaccompanied minors are only returned to a member of their family, a nominated guardian or adequate reception facilities in the State of return (Article 10 of the Return Directive),
- limitations on the length of entry bans and need for individualised case by case examination (Article 11 of the Return Directive) — expressly confirmed by the judgment of the ECJ in Case C-297/12, *Filev and Osmani* (paragraph 55),
- procedural safeguards, including the right to a written, reasoned return decision, as well as the right to an effective remedy and to legal and linguistic assistance (Articles 12 and 13 of the Return Directive),
- limitations on the use of detention and maximum time limits for detention (Article 15 of the Return Directive) and right to human and dignified detention conditions (Article 16 of the Return Directive) — expressly confirmed by the judgment of the ECJ in Case C-61/11, *El Dridi* (paragraphs 46 and 47),
- limitations and special safeguards relating to the detention of minors and families (Article 17 of the Return Directive).

<sup>(1)</sup> As regards the specific situation of Switzerland, Norway, Iceland and Liechtenstein: see related footnote in section 2 above.

Preliminary references to the ECJ: Article 267 TFEU gives the ECJ jurisdiction to give preliminary rulings concerning the interpretation and validity of the Return Directive. Where such a question is raised before any court or tribunal of a Member State, that court or tribunal *may*, if it considers that a decision on the question is necessary to enable it to give judgment, request the ECJ to give a ruling thereon. Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal *shall* bring the matter before the Court. If such a question is raised in a case pending before a court or tribunal with regard to a person in detention, the ECJ shall act by means of an accelerated urgency procedure. Preliminary references have already played an important role for assuring a harmonised interpretation of several key provisions of the Return Directive.

Members of courts or tribunals in Member States are encouraged to make continued use of preliminary references and to ask for authentic interpretation to the ECJ whenever this appears necessary.

Transitional arrangements for cases/procedures related to periods before 24 December 2010: Member States must make sure that all persons covered by the scope of the Directive benefit from the substantive safeguards and rights accorded by the Directive as of 24 December 2010 (as of the accession date in case of new Member States). Whilst it may be legitimate to continue national return procedures launched in accordance with pre-transposition national legislation, this must not undermine in substance the rights afforded by the Directive, such as, for example, limitation on detention and use of coercive measures, procedural safeguards including right to a written decision and to appeal against it, priority for voluntary departure. For any return not already carried out by 24 December 2010, a written return decision must be issued in accordance with the terms of Article 12 of the Directive, and an effective remedy against this decision must be afforded in accordance with the terms of Article 13 of the Directive.

'Historic' entry bans issued before 24 December 2010 must be adapted to the requirements of the Return Directive (see section 11.9). Periods of detention completed before the rules in the Return Directive became applicable must be taken into account for the calculation of the overall maximum time limit provided for in the Return Directive (see section 14.4.2).

Introduction of a derogation from the scope at a later stage (after 2010): Member States may decide to make use of the derogation foreseen in Article 2 ('border cases' and criminal law cases) at a later stage. A change to national legislation must not have disadvantageous consequences with regard to those persons who were already able to avail themselves of the effects of the Return Directive (see section 2).

## 19. SOURCES AND REFERENCE DOCUMENTS

This Handbook is based on the following sources:

1. Compiled minutes of the Contact Group Return Directive.
2. Extracts from relevant ECJ cases (keywords and name of Member State concerned in brackets):
  - Judgment of 30 November 2009, *Kadzoev* (C-357/09 PPU), ECLI:EU:C:2009:741 (detention, reasons for prolongation; link to asylum related detention — BG)
  - Judgment of 28 April 2011, *El Dridi* (C-61/11 PPU), ECLI:EU:C:2011:268 (criminalisation, penalisation of illegal stay by imprisonment — IT)
  - Judgment of 6 December 2011, *Achughbabian* (C-329/11), ECLI:EU:C:2011:807 (criminalisation, penalisation of illegal stay by imprisonment — FR)
  - Judgment of 6 December 2012, *Sagor* (C-430/11), ECLI:EU:C:2012:777 (criminalisation, penalisation of illegal stay by fine; expulsion order; house arrest — IT)
  - Order of 21 March 2013, *Mbaye* (C-522/11), ECLI:EU:C:2013:190 (criminalisation of illegal stay — IT)
  - Judgment of 30 May 2013, *Arslan* (C-534/11) ECLI:EU:C:2013:343 (return vs asylum related detention — CZ)
  - Judgment of 10 September 2013, *G. and R.* (C-383/13 PPU), ECLI:EU:C:2013:533 (right to be heard before prolonging detention — NL)
  - Judgment of 19 September 2013, *Filev and Osmani* (C-297/12), ECLI:EU:C:2013:569 (entry bans, need to determine *ex officio* length; historic entry bans — DE)

- Judgment of 5 June 2014, *Mahdi* (C-146/14 PPU), ECLI:EU:C:2014:1320 (detention, reasons for prolongation and judicial supervision — BG)
- Judgment of 3 July 2014, *Da Silva* (C-189/13), ECLI:EU:C:2014:2043 (criminalisation, illegal entry — FR)
- Judgment of 17 July 2014, *Bero* (C-473/13) and *Bouzalmate* (C-514/13), ECLI:EU:C:2014:2095 (detention conditions, obligation to provide for specialised facilities — DE)
- Judgment of 17 July 2014, *Pham* (C-474/13), ECLI:EU:C:2014:2096 (detention conditions — DE)
- Judgment of 6 November 2014, *Mukarubega* (C-166/13), ECLI:EU:C:2014:2336 (right to be heard before issuing a return decision — FR)
- Judgment of 11 December 2014 *Boudjlida* (C-249/13), ECLI:EU:C:2014:2431 (right to be heard before issuing a return decision — FR)
- Judgment of 18 December 2014, *Abdida* (C-562/13), ECLI:EU:C:2014:2453 (rights pending postponed return — BE)
- Judgment of 23 April 2015, *Zaizoune* (C-38/14), ECLI:EU:C:2015:260 (obligation to issue return decision — ES)
- Judgment of 11 June 2015, *Zh. and O.* (C-554/13), ECLI:EU:C:2015:377 (criteria for determining voluntary departure period — NL)
- Judgment of 1 October 2015, *Skerdjan Celaj* (C-290/14), ECLI:EU:C:2015:640 (criminalisation of non-compliance with an entry ban — IT)
- Judgment of 15 February 2016, *J.N.* (C-601/15 PPU), ECLI:EU:C:2016:84 (enforcement of return decision following a rejection of an application for international protection — NL)
- Judgment of 7 June 2016, *Affum* (C-47/15), ECLI:EU:C:2016:408 (definition of illegal stay, criminalisation, illegal entry — FR)
- Judgment of 15 March 2017, *Al Chodor and others* (C-528/15), ECLI:EU:C:2017:213 (definition of risk of absconding in Dublin procedures — CZ)
- Judgment of 26 July 2017, *Ouhrami* (C-225/16), ECLI:EU:C:2017:590 (date of validity of entry ban — NL)

### 3. The EU return *acquis*:

- 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
- Council Directive 2001/40/EC of 28 May 2001 on the mutual recognition of decisions on the expulsion of third-country nationals
- Council Directive 2003/110/EC of 25 November 2003 on assistance in cases of transit for the purposes of removal by air
- Council Decision 2004/191/EC of 23 February 2004 setting out the criteria and practical arrangements for the compensation of the financial imbalances resulting from the application of Directive 2001/40/EC
- Council Decision 2004/573/EC of 29 April 2004 on the organisation of joint flights for removals from the territory of two or more Member States, of third-country nationals who are subjects of individual removal orders
- Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard and amending Regulation (EU) 2016/399 of the European Parliament and of the Council and repealing Regulation (EC) No 863/2007 of the European Parliament and of the Council, Council Regulation (EC) No 2007/2004 and Council Decision 2005/267/EC
- Commission Recommendation of 7 March 2017 on making returns more effective when implementing the Directive 2008/115/EC of the European Parliament and of the Council, C(2017) 1600
- Communication from the Commission of 12 April 2017 to the European Parliament and to the Council, 'The protection of children in migration', COM(2017) 211 final.

### 4. Relevant documents of the Council of Europe:

- 20 Guidelines on forced return, adopted by the Council of Europe Committee of Ministers on 4 May 2005 and commentaries (September 2005, ISBN 92-871-5809-6)



- CPT standards (document CPT/Inf/E (2002) 1 — Rev. 2013)
  - CPT factsheet on immigration detention (document CPT/Inf(2017) 3 of March 2017)
  - Recommendation Rec(2006)2 of the Committee of Ministers to Member States on the European Prison Rules (Adopted by the Committee of Ministers on 11 January 2006 at the 952nd meeting of the Ministers' Deputies)
5. Relevant documents of the European Union Agency on Fundamental Rights:
- Guidance document on the fundamental rights considerations of apprehending migrants in an irregular situation, October 2012
  - Handbook on European law relating to asylum, borders and immigration, co-edited by FRA and ECtHR, 2014
  - Alternatives to detention for asylum seekers and people in return procedures, October 2015
  - Note — Fundamental rights of migrants in an irregular situation who are not removed, available at: <http://fra.europa.eu/en/Non-removed-migrants-rights>
  - European legal and policy framework on immigration detention of children, June 2017, available at: <http://fra.europa.eu/en/publication/2017/child-migrant-detention>.
6. Reports of Schengen evaluations in the field of return

## 20. ABBREVIATIONS

CFR: Charter of Fundamental Rights of the European Union

CoE: Council of Europe

ECHR: European Convention on Human Rights

ECtHR: European Court of Human Rights

ECJ: Court of Justice of the European Union

EEA: European Economic Area

FRA: European Union Agency for Fundamental Rights

Member States: Member States bound by the Return Directive (all EU Member States except UK and Ireland), as well as Switzerland, Norway, Iceland and Liechtenstein

SBC: Schengen Borders Code

SIC: Schengen Implementing Convention

SIS: Schengen Information System

TEU: Treaty on European Union

TFEU: Treaty on the Functioning of the European Union

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