

Support to Implementation of EC Readmission Agreements with the Republic of Moldova,  
the Russian Federation and Ukraine: Facilitation of Assisted Voluntary Return and Reintegration

**SIREADA**



# **LEGISLATIVE REVIEW OF AVRR PROCEDURES IN THE REPUBLIC OF MOLDOVA**

Prepared by: Christian Mommers

JANUARY 2013

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The European Union is made up of 27 Member States who have decided to gradually link together their know-how, resources and destinies. Together, during a period of enlargement of 50 years, they have built a zone of stability, democracy and sustainable development whilst maintaining cultural diversity, tolerance and individual freedoms.

The European Union is committed to sharing its achievements and its values with countries and peoples beyond its borders.

The European Commission is the EU's executive body.

In the context of increased migration flows from and to Moldova, which imposes a range of important challenges to the Moldovan Government, the International Organization for Migration launched the project "Support to Implementation of EC Readmission Agreements with the Republic of Moldova, the Russian Federation and Ukraine: Facilitation of Assisted Voluntary Return and Reintegration (SIREADA)" 2011-2013, financed by the European Union and co-funded by Austrian Development Agency. Implementation of this regional project in Moldova aims at improving the country's migration management system through the capacity building of Moldovan relevant agencies in order to make it fully effective, self-reliant and able to manage various migration challenges, especially related to the implementation of the EC-Moldova Readmission Agreement.

The Project built directly on previous EU-funded and IOM-implemented regional projects on Readmission, and, namely GUMIRA (in Ukraine and Moldova) and MIGRABEL-MIGRAMOL (in Belarus and Moldova). The SIREADA constitutes a natural continuation of and a synergistic supplement to past and on-going efforts in this area, as it sustains key migration management operations in the region, institutionalizes international best practices, and ensures a smooth transition to a sustainable return system in the country with due attention to human rights and basic needs of migrants.

#### ***Overall Project objectives:***

Support to the implementation of EC Readmission Agreements with the Republic of Moldova, the Russian Federation and Ukraine, promoting sustainable reintegration of voluntary returnees and serving the economic and political interests of countries of origin, transit and destination.

#### ***Specific Project objectives in Moldova:***

Responding to the EU and Moldova priority to support the implementation of the Readmission and Visa Facilitation Agreements including:

- facilitating social and professional reintegration of the readmitted nationals of the parties;
- Enhancing the reception capacities and providing assistance to the third country nationals apprehended or readmitted for illegal entry for voluntary return to their countries of origin in line with international standards;
- Contributing to smooth transition to a sustainable return system in the country.

#### **For more information:**

Official web site of the EU: [www.europa.eu](http://www.europa.eu)

Delegation of the European Union in the Republic of Moldova:

E-mail: [delegation-moldova@eeas.europa.eu](mailto:delegation-moldova@eeas.europa.eu)

**Key activities in Moldova:**

1. Assisted Voluntary Return & Reintegration of Readmitted, Stranded and Apprehended Third-Country Nationals from Moldova.
2. Reception of & Reintegration Assistance to Returned or Readmitted Moldovan Nationals.
3. Special Assistance Fund for Migrants placed under public custody.
4. Monitoring of Services at the Migrant Accommodation Centre through the Observatory Mechanism
5. Legislative Review of Assisted Voluntary Return procedures in Moldova

The action was aimed at harmonizing the relevant Moldovan legislation to EU standards covering detention, AVR procedures, and migrant rights through legal review for:

- Detailed assessment of the migration legislation to identify the links with EU norms regulating the AVR procedures in accordance to the EU standards covering detention and migrant rights, as well as associated departmental procedures and recommendations for legislative amendment;
- Informing the Moldovan Government, relevant ministers and officials of the results of the assessment review;
- Development of the necessary amendments and of a training course that ensures that the newly amended legislation and procedures are included in the Training Curricula of the MIA and other relevant agencies.

The present report prepared by Netherland expert Christian Mommers, constitutes the result of this action and will be disseminated to interested partners and general public. The Bureau of Migration and Asylum, of the Ministry of Interior of the RM has examined the report and considered appropriate to take into consideration the expert's suggestions for improving the legislative and normative framework in the field.

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The present report evaluates the position of the institution of assisted voluntary return and reintegration (AVRR) in the current legal framework applicable to foreigners in the Republic of Moldova. Additionally, it seeks to identify possibilities for further embedding AVRR in that legal framework, to improve its effectiveness as a migration management tool in the Republic of Moldova, and to maximize the benefits of this instrument for returnees, in comparison to forced return. This study is part of the project *Support to the Implementation of EC Readmission Agreements with the Republic of Moldova, the Russian Federation and Ukraine: Facilitation of Assisted Voluntary Return and Return and Reintegration* (SIREADA), implemented by the International Organization for Migration (IOM). The study builds, inter alia, on the results of a previous project, GUMIRA, which related to the specific issue of readmission.<sup>1</sup>

This evaluation is undertaken on the basis of international and European (EU and Council of Europe) legal standards, as well as best practices in the implementation of voluntary return programmes. It consists of a review of various legal instruments applicable to foreigners in the Republic of Moldova, with a primary focus on the situation of those foreigners who are, or are soon to be, under an obligation to return. It identifies areas in which strengthening of the AVRR institution is possible, and sets out some concrete recommendations to achieve this.

The results were achieved by means of a desk review of the appropriate legal instruments, and a comparison with legal, policy-based and academic documents pertaining to voluntary return assistance programmes in various EU/EEA Member States, as well as those policies pursued by the EU and the Council of Europe. This desk review was supplemented by discussions with relevant governmental, non-governmental and international stakeholders during two visits to the Republic of Moldova (5-9 December 2011 and 17-20 January 2012). The input of these stakeholders has been invaluable in the production of this report, and the author extends his gratitude to the various interlocutors for their hospitality and cooperation.

The present report does not purport to provide an exhaustive overview of all relevant issues relating to the issue of AVRR in the Republic of Moldova now and in the future, but rather aims to identify key aspects which need attention in the short term. In this way, it aims to provide a basis for further debate and investigation. It is hoped that it will provide a useful starting point for follow-up on this issue.

The report is divided in two sections. Section I sets out the main standards and best practices on which an effective AVRR institution should be based. It briefly discusses what AVRR is (I.1); why AVRR is a useful and necessary instrument for governmental policy on the return of irregular migrants and rejected asylum seekers (I.2); how the notion of voluntary return (as the granting of a period for meeting the legal obligation

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<sup>1</sup> See Van Krieken and Cernei (2009). Readmission Report Moldova.

to leave the territory of the host state) and AVRR (as a practical instrument to assist return) are interconnected (i.3); what substantive legal standards and best practices can be identified at the EU/Council of Europe level (I.4); and what circumstances specific to Moldova should be taken into consideration in evaluating the state and future possibilities of AVRR as a legislative issue.

Section II subsequently provides the results of the evaluation, as well as recommendations for improvement. This section focuses on the institutionalization of AVRR in the Moldovan legal framework (II.1); to what extent a period for voluntary return is guaranteed in law and whether this is sufficient for providing effective return assistance (II.2); to what extent exit procedures for foreigners wishing to leave Moldova allow for effective voluntary return (II.3); the possible impact on AVRR participation of the imposition of a prohibition of re-entry on persons who are expelled (II.4) and other sanctions applicable to illegally resident foreigners (II.5); and the interconnection between detention and AVRR (II.6).

# I

## AVRR: principles, functions and implementation

### I.1. AVRR in a nutshell

Assisted voluntary return and reintegration (AVR) refers to the practice of providing certain services to migrants<sup>2</sup> to enable and promote their voluntary return. The shapes these AVRR programmes take are diverse, and different approaches exist across EU Member States, and even between different programmes and projects within the same Member State. Common elements of such programmes include the provision of transport from the host country to the country of origin or another, third country; information and counselling on voluntary return possibilities and procedures; assistance in obtaining necessary travel documents; and, increasingly, assistance to promote sustainable socio-economic reintegration in the country of return. For the latter reason, AVR is increasingly referred to as AVRR, assisted voluntary return and reintegration.<sup>3</sup>

AVRR programmes target different groups of migrants, depending on the specific policy interests of the state in question. This may include legal migrants, asylum/protection seekers, rejected asylum seekers and illegal residents. From the perspective of most migrant hosting states, the practice of AVRR is particularly relevant to migrants who do not (or no longer) have authorization to remain in the Member States, and it is this category that this report focuses on primarily.<sup>4</sup>

### I.2. Why AVRR?

#### I.2.1. The role of AVRR

Over a period of more than 30 years, AVRR has grown from a somewhat experimental practice of a handful of European states to *an integral and indispensable element of EU return policy*. It plays a role, inter alia, in ensuring the effective return

<sup>2</sup> “Migrants” will be used here as a generic term to signify a range of persons who do not have the nationality of the host state. This may include (rejected) asylum seekers, persons receiving international protection, legal residents and persons illegally remaining on the territory of the host state. Where appropriate, these different legal categories will be specified. Other terms that will be used are “third country nationals” when dealing with EU legislation (i.e. persons who do not have the nationality of the EU Member State in which they reside or of any of the other EU Member States), and “foreigners” when dealing with the specific situation in Moldova (in section II), since this is the term used in Moldovan legislation.”

<sup>3</sup> To reflect this tendency (also see I.2.1.3), the term AVRR is primarily used in this section.

<sup>4</sup> It should be noted that, even before AVRR programmes were developed for this category, programmes existed to promote the voluntary return of legal migrants, such as guest labourers. Interest in promoting the return of the latter group seemed to have waned for some time, but is now increasingly on the agenda, especially in light of the global economic crisis. See, for example, Plewa, Piotr (2009). Voluntary Return Programmes: Could they Assuage the Effects of the Economic Crisis? Working paper No. 75, Centre on Migration, Policy and Society (COMPAS), University of Oxford (available from: [http://www.compas.ox.ac.uk/fileadmin/files/Publications/working\\_papers/WP\\_2010/WP1075%20Piotr%20Plewa.pdf](http://www.compas.ox.ac.uk/fileadmin/files/Publications/working_papers/WP_2010/WP1075%20Piotr%20Plewa.pdf))

of illegally resident migrants, in protecting the integrity of asylum and immigration systems, and in safeguarding the human rights of migrants who are no longer allowed to remain in the EU. **AVRR is of particular importance in giving effect to the principle that voluntary return should, whenever possible, be given priority over forced return.** This principle, which is a long-standing ‘best practice’ in the EU, has become a legally binding norm, with the entry into force of Directive 2008/115 on common standards and procedures for returning illegally staying third-country nationals (the ‘Returns Directive’).<sup>5</sup>

Broadly speaking, AVRR programmes have traditionally had two primary functions:

1. To make voluntary return *possible*: it facilitates the voluntary return of migrants who would otherwise be unable to do so.
2. To make voluntary return *more attractive*: it increases the relative advantage of voluntary return over ‘alternatives’ such as continued illegal stay or forced return.

Based on developments in the last few years, a third core function of AVRR may be added:

3. To make voluntary return *sustainable*.
- These functions are discussed below in turn.

#### **1.2.1.1. Decreasing practical barriers to voluntary return**

The granting of a possibility for voluntary return would be meaningless for persons who do not have the means to arrange their own return, or who otherwise experience practical barriers to return. Without assistance, therefore, such migrants – even if they wanted to meet the obligation to return – would have to wait until they were forcibly removed. This would unnecessarily delay their return, increase the cost of the return procedure, and expose the migrants to restrictions of their rights. By investing in AVRR, states can prevent such undesirable effects for this group of migrants.

#### **1.2.1.2. Making voluntary return attractive**

In addition to facilitating voluntary return for those who would otherwise be unable, AVRR programmes also seek to make voluntary return attractive. They do so, inter alia, by providing financial or in-kind incentives, by providing information about return possibilities and the comparative advantage of voluntary return over forced return. Such incentives work best in combination with legislative measures that institutionalize this comparative advantage, for example, by refraining from issuing entry bans on AVRR participants (see I.3, II.4.). By making voluntary return more attractive, AVRR programmes seek to *increase the number* of migrants that take up this option.

<sup>5</sup> Official Journal of the EU, L 348/98 of 24 December 2008.

It should be emphasized that the dual functions of making voluntary return possible and attractive usually go hand-in-hand. This is why AVRR programmes usually incorporate elements to remove practical barriers to return, and provide incentives to participation.

#### **1.2.1.3. Promoting sustainable return**

In the last few years, a lot of attention has been devoted to the effects of the return process after the migrant has arrived in the country of origin or a third state (thus the addition of assisted voluntary return *and reintegration*).<sup>6</sup> It is no longer considered enough to merely ensure that migrants leave the host state, and in the largest numbers possible, but also that their return is sustainable. This has different dimensions. Firstly, sustainability can be regarded as permanent return, or at least to ensure that the returnee does not try and illegally re-enter the EU. Secondly, sustainability has a socio-economic dimension: it relates to the possibility of the migrant to rebuild his/her life after return. It also relates to the goal of minimizing the negative impact, or – preferably – maximizing the positive impact of return migration on the receiving community (both the immediate circle of the returnee and the country of return in general). In the latter way, AVRR has become closely connected to the international effort to strengthen the links between migration and development.

The sustainable return element of AVRR has value in its own right, but also interacts with the first two functions. For some migrants, the lack of prospect in their countries of return may constitute an insurmountable barrier to voluntary return. By providing reintegration support, this barrier can be removed, thus helping return migrants who would have otherwise not been able to do so. Also, reintegration assistance as part of AVRR, which is commonly not (or to a much lesser extent) available to forced returnees, increases the attractiveness of AVRR, and can thus act as a means to increase the number of persons interested in voluntary return.

<sup>6</sup> See, for example, EMN (2011). Programmes and Strategies in the EU Member States fostering Assisted Return to and Reintegration in Third Countries. European Migration Network (available from: <http://emn.intrasoft-intl.com/Downloads/prepareShowFiles.do?directoryID=123>). For examples of evaluations of the reintegration components of specific AVRR programmes see: Strand, Arne et al (2008). Return to Dignity, Return to What? Review of the Voluntary Return Programme to Afghanistan. Report R 2008:6, Chr. Michelsen Institute, especially chapter 9 (dealing with the reintegration of Afghan former asylum seekers in Norway) (available from: <http://www.cmi.no/publications/publication/?3055=return-with-dignity-return-to-what>); Chu, Bettina et al (2008). Recommendations for the Return and Reintegration of Rejected Asylum Seekers: Lessons Learned from Returns to Kosovo. Danish Refugee Council/Bayerischer Flüchtlingsrat (dealing with returns from Germany and Denmark to Kosovo) (available from: [http://flygtning.dk/fileadmin/uploads/pdf/Saadan\\_hjaelper\\_vi\\_PDF/asyl\\_PDF/recommendations\\_return\\_and\\_reintegration.pdf](http://flygtning.dk/fileadmin/uploads/pdf/Saadan_hjaelper_vi_PDF/asyl_PDF/recommendations_return_and_reintegration.pdf))

## I.2.2. Effects

### I.2.2.1. For states

From a migration management perspective, AVRR programmes can have positive effects. Firstly, persons who are not, or no longer, allowed to remain may leave their territories earlier than if host states would depend on expulsion alone. This is, *inter alia*, because migrants who have opted to take up voluntary return will be inclined to cooperate in the smooth and timely realization of their return. In some cases, this will also go for countries of origin, on which host states often depend to issue travel documents that make departure of the migrant possible.<sup>7</sup> These factors contribute to a departure which is likely to be quicker than when it has to be enforced. This is evident, for example, from statistics gathered in the Netherlands of the turnaround time for returns within the national AVRR programme. In 2009, of those who had turned to IOM (which implements the Dutch AVR programme) 87 percent had left the country within four weeks.<sup>8</sup> By contrast, the stay in detention for those subject to forced removal was, on average, 97 days in that same year.<sup>9</sup> Data on the speed of departure is readily available only for few EU Member States, but, for the reasons stated above, it is likely that difference between voluntary return and removal in the Dutch case is hardly incidental.

Additionally, and partially in connection to the issue of timeliness, AVRR is also widely considered to be more cost-effective than forced return.<sup>10</sup> If a migrant takes up the possibility of AVRR, the host state might avoid such extremely costly activities as (long-term) detention, arranging special (charter) flights for removal, and escorting the expellee, which in many cases requires significant man-power. In 2005, a report by the National Audit Office of the United Kingdom showed that the costs for an assisted voluntary return of rejected asylum seekers amounted to £ 1,100 per person, whilst the

<sup>7</sup> See, for example, Noll, Gregor (2003). "Return of Persons to States of Origin or Third States" in Aleinikoff, T. Alexander and Vincent Chetail (eds). *Migration and International Legal Norms*. The Hague, T.M.C. Asser: pp. 61-74. Noll notes that especially Southern countries may be less inclined to assist host countries in realizing the return of rejected asylum seekers or illegal migrants if such return is forced. Alternatively, they are likely to be more amenable to cooperate in voluntary return (see pp. 66-67). Also see EMN (2011). *Programmes and Strategies in the EU Member States* (footnote 6 above), which describes the impression supplied by the UK authorities "that third countries tended to cooperate better with Member States which showed an overall policy preference for Assisted Return rather than for Forced Return, as this was a signal that removal constituted a last resort.", p. 54.

<sup>8</sup> IOM Netherlands Annual Report 2009, p. 6 (available from: <http://www.iom-nederland.nl/dsresource?objectid=3699&type=org> [in Dutch only]; IOM Netherlands Annual Report 2010, p. 6 (available from: <http://www.iom-nederland.nl/dsresource?objectid=4546&type=org>)

<sup>9</sup> DJI (2011). *Vreemdelingenbewaring in getal 2006-2010, Dienst Justitiële Inrichtingen* (available from: <http://www.dji.nl/Organisatie/Feiten-en-cijfers/index.aspx> [in Dutch only]). It should also be noted that substantial numbers of migrants put in detention are released after some time because removal has not been realized.

<sup>10</sup> For example, Parliamentary Assembly of the Council of Europe (PACE) (2010). "Voluntary return programmes: an effective, humane and cost effective mechanism for returning irregular migrants", report and recommendation, PACE doc. 12277, 4 June 2010 (available from: [assembly.coe.int/Documents/WorkingDocs/Doc10/EDOC12277.pdf](http://assembly.coe.int/Documents/WorkingDocs/Doc10/EDOC12277.pdf)); EMN (2011). *Programmes and Strategies in the EU Member States* (footnote 6 above), p. 54.

cost of a forced return came to £ 11,000 per person.<sup>11</sup> Statistics from the Netherlands seem to confirm this enormous financial disparity between assisted voluntary returns and removals.<sup>12</sup>

### I.2.2.2. For migrants

AVRR might also have benefits for migrants themselves. Sometimes this benefit is presented as being derived from the "voluntariness" of such return. However, it should be noted that for migrants who are under an obligation to leave the host state, choice is limited: if they do not leave of their own accord they will be subject to forced removal. However, AVRR does present a more narrow choice between taking return into one's own hand or waiting for the host state to take action. The latter option, which may include detention and, if necessary, physical force to remove the migrant, is often highly intrusive, possibly traumatic and usually detrimental to their health and general well-being.<sup>13</sup> Individuals might also find the idea of being forcibly returned to their countries of origin undignified,<sup>14</sup> and prefer to return without escorts, being handed over to the authorities upon return, and generally, upon their own terms. Additionally, AVRR programmes often provide financial incentives to take up return, or even support the post-return reintegration process, which are usually not available when forcibly returned, which may be an important factor to opt for the former.

## I.3. Interconnection between return legislation and AVRR

*There is a symbiotic relationship between legislation governing the return of illegally resident migrants and the institution of AVRR.* As noted, within the EU framework, legislation on return must now include the provision of a period in which such migrants can voluntarily comply with the obligation to leave their host country. And, as discussed above, the possibility and likelihood of such voluntary compliance is enhanced by AVRR programmes. As such, a system in which the legal possibility for voluntary return exists, but which does not also provide AVRR services is hardly

<sup>11</sup> NAO (2005). *Returning Failed Asylum Applicants: Report by the Comptroller and Auditor General*. HC 76 Session 2005-2006, at p. 19 (available from: <http://www.official-documents.gov.uk/document/hc0506/hc00/0076/0076.pdf>)

<sup>12</sup> For example, in 2010 the total funding IOM received for AVRR programmes and activities in the Netherlands was some € 8.4 million (including reintegration activities for selected groups of returnees), whilst 3,064 individuals returned, i.e. € 2,741 per person (source: IOM Netherlands Annual Report 2010, footnote 8 above). By contrast, detention of forced returnees alone (i.e. without costs for flights, escorts etc.) are much higher: at € 172 per person per day, an average of 97 days in detention, this would amount to € 16,684 per person (2009 figures. Source: DJI (2011), footnote 9 above).

<sup>13</sup> See, for example, Jesuit Refugee Service-Europe (2010). *Becoming Vulnerable in Detention* (available from: [http://www.jrs-europe.org/publications/JRS-Europe\\_Becoming%20Vulnerable%20In%20Detention\\_June%202010\\_FULL%20REPORT.pdf](http://www.jrs-europe.org/publications/JRS-Europe_Becoming%20Vulnerable%20In%20Detention_June%202010_FULL%20REPORT.pdf)); Steel et al (2006). "Impact of immigration detention and temporary protection on the mental health of refugees", *British Journal of Psychiatry*, Vol. 188: pp. 58-64.

<sup>14</sup> See, for example, Strand et al (2008). *Return to Dignity* (footnote 6 above), p. 24: "Many [of the Afghan respondents] said, for instance, that they were close to forced removal, but then added that they wanted to return in dignity."

imaginable in the contemporary context. It is for this reason that the Returns Directive strongly recommends that “[i]n order to promote voluntary return, Member States should provide for enhanced return assistance and counselling...”<sup>15</sup> Conversely, *the success of AVRR programmes in meeting their objectives is also closely dependent on the precise provisions in the state’s legislation.* This relates, for example, to:

- The *extent to which a period for voluntary return is granted to different groups*; if this provision is too restrictive, excluding too many migrants from having a period for voluntary departure, this is likely to significantly impact on the participation levels in AVRR programmes.
- The *length of the period for voluntary return that is granted*; if such a period is unreasonably short, this will impair the ability of the AVRR service provider and the migrant, to successfully complete the procedure in line with best practices (see II.2)
- The *possibilities for extending the period for voluntary return*; if AVRR procedures cannot be completed within the specified time frame, but still have a good prospect of succeeding, the extension of the deadline for voluntary return can be a useful instrument to support AVRR
- The *imposition of penalties for irregular stay on AVRR participants*; if measures imposed on illegal migrants, such as fines or entry bans, are applied without discretion to persons who take up voluntary return, this significantly reduces the comparative attractiveness of AVRR over forced migration, and may thus lead to a decrease in the effectiveness of AVRR programmes (see II.4 and II.5).

For an AVRR programme to be effective in facilitating and promoting voluntary return and reintegration, therefore, there has to be a sufficient ‘fit’ between such programmes and the applicable legislation on expulsion and return. It is a major objective of this report to assess to what extent this fit exists in the current Moldovan framework, and to what extent improvements are possible. To be able to make such an assessment, however, it is useful to see what an effective AVRR programme looks like. To do so, the section below discusses some standards and best practices on AVRR.

## **I.4. Standards and best practices for AVRR**

When discussing standards and best practices, two factors can be distinguished:

1. Those pertaining to the protection of migrants in return procedures; and
2. Those pertaining to ensuring effectiveness, i.e. the realization of departure from the host state

These two factors may not always complement each other, and an appropriate balance must be sought by states who wish to return migrants. In the following sections,

<sup>15</sup> Directive 2008/115, recital 10.

standards and best practices in relation to AVRR are discussed, providing an overview of relevant human rights situations, and standards for implementing AVRR that will enable striking an appropriate balance.

### **I.4.1. Human rights standards**

Return procedures must be in conformity with human rights standards, and this goes equally for voluntary return through AVRR programmes. The fact that migrants themselves decide to approach an AVRR provider for assistance does not mean that the state is in any way released from its international obligations. This is particularly relevant in the case of irregular migrants and rejected asylum seekers, since their decision to apply for AVRR is made within the context of a legal obligation to leave the host state (see also I.2.2.2 above).

The discussion of human rights considerations below is brief and non-exhaustive. It serves to point out to the reader a number of human rights obligations that are relevant at different stages of the voluntary return process.

#### ***I.4.1.1. Standards for decision making on expulsion***

Strictly speaking, standards for decision making on the decision to expel, that is, the decision by the host state to not allow the migrant to remain on its territory, is outside the scope of voluntary return. As discussed, voluntary return – and AVRR as an instrument to support it – becomes relevant at the moment that a migrant receive a decision that s/he must leave. Voluntary return is part of a procedure to give effect to that decision, and as such is not concerned with the basis for the decision as such. This also means that for AVRR programmes, the general starting point for assisting irregular migrants or rejected asylum seekers is that their cases have been assessed in a manner that ensure a fair decision. This is, however, a crucial precondition, which should not be underestimated. AVRR programmes must be embedded in a legal system that ensures that the cases of those who are denied the right to stay have been in full conformity with human rights standards, including:

- non-refoulement of refugees and persons in danger of torture or inhuman or degrading treatment
- respect for family life
- possible objections to expulsion based on the fact that the migrant has been integrated in the society of the host state
- the best interest of the child
- principles related to procedural fairness, including the to receive a reasoned decision, the right to a hearing, and the right to an independent review

Where such guarantees are not in place, AVRR programmes will contribute to the host state evading its human rights obligations, and can therefore not be credible or

legitimate. It should be noted that this also goes for migrants still allowed to remain (for example, for who a decision is pending).

For those still allowed to remain, and do have choice, such guarantees also crucial to ensure they are not pushed into AVRR because of lack of prospects to claim their rights

#### **1.4.1.2. Standards for implementation of returns**

The rights discussed above only relate to the legitimacy of the decision to compel a migrant to leave, and thus only provides a starting point for return procedures. Additionally, in implementing those procedures, a number of other standards and principles need to be taken into consideration. These include:

- The priority of voluntary return over forced return

As noted, this priority is institutionalized in the EU context through Directive 2008/115, but is also part of the *acquis* of the Council of Europe. In 2005, the Council of Europe adopted its *20 Guidelines on Forced Return*, which includes, as the first principle:

*“The host state should take measures to promote voluntary returns, which should be preferred to forced returns. It should regularly evaluate and improve, if necessary, the programmes which it has implemented to that effect.”*<sup>16</sup>

Thus, when possible and feasible, a possibility for voluntary return should be accorded to expelled migrants. This also relates to the more general principle of international law that measures which interfere with human rights (such as detention and physical force) are only used when this is necessary, i.e. when other effective, less coercive measures are not available.

- The right to leave and to return

These rights are enshrined in international and European human rights instruments and provide a necessary basis for successful AVRR. The host state should not restrict the exit of the migrant in question further than absolutely necessary, thus making departure a viable option. Furthermore, countries of origin are under obligation to facilitate both leaving and returning, *inter alia*, by providing their nationals with the necessary travel documents.

- Return in safety and dignity

Apart from the issues of safety and dignity impacting on the legitimacy of the return decision (i.e. whether it is possible for a migrant to return), these should also be taken into account in implementing the return, including through AVRR. This would entail, for example, that the modes of transport offered to

<sup>16</sup> Council of Europe (2005). *Twenty Guidelines on Forced Returns*. September 2005.

assist the return are safe, and that the autonomy and dignity of the returnee are respected throughout the process (which would include the possibility of the individual changing his/her mind about participating in AVRR).

- Special consideration to the needs of vulnerable individuals

The previous issue is particularly relevant to vulnerable individuals or those with special needs. This means that the AVRR process needs to take into account, and make appropriate arrangements (in cooperation with the returnee), such needs, including serious medical conditions, psychological or psychiatric problems, the age of the returnee (special attention needs to be devoted both to the well-being of (unaccompanied) minors and the elderly), or the fact that the returnee was a victim of trafficking.

#### **1.4.1.3. Detention of persons in return procedures**

The interconnection between AVRR and the detention of migrants faced with a return decision requires specific attention. In principle, effective AVRR programmes should work to reduce the number of persons in detention. As noted, AVRR programmes provide a means to meet the obligation to return with the allocated period for voluntary return. If AVRR programmes are successful in doing this, there will be no need to use the instrument of detention. Additionally, since detention is to be only when this is necessary for removal<sup>17</sup>, and as a measure of last resort.<sup>18</sup> Therefore, when a decision has to be made about placement in detention, the possibility of AVRR as a viable alternative should be explored.

Finally, several EU Member States have started to offer AVRR services to migrants who are already in detention.<sup>19</sup> AVRR may provide some benefits to detained migrants in relation to forced return: it may speed up their departure (and thus the time spent in detention), it allows them to leave the host state without escorts, and – in some cases – they may be eligible for basic financial assistance. It should be noted, however, that such programmes also run the risk of conflating forced and voluntary return, and that AVRR from detention should be the exception rather than the rule; the focus should be on offering AVRR in such a way that the migrant can leave the host state *before* the need for detention arises.

<sup>17</sup> See, for example, Article 5(1)(f) ECHR, Guidelines 6 of the CoE Twenty Guidelines on Forced Return.

<sup>18</sup> Article 15, Directive 2008/115.

<sup>19</sup> Belgium, for example, offers this possibility to persons held in “closed centres”, see EMN Belgian Contact Point (2009). *Programmes and Strategies in Belgium fostering Assisted Voluntary Return in Third Countries*. (available from <http://www.emnbelgium.be/publication/programmes-and-strategies-belgium-fostering-assisted-voluntary-return-and-reintegration->). For the Netherlands, see IOM Netherlands (2010). *Infosheet Return: Aid when Leaving Alien Detention* (available from [http://www.iom-nederland.nl/english/Programmes/Return\\_Reintegration/Reintegration\\_Projects/Assisted\\_Voluntary\\_Return\\_from\\_Detention\\_AVRD](http://www.iom-nederland.nl/english/Programmes/Return_Reintegration/Reintegration_Projects/Assisted_Voluntary_Return_from_Detention_AVRD)).

#### I.4.1.4. Socio-economic rights

Practices of Member States on the provision of socio-economic rights vary across states. Socio-economic rights are sometimes used as an instrument to enforce return. By excluding irregular migrants from housing, welfare assistance and other facilities, it is hoped that they will be discouraged from staying in the host state, and thus to take up voluntary return. Although an in-depth discussion of the effects of such schemes is outside the scope of this report, it should be noted that there is no hard evidence that they are effective. By depriving individuals of such basic benefits it is equally likely that they are made more vulnerable, and thus less able to take a well-informed decision about participating in AVRR. Furthermore, such persons usually disappear “off the radar” of authorities, which deprives those authorities to work with these migrants in order to prepare them for return and reintegration.

As a best practice, participants in AVRR programmes should be provided with basic benefits until their return can be realized, in order to ensure an effective procedure. This includes:

- Ensuring children of returnees continue to receive education
- Ensure access to medical care
- Not to deprive migrants engaged in AVRR from government-sponsored housing<sup>20</sup>
- To ensure access to legal aid
- Where necessary, to provide financial assistance to prevent returnees from becoming destitute.<sup>21</sup>

Such measures strengthen the institution of AVRR, both because it enables migrants to better prepare for their return, and because it allows the AVRR implementing body to interact with the migrant on a regular basis.

It should be noted that the rights above, and thus the overall credibility of the AVRR institution, would be further strengthened should the Republic of Moldova accede to the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families.<sup>22</sup>

<sup>20</sup> This goes especially for vulnerable individuals. In the case DCI v. the Netherlands, for example, the European Commission on Social Rights found the eviction from an asylum centre of a rejected asylum seeker and her young child a violation of the European Social Charter (Decision of 20 October 2009, Complaint No. 47/2008). In some cases, governments put a moratorium on evictions during winter time.

<sup>21</sup> In the UK, for example, rejected asylum seekers engaged in voluntary return proceeding may apply for so-called “Section 4” support in case of destitution, see UK Border Agency (2011). Section 4 support. (available from: <http://www.ukba.homeoffice.gov.uk/asylum/support/apply/section4/>). It should, however, be noted that the rules for receiving such support have been criticized as too narrowly construed and inadequate. See, for example, Lewis, Hannah (2009). Still Destitute: A Worsening Problem for Refused Asylum Seekers. York, Joseph Rowntree Charitable Trust (available from: [www.jrct.org.uk/core/documents/download.asp?id=388](http://www.jrct.org.uk/core/documents/download.asp?id=388)).

<sup>22</sup> This was recommended as part of Moldova’s Universal Period Review at the Human Rights Council, see UN doc. A/HRC/WG.6/12/L.16, point 76.1.

#### I.4.2. Best practices for implementation of AVRR

##### I.4.2.1. Responsibility for making available AVRR services

Whilst offering AVRR to illegally resident migrants is not a hard obligation on EU Member States, it has developed beyond merely being a recommended practice. As noted, especially the Commission has consistently encouraged Member States to develop such programmes to complement an effective EU Return Policy.<sup>23</sup> This has been supported by the Council, which, as early as 1997, decided that Member States which were implementing AVRR programmes would submit information for the purpose of analysis and exchange.<sup>24</sup> The clear motivation behind this was to encourage Member States which had not yet instituted AVRR programmes to adopt these.<sup>25</sup> Outside the EU framework, strong support for AVRR has been expressed by the Council of Europe Parliamentary Assembly<sup>26</sup> and the Committee of Ministers.<sup>27</sup>

In this respect, providing AVRR is not simply a good practice. ***Given the importance of AVRR in ensuring the realization of the principle of priority for voluntary return, its contribution to effective return policy, and the possible human rights benefits for returnees, states that do not provide AVRR might even be considered to be engaged in bad practice.***

It should also be noted that ***the responsibility for ensuring that AVRR is offered is firmly located with the Member States.*** Both the Commission and the Council (as well as the Council of Europe bodies) frequently refer to the cooperation with international organizations, such as IOM, and other third parties, their recommendations, positions and decisions address *states*. This is particularly evident from the Returns Directive, which sets a binding framework for Member States to ensure effective return, which includes the (albeit non-binding) provision to provide enhanced return assistance.

As such, ***it is up to states to ensure such assistance is readily available, which would include making available resources (from their domestic budgets or acquiring EU or other funding) to implement assistance activities.*** This does not mean, however, that states should also be responsible for the actual implementation, for which different models are available and acceptable (see below), although the state would have to exercise some supervisory functions over the effectiveness thereof.

<sup>23</sup> It has done so as early as 1994, see COM(94) 23 final, 23.2.1994, p. 30, paragraph 111; p. 46, recommendation 16; Commission Green Paper on Community Return Policy, COM(2002) 175 final 10.04.2002.

<sup>24</sup> Council decision 97/340/JHA, 26.5.1997, [1997] OJ L 147/3.

<sup>25</sup> Ibid, see particularly Article 3.

<sup>26</sup> “Voluntary return programmes: an effective, humane and cost effective mechanism for returning irregular migrants”, report and recommendation, PACE doc. 12277, 4 June 2010.

<sup>27</sup> Recommendation 1926(2010), reply from the Committee of Ministers, adopted at the 1103rd meeting of the Ministers’ Deputies (19-20 January 2011).

### 1.4.2.2. Implementation

Whilst states should be responsible for guaranteeing that AVRR is available in general, there are different possibilities for the actual delivery of AVRR services to migrants. Broadly speaking, three models can be identified:

1. AVRR is implemented directly by a governmental agency<sup>28</sup>
2. AVRR is implemented by an international organization, usually IOM, on behalf of, and based on an agreement with the host government<sup>29</sup>
3. AVRR is subcontracted by the government to non-governmental organizations.<sup>30</sup>

It should be noted that combinations of these three options are common. For example, by having NGOs responsible for outreach/information dissemination and referrals, and the governmental agency or the international organization makes the actual arrangements for the return to and, where necessary, reception in, the country of return or third country.

None of these models necessarily constitutes 'better practice' than any of the others. As long as there is effective delivery of AVRR services, the implementation model is open to the state. However, Member States have frequently been encouraged, both by EU institutions and by the Council of Europe to develop and implement AVRR programmes in close cooperation with international organizations, and in particular IOM. This is related, inter alia, to the extensive expertise that IOM has built up over the years on AVRR issues, and its worldwide network of missions which enable it to provide both pre-departure and post-arrival assistance.<sup>31</sup>

### 1.4.2.3. Content of AVRR programmes

Whilst there is a strong normative framework supporting the need for states to set up and maintain AVRR programmes, this does not tell us what such programmes should look like. Standards in this respect are much more flexible and more difficult to identify. AVRR has emerged 'bottom-up' from the activities of Member States, and that its development at the EU level is primarily based on inventory and exchange of 'best practices', rather than on hard standards. Despite this, EU institutions are unequivocal

<sup>28</sup> For example, in France, AVRR is implemented by the French Office for Immigration and Integration (OFII), see EMN France National Focal Point (2009). Programmes and Strategies in France to Encourage Assisted Returns and the Reintegration of Migrants from Third Countries. (available from: [www.immigration.gouv.fr/IMG/pdf/EMNProgrStratTC.pdf](http://www.immigration.gouv.fr/IMG/pdf/EMNProgrStratTC.pdf)). In Sweden, AVRR is implemented by the Migration Board, see EMN Sweden National Contact Point (2009). Programmes and Strategies in the EU Member States fostering Assisted Return to and Re-integration in Third Countries. (available from: <http://emn.intrasoft-intl.com/Downloads/prepareShowFiles.do?directoryID=123>).

<sup>29</sup> This is the most common model, applied in most EU countries, including almost all of the countries which acceded to the EU since 2004.

<sup>30</sup> See the United Kingdom, where the main responsibility for AVRR has been contracted to the NGO Refugee Action ([www.refugee-action.org.uk](http://www.refugee-action.org.uk)).

<sup>31</sup> For example, COM(2002) 175 final 10.04.2002; "Voluntary return programmes: an effective, humane and cost effective mechanism for returning irregular migrants", report and recommendation, PACE doc. 12277, 4 June 2010.

cal in their support for AVRR as an integral and essential part of return policy. Below, several best practices in relation to AVRR are discussed, focusing on:

1. The groups of *migrants eligible for AVRR programmes*, and
2. The *activities to be included* in successful AVRR programmes

#### Ad 1. Target groups

Considerable differences exist in relation to the conditions under which individuals are eligible for AVRR services. Such criteria may be based, inter alia, on legal status, nationality and other criteria. However, it can be considered a best practice to keep the eligibility for AVRR programmes as wide as possible, as this will allow for the most positive influence on the attainment of return policy goals. This is particularly the case in relation to legal status. This is reiterated in the Luxembourg Council's conclusion no. 4:

*"Voluntary return can be most effective where its scope covers a wide range of third country nationals wishing to return home. This may include, without prejudice to the applicable rules under national legislation, unsuccessful asylum seekers or those awaiting a final decision, those with a temporary protection status and, where applicable, illegally staying third country nationals and/or legal migrants."*

As noted, eligibility might also include legal residents, such as labour migrants or even recognized refugees or naturalized foreigners, although these would seem to be of low priority in relation to the problem of irregular migration. More importantly, however, is the emphasis on **including all categories of persons not or no longer authorized to stay in the host state**. In some cases, AVRR programmes make a distinction, for example, between rejected asylum seekers and other categories of irregular residents, with the latter sometimes excluded from specific forms of assistance, particularly in the area of reintegration. It is questionable, however, that such differentiation leads to the most effective outcomes. The provision of AVRR also to irregular migrants, even if they have entered the host country without authorization and who have never sought to regularize their status, is an essential condition for AVRR to positively affect return policy. As such, even when there are strong policy reasons to restrict some forms of assistance to specific categories, it is highly advisable to at least provide access to basic AVRR services (see ad 2) to all, regardless of their possible illegal entry or that they have never made an official application for residence.

Furthermore, **specific attention should be paid to the situation of those TCNs who might be expected to be under an obligation to leave in the near future, but who – at current – do not fall under legal provisions that compel them to leave**. This applies, for example, to asylum seekers still in procedure or those enjoying temporary protection, especially when they reach the stage that it becomes increasingly obvious that

their claim for protection will be unsuccessful, or that such protection will end. In such a stage, it may be useful to inform them about the possibilities that AVRR offers and to offer return counselling.<sup>32</sup> This is likely to shorten the process of return once they are under obligation to leave. However, special care must be taken at this stage that such activities are only informative, and that they respect the principle of genuine voluntariness (i.e. the choice between staying or leaving) as long as they are protected from *refoulement*.

In addition to legal status, AVRR programmes also sometimes make distinction as to nationality. Generally, EU citizens are excluded from such assistance (which also relates to the fact that they are unlikely to be illegally resident). However, such exclusion is also sometimes applied to citizens of Western countries.<sup>33</sup> It should be noted that there are also AVRR activities which focus on one or a few specific national groups. These, however, invariably constitute additional assistance activities, such as reintegration programmes for asylum seekers of a certain nationality whose protection has just been ceased. Excluding other nationalities from such activities should only be possible if these take place in conjunction with a general AVRR programme, providing at least basic assistance to (rejected) asylum seekers and irregular migrants of all relevant nationalities.

Finally, inclusion in AVRR programmes can also be based on additional criteria. Whether the migrant has his/her own (financial) means to arrange travel to the country of return is a common indicator. Some programmes assist migrants who, if unassisted, would become dependent on state social welfare provisions. It should be noted, that whilst making inclusion dependent on financial criteria can be legitimate, there is often a problem of proof in this respect. It is, therefore, a good practice to apply the benefit of the doubt liberally in such cases where it cannot be assessed with certainty that a migrant should be included in an AVRR programme.

#### *Ad 2. AVRR activities*

The content of AVRR programmes varies considerably, and it is therefore difficult to pinpoint what such programmes should include. This is particularly so because these programmes should be adapted both to the needs of potential returnees, as well as the specific national context in the host country. In general, however, the 2005 Luxembourg Council's conclusions contain a broad list of elements commonly considered to be part of effective AVRR programmes:

<sup>32</sup> Cf. Luxembourg Council conclusion no. 6: "Information on the possibility of voluntary return should be made readily available and as early as possible. In order to facilitate sustainable voluntary returns, this may include the provision of pre-return information and counselling, for example, in respect of the conditions and circumstances in the country of return. Innovative Member States' approaches, such as those which raise awareness amongst prospective returnees of conditions in the country of return, might also be useful in this respect."

<sup>33</sup> See, for example, the REAN programme, which includes all citizens of the EU, EEA, North America, Oceania, as well as Japan and South Korea.

- i. *travel arrangements (which may cover costs, travel documents, transit arrangements, transport of belongings);*
- ii. *medical assistance, where applicable;*
- iii. *reception on arrival in the country of return and referral to relevant local bodies/agencies;*
- iv. *onward transportation to the final destination in that country;*
- v. *adequate temporary accommodation for the first few days after arrival;*
- vi. *essential initial expenses after return;*
- vii. *relevant training, including that which is labour market oriented, and help in finding employment;*
- viii. *limited start-up assistance for economic activities, for example micro-credit schemes; and*
- ix. *post return assistance and counselling.*<sup>34</sup>

In addition to these, the Council noted that "there can be significant added value in establishing programmes tailored to the circumstances and needs of specific categories of persons, in particular those who are deemed to be more vulnerable or with other special needs" (Conclusion 5).

Since practices these elements vary considerably, only some brief comments will be made on each of them. It is highly recommended to refer to the several compilations of AVRR practices available when considering the further development of such elements in a Moldovan AVRR programme. Such compilations include:

- *ICMPD (2002). Study on Comprehensive EU Return Policies and Practices for Displaced Persons under Temporary Protection, Other Persons whose International Protection has Ended, and Rejected Asylum-Seekers*
- *IOM (2004). Return of Rejected Asylum Seekers: Policies and Practices. Geneva. IOM.*
- *IOM Vienna (2005). Compilation of Best Practice in Return Management in Selected EU Countries and Romania*<sup>35</sup>
- *European Migration Network (2011). Programmes and Strategies in the EU Member States fostering Assisted Return to and Reintegration in Third Countries. Synthesis report.*

Also see the EMN website for individual country reports.<sup>36</sup>

**It should be noted that AVRR implementation continues to develop, and that it is highly recommended that the Government of Moldova participates as much as**

<sup>34</sup> Conclusion 7.

<sup>35</sup> Available from: [http://www.ch.iom.int/fileadmin/media/pdf/publikationen/handbook\\_argo.pdf](http://www.ch.iom.int/fileadmin/media/pdf/publikationen/handbook_argo.pdf)

<sup>36</sup> Available from: <http://emn.intrasoft-intl.com/Downloads/prepareShowFiles.do?directoryID=123>

*possible in exchanges on best practices and innovative approaches to AVRR, and to assess the possibilities of incorporating these in its future AVRR programme.*

### **I.5. Towards AVRR that works for Moldova and for migrants**

While it is important to understand the standards and best practices of AVRR, it is equally important to develop an AVRR system that is sufficiently adapted to the specific national context in which it operates. There is no such thing as a “one-size-fits-all” AVRR programme that could be equally effective in all states. What elements can and should be incorporated in AVRR, and how this needs to be embedded in the legislative framework of the state, depends, inter alia, on:

- The profile of possible returnees (e.g. number of rejected asylum seekers and irregular migrants present in the country, their countries of origin, gender balance, inclusion of large numbers of minors, elderly or other vulnerable groups, etc.)
- The broader migration context in which return takes place (e.g. is the country primarily a destination country, a transit country, an emigration country for its own citizens etc.)
- The extent to which resources can be made available for AVRR and maintaining a proper balance with other policy needs.

It is beyond the scope of this report to discuss each of these elements as they occur in the Moldovan context in great detail. However, a number of points have been taken into consideration for the further review:

- The desire of the Government of Moldova to approximate asylum and migration legislation, as well as practices, to EU standards, with a view to possible accession in the future;
- The fact that, at current, the number of (rejected) asylum seekers and irregular migrants in Moldova is relatively low, in comparison with EU countries;
- However, under influence of future developments, influx might rise, thus demanding an effective return system that can accommodate (much) larger numbers, including:
  - The possible returns of irregular migrants from EU Member States under the EU-Moldova Readmission Agreement;
  - The inclusion of Romania in the Schengen Area, making the Moldovan-Romanian border an access point to the Schengen Area; this may make Moldova a more attractive destination country for migrants seeking to access the EU;
  - In the long term: Moldova’s own possible accession to the EU.

- The fact that AVRR in Moldova is currently implemented by IOM with EU funding, but that such a situation is no guarantee for sustainability of the programme in Moldova.
- The fact that any developments in the area of AVRR must not only lead to effective return, but also be of benefit to migrants, with respect for their dignity and fundamental rights.

With these points in mind, the following section presents a review of the current Moldovan legislative framework, to the extent that it is relevant to voluntary return and AVRR, and identifies areas where such legislation could be improved.

# II

## II. Legislative review

This sections deals primarily with two issues relating to current provisions on return in Moldovan legislation:

1. The compatibility with EU legal standards, particularly the provisions of the EU Returns Directive on voluntary departure;
2. The compatibility with best practices related to effective AVRR programmes.

It should be noted that these two components may overlap, but this is not necessarily the case. In some situations, EU legal standards might set conditions that are not the most conducive to successful AVRR programmes. Where this is the case, both the compatibility with legal standards and with best practices for AVRR are addressed.

Also, it should be noted that where compatibility with the Returns Directive is discussed, some of the conclusions are speculative. Several of the provisions of the Directive are open to interpretation, and given the lack of any significant body of case law from the European Court of Justice, authoritative interpretations on such provisions are not yet available.

Finally, this section does not provide a full review of compatibility with the Returns Directive, but only with those provisions relevant to AVRR.<sup>37</sup>

### II.1. Incorporation of AVRR facility in the legislative framework

Law on Foreigners, Article 61

#### **Article 61. Assisted Voluntary Return**

(1) *Foreigners residing on the territory of the Republic of Moldova who do not have the necessary financial means may appeal to the competent authority for foreigners for assistance in their return to the country of origin.*

(2) *The competent authority for foreigners jointly with the relevant national and international organizations shall develop common programs to identify specific ways to assist foreigners mentioned in paragraph (1) in their return to the countries of origin, as well as finding financial resources necessary for these purposes.*

(3) *Foreigners mentioned in paragraph (1) may once individually receive the assistance provided by the competent authority for foreigners via the programs mentioned in paragraph (2) to return to their countries of origin.*

<sup>37</sup> In this section, in addition to “AVRR”, the term “AVR” will also be frequently used, as this is the term incorporated in the Moldovan legal framework (see Article 61 of the Law on Foreigners below).

Return Regulation, Chapter V, points 43-45

#### **Assisted voluntary return**

43. *The competent authority for foreigners together with the relevant national and international originations may grant assistance for foreigners’ return to the country of origin through joint assistance programs in case of the foreigners who do not have financial means.*

44. *For the given purpose, the foreigners who request for assisted voluntary return may submit to the competent authorities for foreigners or directly to national and international organizations active in the area written requests, which will contain information about the applicant, the valid or invalid travel documents, the family members, as the case may be, etc.*

45. *The foreigners will benefit, individually, only once from the support granted through the joint assistance programs for voluntary return.*

#### **II.1.1. Positive starting point for further institutionalization of AVRR**

The fact that the possibility of AVR is specifically addressed in the Law on Foreigners is a positive development. It presents **a clear commitment on the part of the Government of Moldova not only to allow for voluntary departure in line with the EU Returns Directive, but also to assist such departure where necessary.** In this sense, the Government of Moldova has taken steps that are more progressive than in most EU Member States, where AVR is only policy, or incorporated only in secondary regulations.

This commitment is particularly evident in Article 61(2), which seems to set out an obligation on the competent authority for foreigners to develop AVR programmes and find the necessary resources. This is a very important commitment to develop AVR in a state institution, rather than an “external” activity brought to Moldova by IOM. This provides a good starting point for the further institutionalization of AVRR in Moldova.

#### **II.1.2. Ambiguous provisions on the extent of responsibility of Government of Moldova in maintaining the AVRR programme**

The text of Article 61, however, also leaves some ambiguity as to whether the Government of Moldova intends to have an autonomous responsibility for AVRR if other “national or international organisations” would no longer be involved.

IOM currently plays the leading role in AVRR, and the reference to “international organisations” no doubt refers to IOM. The text could be read as implying the assumption that IOM will remain not only the implementer of AVR, but also play a significant role in acquiring funding for this. However, it is also clear that such funding for IOM will always be temporary, and to a large extent dependent on the willingness of the EU to fund AVRR activities. Even within the EU, it is clear that stability of AVR activities must come, in the final analysis, from Member States themselves, which is indeed the case in such states that have been implementing AVR for a decade or more. Also in the later accession states, there will be an inevitable point at which EU funding (which still accounts for the majority of AVR resources) must be replaced by domestic funding. This will, sooner or later, be the situation for Moldova. However, although the Law on Foreigners expresses a clear commitment, in principle, to AVR, *it is altogether unclear whether it envisages the Government of Moldova doing more than enacting due diligence in finding external funds, or whether it implies due diligence in providing resources from its own budget.*

Given this ambiguity, it is recommended that *references to international and non-governmental organizations are removed, and to provide that the Government of Moldova is responsible for maintaining AVRR out of budgetary and extra-budgetary resources.* This is without prejudice of the possibilities of including organizations such as IOM and NGOs in the implementation process.

### II.1.3. Is AVRR an entitlement of the migrant or a discretionary privilege?

As regards to the access to AVRR by migrants, the wording of Article 61 leaves room for a lot of flexibility, which gives rise to some questions. Firstly, it only provides that individuals “may appeal to the competent authority” for assistance. Point 43 of the Regulation on Return furthermore asserts that “the competent authority for foreigners together with the relevant national and international organisations *may* grant assistance” (my emphasis). As such, the Law on Foreigners and the Regulation confer on the Government of Moldova, in tandem with national or international organisations, a clear *competence* to provide AVR, but no (qualified) *obligation*. Neither the Law on Foreigners, nor Chapter V of the Return Regulation, set out the conditions under which an applicant should receive such assistance, and when he/she should be excluded.

From the perspective of legal certainty, and to prevent arbitrariness, it would be necessary to set clear, realistic eligibility criteria and indicators. Whilst states usually have an interest in provide AVR as widely as possible, it should be emphasized that the individual also has a clear interest in AVR procedures. Especially if, for whatever reason, the authority decides *not* to grant assistance, this can have far-reaching con-

sequences.<sup>38</sup> It must be clear to the potential returnee who has the mandate to decide whether or not to provide AVR, and on which conditions he can be included or excluded. To this effect, it is highly recommended that *a future AVR programme is based on a set of rules that are clear both for the service provider and the returnee, and that these rules are incorporated in a legal instrument.* These should be binding to the extent that, if an applicant meets the conditions, s/he will be guaranteed of return assistance. This does not preclude such regulations from making this conditional on the availability of resources, although this should be clearly stated.

Such a regulation should balance the need to institutionalize AVR in a practical and affective manner with the limited resources that are available for migration management activities. It is acknowledged that the Republic of Moldova will not be in the position to set up such elaborate activities as many EU Member States. However, a draft regulation should leave open the possibility of further developing services, especially in the area of reintegration, in the future. This would strengthen the effectiveness of the Moldovan AVRR institution. The regulation should also balance the need for an open, accessible system that is of benefit to the widest possible range of foreigners with a (future) obligation to leave, and the prevention of the abuse of such a system.

### II.1.4. Content of AVR

As with the eligibility, the content of the assistance available is not specified. A regulation on AVR, as recommended under 1.3, should also specify what services would minimally be granted.

For an example of such a comprehensive set of rules, see the Dutch Return and Emigration of Aliens (REAN) Implementation Regulation 2006.

In deciding on the content to be had, regard should also be had to EU best practices as outlined in section I.4.

### II.1.5. The “necessary financial means” criterion

Article 61 makes access to AVR dependent on the lack of “necessary financial means” of the applicant. This is not an uncommon condition, and in line with the notion that the individual is him/herself responsible for return, with AVR being a back-up to make this possible. However, it should be noted that, in practice, this criterion is difficult, if not impossible, to enforce.<sup>39</sup>

<sup>38</sup> For example, a migrant who has no financial means to arrange his own transport, and is excluded from AVR, will by default be subject to forced removal proceedings, including the likelihood of detention.

<sup>39</sup> See, for example, Article 4(b) of the REAN Regulation. Here, the “test” for this criterion is the applicant’s own statement.

### II.1.6. Limitation of eligibility to AVR

Both paragraph 3 of Article 61 of the Law on Foreigners and rule 45 of the Return Regulation specify that beneficiaries may make use of AVR only once. A limitation on repeated use of AVR is common, and the provisions in the Law and Regulation are undoubtedly in line with the concerns of the European Commission and Council that AVR programmes might be abused.<sup>40</sup> However, it should be noted that enforcement of a “once only” limit on AVR services also implies registration of personal details to this effect. This raises questions about which agency is authorized to gather and store this data, for what period this data can be retained etc. It is recommended that **EU rules on data protection are taken into consideration in answering these questions, to ensure adequate protection of the privacy of AVR beneficiaries.**

## II.2. Granting of a voluntary return period

### II.2.1. The Law on Foreigners and Return Regulation

Law on Foreigners

#### Article 52. Decision on Return

(1) *The decision on return is an administrative act of the competent authority for foreigners by which a foreigner's residence is declared illegal and which forces the foreigners defined in Article 51 to leave the territory of the Republic of Moldova within a certain term, specifically:*

- a) *5 calendar days at most – foreigners whose visa was cancelled or who entered the territory of the Republic of Moldova illegally or whose stay became illegal;*
- b) *30 calendar days – foreigners who were denied the extension of the residence permit or whose permission was cancelled or revoked;*
- c) *3 months - foreigners who need to close up an investment;*
- d) *15 calendar days – former applicants for asylum.*

(2) *The terms stipulated in paragraph (1) shall be calculated as from the date when the foreigner was informed about the decision on return, according to this law.*

Return Regulation, Chapter II:

11. *The foreigner subject to return measure shall leave voluntarily the territory of the Republic of Moldova within the following deadlines:*

1. *maximum 5 calendar days – for foreigners whose visa was cancelled, who entered illegally the territory of the Republic of Moldova or whose stay became illegal;*
2. *within 30 calendar days – for foreigners who were refused to get their right to stay prolonged, or whose right to stay was cancelled or withdrawn;*
3. *within 3 months – for foreigners who must liquidate an investment (enterprise);*
4. *within 15 calendar days – for former asylum seekers.*

*The deadline is calculated from the day when the foreigner was notified about the return decision.*

12. *The period for voluntary departure from the territory of the Republic of Moldova may be prolonged by the competent authority for foreigners, if there are circumstances related to existence of children who go to school or existence of other family and social relations. In this case, the foreigner shall come on monthly basis, or as many times as he/she is called, to the competent authority for foreigners and shall notify about any change of his/her residence place or status, and submit confirming documents that oblige him/her to remain on the territory of the Republic of Moldova;*

13. *If there is a circumvention risk or the foreigner is a danger for public order and national security, the period for leaving voluntarily the territory of the Republic of Moldova is not prolonged.*

Return Regulation, Chapter 1, Rule 3:

circumvention risk – existence of reasons in a particular case, based on objective criteria, defined through legislation, which justify the assumption that a foreigner subject to return procedure may circumvent from the respective decision;

#### II.2.1.1. Compatibility of periods for voluntary return with the Returns Directive

**The length of some of the periods for voluntary return do not meet the standards set out in the Directive.** The Directive provides that a period for voluntary return must a minimum of 7 days.<sup>41</sup> Article 52(1)(a) of the Law on Foreigners provides a shorter period. This would have to be amended to meet the standards of the Directive.

<sup>40</sup> See, for example, COM(94) 23 final, p. 30, paragraph 111; Council doc. 97/340/JHA.

<sup>41</sup> Directive 2008/115, Article 7(1).

Furthermore, there may be some *doubt whether the application of different voluntary return periods for different categories of foreigners in the Law on Foreigners is compatible with the Directive*. The Directive only recognizes one category: illegally staying third-country nationals. It makes no distinction to the reason they are illegally staying. As such, the same procedures are applied to rejected asylum seekers, refugees or other protected persons whose status has been revoked or not extended, previously lawful residents who have lost their residence rights, visa overstayers and persons who entered the state illegally (with the possible exception of those caught in relation to their crossing).<sup>42</sup> Since these are all considered equal under the Directive, they would all be subject to the same provision, and thus, to the same period for voluntary return. The Directive requires Member States to provide for an appropriate period between 7 and 30 days for voluntary departure in the return decision. However, this cannot simply be interpreted as giving the Member State flexibility to choose a period within that range on a case-by-case basis. The more likely interpretation is that it obligates states to set one specific return period for all cases falling within the scope of the Directive. This is, however, without prejudice to the possibility of shortening this period in the case of a risk of absconding/circumvention risk (see 3 below).

### **II.2.1.2. Compatibility of periods for voluntary return with successful AVR**

The granting of an adequate period for voluntary return is essential for a successful AVR programme. It should be noted that, whilst setting binding standards for EU Member States on the voluntary return period, *the Returns Directive does not necessarily reflect best practice with regards to implementing an effective AVR programme*. Whereas the Directive allows for a voluntary departure period of as little as 7 days, it is clear from practice that, in the vast majority of cases, this will be grossly insufficient for facilitating voluntary return in a humane and dignified manner. This is particularly the case for undocumented persons, for whom substitute travel documents need to be acquired. It also goes for persons who are in need of thorough psychosocial or socio-economic preparation of return and reintegration.

Thus, regardless of their compatibility with the Returns Directive, *the provisions in Article 52(1)(a) of the Law on Foreigners are unlikely to be sufficient to allow for the provision of high-quality, sustainable voluntary return assistance. It is recommended to maximize this period (i.e. to 30 days) in the interest of successful AVR procedures*.

It is furthermore recommended that *the prolongation of the period for voluntary departure will be applied to those foreigners who are genuinely engaged in the AVR process, and for whom a reasonable prospect of AVR being successful still exists*.

<sup>42</sup> Directive 2008/115, Article 2(2)(a).

### **II.2.1.3. Shortening or not granting a period for voluntary return based on a circumvention risk**

The possibility of shortening or revoking the period for voluntary return based on a “circumvention risk” is obviously of great significance to implementing AVR procedures. This is particularly the case since AVR should ideally take place outside a detention context. Predictability on this issue is also of importance to the individual contemplating voluntary return, who should know exactly when s/he can expect enforcement measures to take place.

The Return Regulation defines a “circumvention risk” as the “existence of reasons in a particular case, based on objective criteria, *defined through legislation*, which justify the assumption that a foreigner subject to return procedure may circumvent from the respective decision” (my emphasis). This definition is very similar to the of the “risk of absconding” in the Returns Directive.<sup>43</sup> The definition of criteria as to when a circumvention risk exists is crucial to provide legal certainty both to the agency implementing AVR and the individual who has applied for assistance. Nowhere in the Regulation, nor in the Law on Foreigners, however, are such objective criteria laid down in a legally binding instrument.

It is therefore recommended, *as a matter of priority, to set out in a legal instrument the criteria on which the assessment whether there is a circumvention risk can be based*. Such criteria could incorporate, inter alia, the application of a foreigner for AVR assistance as an indication against a risk of absconding.

In the drafting process of the Returns Directive, the Council had proposed the following criteria to be included in such an assessment:

“Risk of absconding” means the existence of particular reasons to believe that a third-country national who is subject to return procedures will abscond, for example:

- If the person has illegally entered the territory of a Member State and has not subsequently obtained an authorisation to stay in that Member State
- If the person was intercepted at, or in the vicinity of the external border while trying to enter illegally the territory of a Member State;
- If during the period of voluntary departure the person has changed place of residence without notifying the authorities of a change of address;
- If the person has not complied with the measures adopted to ensure that he/she will not abscond;
- If the person has in the past evaded removal or frustrated removal efforts.<sup>44</sup>

<sup>43</sup> Directive 2008/115, Article 3(7).

<sup>44</sup> Quoted in Lutz, Fabian (2010). The Negotiations on the Return Directive. Nijmegen, Wolf Legal Publishers.

It should be noted that these criteria are only broadly indicative, and were never adopted as such, the drafter having chosen to leave the definition of such criteria in law to the individual Member States.

Furthermore, it should be noted that the Directive provides that “[a]ccording to the general principles of EU law, decisions taken under this Directive should be adopted on a case-by-case basis and based on objective criteria, implying that consideration should go beyond the mere fact of an illegal stay.”<sup>45</sup> As such, **any decision not to grant a period for voluntary return cannot be based simply on the circumstance that the foreigner is illegally in the country.**

It is furthermore recommended that **in setting criteria for the existence of a “circumvention risk”, the fact that a migrant has applied for AVR will be taken positively into consideration as evidence of his willingness to return, and thus as a counter-indication for circumvention.**

## II.2.2. The Law on Asylum

### Article 60. Decision on the asylum application

(1) Following the interview with the asylum-seeker, on the basis of the information prepared by Refugee Directorate, its Head shall take one of the following decisions:

- a) to recognise refugee status;
- b) to grant humanitarian protection;
- c) to reject the application for asylum;
- d) not to grant humanitarian protection.

[...]

(5) In case of a negative decision it shall contain the right and the period for appeal, as well as the obligation to leave the territory of the Republic of Moldova upon expiration of 15 days following the date when the decision of rejection of the application for asylum becomes irrevocable.

The Law on Asylum contains its own provisions on return, granting a period of 15 days to prepare departure. This is independent of the provisions of the Law on Foreigners. Only after these 15 days is does the rejected asylum seeker fall under the Law on Foreigners, and is issued a return decision.

It is recommended that **the period for voluntary return under the Law on Asylum is fully utilized for the possibility of exploring assisted voluntary return, inter alia by offering information and counselling** to individuals while still governed by the provisions of the Law on Asylum.

<sup>45</sup> Directive 2008/115, recital 6.

It is also recommended that **continuity between the two legal instruments is sought, including in relation to the accommodation of the asylum seeker, so as to avoid that AVRR activities that have already been undertaken with him/her, are unnecessarily interrupted.**

## II.2.3. Contravention Code

### Article 40. Expulsion

(1) Expulsion is a measure to remove by force from the territory of the Republic of Moldova foreign citizens and stateless persons who have violated the rules for staying. Expulsion aims to eliminate a state of danger and to prevent the commission by such persons of socially dangerous deeds.

(2) Expulsion can be imposed on foreign citizens and stateless persons as a complementary sanction if they have committed the contraventions stipulated in Art.58, Art.67 par.(4), (5), Art.76, 80, 81, 83, 84, 87, 323, 324, 326, 328, 330-333, 339, 348.

(3) With regard to foreign citizens and stateless persons who cannot be immediately expelled, the court may order their public custody and placement for a period not to exceed 6 months in the Centre for the Temporary Placement of Foreigners.

(4) The court may order public custody for foreign citizens and stateless persons for whom return has been ordered or who have been declared undesirable.

(5) If expulsion accompanies arrest, expulsion shall be executed after the execution of the arrest.

In addition to the return provisions in the Law on Foreigners and in the Law on Asylum, a third piece of legislation, the Contravention Code, also allows for return proceedings. The Contravention Code authorizes the state to expel and remove foreigners in relation to a series of contraventions. The Contravention Code, in contrast to the Law on Foreigners and the Law on Asylum, does not provide for voluntary return, but only for either the immediate execution of the expulsion or of the detention of the foreigner. As such, it represents a break with the principle that illegally resident aliens should be accorded an opportunity to voluntarily comply with an obligation to leave the country. This also reduces the possibilities for a thorough AVR process for persons falling under the expulsion provisions of the Contravention Code.

It should be noted that the Returns Directive allows the exclusion from its scope of persons who “are subject to return as a criminal law sanction or as a consequence of a criminal law sanction”<sup>46</sup> who therefore do not have to be given a voluntary return

<sup>46</sup> Directive 2008/115, Article 2(2)(b).

period. However, the Code provides for expulsion as a sanction for the mere fact that the foreigner is found staying illegally in the country, this is unlikely to be in line with EU standards. After all, the Returns Directive has been specifically set up to deal with this category, and incorporates the principle of the priority for voluntary return. Furthermore, recent case law of the European Court of Justice shows that the Court is seemingly unwilling to accept criminal sanctions purely based on illegal stay and non-compliance, to the extent that they encroach on the normal return process set out by the Directive.<sup>47</sup>

***It is recommended that those provisions in the Contravention Code that allow for expulsion on the basis of illegal residence are reviewed and, where necessary, brought in line with EU legal standards.***

It is furthermore recommendation ***to amend the Contravention Code in such a way that illegal entry and residence and such are removed as offences***, so as to ensure that these provisions cannot be used to circumvent the principle that a period for voluntary return should first be granted under the Law on Foreigners.

### II.3. Exit procedures

Law on Foreigners

#### ***Article 12. Prohibition of Departure***

*(1) The foreigner shall not be allowed to leave the country, if:*

- a) he/she is suspected, accused of or defendant in a criminal case, the prosecutor or court obliged him/her not to leave the country and no permission for leaving the country was given;*
- b) he/she was convicted based on a final court judgment and must sustain a custodial sentence, criminal sentence in the form of fine or non-reimbursable social labour.*

*(2) In all cases, reasons for prohibition of departure from the country shall be specified and confirming documents shall be presented, as applicable.*

*(3) Prohibition of departure from the country shall be executed by:*

- a) making a nominal direction in the Integrated Automated Migration and Asylum Information System;*
- b) affixing a seal on prohibition of departure from the Republic of Moldova onto identity documents by the competent authority for foreigners.*

#### ***Article 13. Termination of Prohibition of Departure***

*(1) Prohibition of departure shall be cancelled by annulling the nominal direction in the Integrated Automated Migration and Asylum Information System and affixing a seal on cancellation of the prohibition of departure onto identity documents by the competent authority for foreigners.*

*(2) Prohibition of departure from the country shall terminate on legal grounds if it is proved that:*

- a) renunciation of suit, release from prosecution or termination of prosecution, finding of innocence, termination of criminal procedure or cancellation of the preventive measure consisting in an order not to leave the country has been prescribed with regard to the foreigner;*
- b) the foreigner has sustained the sentence, has been pardoned, granted amnesty or convicted by a final court judgment with suspension of sentence.*

There is nothing in European or international law to prevent states from requiring foreigners exiting the country to submit reasonable proof of having fulfilled financial obligations (fines, taxes) or to check that they do not have any outstanding criminal law procedures pending. However, as a best practice, the barriers to exit should be as low as possible, and only applied to the extent necessary. If exit procedures are cumbersome, this has the dual effect of disincentivizing illegal residents from spontaneously taking up their obligation to leave, and of potentially delaying voluntary return through AVR programmes.

In the meetings with the various stakeholders it was noted that foreigners wishing to leave voluntarily need to obtain written documentation from the Bureau on Migration and Asylum that they have fulfilled their obligations and do not have outstanding criminal law procedures. This documentation is to be presented to the Border Police at the moment of departure. Apparently, at current no or insufficient possibilities exist for these agencies to share such information electronically, and make it available without the potential returnee taking several administrative steps to get paper documentation.

Ensuring that immediate access to databases with information about potential bars to exit is available at the exit points will significantly smoothen the voluntary return process, and could speed up AVR movements of persons already in possession of valid travel documents.

This would particularly be the case in combination with the possibility of automatically suspending fines or other sanctions for illegal stay if the foreigner demonstrably leaves voluntarily (see II.5).

<sup>47</sup> El Dridi case, C-61/11 PPU, ECJ judgment of 28 April 2011; Achughbabian case, C-329/11, ECJ judgment of 6 December 2011.

## II.4. Prohibition of (re-)entry

### Law on Foreigners

#### **Article 8. Prohibition of Entry into the Republic of Moldova**

(1) Foreigners shall not be allowed to enter the territory of the Republic of Moldova if:

a) they fail to meet the terms of Article 6 par. (1);

[...]

f) they violated the state border regime and the regime of the state border crossing point;

[...]

(2) Public authorities or institutions possessing data and information on the existence of situations similar to those stated in paragraph (1) must inform the competent authorities.

(3) Prohibition of a foreigner's entry into the Republic of Moldova shall be justified by the state border control authority and shall be brought to notice of the corresponding foreigner, the fact being recorded in the Integrated Automated Migration and Asylum Information System. The decision on prohibition of entry into the Republic of Moldova may be contested by the foreign citizen within the applicable legislation.

(4) The foreigner whose entry into the Republic of Moldova is prohibited must immediately leave the state border crossing point for the country of origin or another desired destination, other than the territory of the Republic of Moldova.

(5) In case if the foreigner cannot immediately leave the state border crossing point, as provided by paragraph (1), the competent authority shall provide him/her with accommodation in a place meant for this purpose till the cessation of causes impeding his/her departure, but for no longer than 24 hours after the accommodation. If the causes impeding his/her departure fail to cease within 24 hours after the accommodation, the foreigner shall be handed over to the competent authority for foreigners for the purpose of his/her deportation from the territory of the Republic of Moldova according to law.

#### **Article 10. Establishing the Period of Prohibition of Entry into the Republic of Moldova**

(1) With regard to foreigners who entered the Republic of Moldova on legal grounds but whose residence became illegal the prohibition of entry shall last for:

a) 1 year – in case of illegal residence from 3 months to 1 year;

b) 2 years – in case of illegal residence from 1 to 2 years;

c) 3 years – in case of illegal residence from 2 to 3 years;

d) 5 years – in case of illegal residence for over 3 years;

e) 3 years – in case of illegal labor activity

f) 5 years – in case of willful submission of false personal data;

g) 5 years – in case of deportation.

(2) In case of foreigners who request voluntary return, the period of prohibition established in paragraph (1) letters a)–d) shall be reduced by half.

(3) In case of foreigners who committed intentional crimes or grave, especially grave or extremely grave crimes through negligence on the territory of the Republic of Moldova, the prohibition of entry into the territory of the Republic of Moldova shall last for 5 years; and if they pose serious danger to the public order or national security, the prohibition shall be established for up to 10 years;

(4) In case of foreigners who entered the Republic of Moldova illegally, the prohibition shall last for 5 years.

(5) Terms of prohibition provided in paragraph (1), (3) and (4) shall increase by 6 months in case of foreigners deported from the country on account of the Republic of Moldova.

(6) Provisions of paragraph (1) shall not apply to foreigners having minor children or children incapable of work in common with persons domiciling on the territory of the Republic of Moldova, with exception of foreigners deprived of parental rights.

### II.4.1. Compatibility with the Returns Directive

The Law on Foreigners requires the imposition of a prohibition on entry on foreigners who have stayed illegally, with the length determined by the period in which they have stayed illegally, and whether they have engaged in unauthorized labour. Furthermore, a prohibition on entry of five years is imposed on illegal entrants. This is, at least on the surface, in line with the Directive, which allows for the imposition of an entry ban for a period normally not exceeding five years.<sup>48</sup>

However, in contrast to the Law on Foreigners, the Directive only provides for a mandatory prohibition in those cases where no period for voluntary departure has been granted, or the obligation to return has not been complied with. In other cases, particularly those in which the third-country national leaves within the voluntary departure period, imposing a prohibition is discretionary. As discussed under point 2 below, from the perspective of AVR, the imposition of a prohibition on voluntary re-

<sup>48</sup> Directive 2008/115, Article 11(1) and (2).

turnees is highly undesirable. As such, whilst the Law on Foreigners falls within the standards of the Directive in this regard, it does not reflect best practice.

Real compatibility issues arise in relation to Article 10(5). This allows for the expansion of the prohibition in Article 10(1), (3) and (4) by another six months if the foreigner is deported. Based on these paragraphs, some categories of illegal foreigners can already be subject to a prohibition of five years, which is the maximum period allowed by the Directive, with the exception of cases in which a third-country national represents a serious threat to public policy, public security or national security.<sup>49</sup> The mere fact that the individual has been subject to forced removal/deportation, is not sufficient to exceed the five-year maximum. Under the Law on Foreigners, however, a person who falls under Article 10(1)(f) and (g) or 10(4), and who are deported, **would be subject to a prohibition of 5 ½ years**. Unless they also represent a danger to public order, public or national security, this would **not be compatible with the Directive's standards**.

#### II.4.2. The undesirability of the prohibition of entry for voluntary returnees

The standards in the Directive notwithstanding, it is noted that imposition of an entry prohibition on voluntary returnees, i.e. those who comply with the obligation to leave within the period provided for this, is highly undesirable and constitutes a bad practice. **The impossibility of legal re-entry for a considerable period of time is a major disincentive for voluntary return**, particularly of those illegal migrants with specific ties to the Republic of Moldova. It is further noted that AVR is not merely an instrument to ensure the departure of migrants, but that it is part of an overall system that encourages legal migration. As such, it should be possible for an illegally present alien to use AVR to return to his country of origin, and apply for the proper authorization to enter the Republic of Moldova from there. This would be particularly the case for those who have family members legally residing in Moldova. Prima facie preventing them from re-entering is likely to have counterproductive effects, as this will be a reason for such migrants to try and re-enter Moldova again *without* authorization, thus only adding to the problem of illegal migration that it seeks to prevent.

**Although the Law on Foreigners privileges voluntary returnees to some extent, by providing that their prohibition on entry will be halved, it is doubtful that this will be a sufficient incentive for illegal residents to actually take up voluntary return**, given that the prohibition of entry may still span several years.

In this respect, attention is also drawn to the fact that the Returns Directive explicitly obliges Member States to “consider withdrawing or suspending an entry ban where a third-country national who is the subject of an entry ban ... can demonstrate

that he or she has left the territory of a Member State in full compliance with a return decision.”<sup>50</sup> Following this example, **the Government of Moldova could consider a system in which voluntary returnees are automatically released from their prohibition of entry when they have demonstrably arrived in the country of origin or another third state**. In this way, the advantages of voluntary return over forced return are significantly enhanced, thus increasing the attractiveness of the former option.

Regardless of the model used, **it is highly recommended that the Government considers exempting foreigners who have demonstrably left the country within the period for voluntary return, including through AVRR programmes, from any prohibition of entry**.

## II.5. Imposition of other penalties for illegal stay

### Contravention Code

#### **Article 332. Violations of state border rules and of rules for crossing state borders**

(1) *Violations of state border rules and of rules for crossing state borders shall be sanctioned by a fine of 10 to 20 conventional units for individuals and by a fine of 15 to 30 conventional units for responsible persons.*

(2) *Crossing the state border through state border crossing points without a passport or without an authorization issued by a competent authority shall be sanctioned by a fine of 20 to 50 conventional units for individuals and by a fine of 100 to 150 conventional units for responsible persons.*

#### **Article 333. Violations of rules for staying in the Republic of Moldova**

*Violations by foreign citizens and stateless persons of rules for staying in the Republic of Moldova expressed through staying without identity documents or with inauthentic documents or documents whose validity has expired; by avoiding leaving the country after the expiration of the period of stay granted; by violating the rules for entering or exiting the Republic of Moldova; by avoiding taking a medical examination for identifying the human immunodeficiency virus (HIV); by declaring false information with a view to obtaining a visa, a permit to stay or an identity card shall be sanctioned by a fine of 50 to 100 conventional units with or without expulsion from the Republic of Moldova.*

As with the prohibition of entry, the imposition of fines for illegal residence raises the barrier to voluntary return. This is particularly relevant in the case of AVR, which

<sup>49</sup> Directive 2008/115, Article 11(2).

<sup>50</sup> Directive 2008/115, Article 11(3).

is specifically designated to assist those illegal foreigners who do not have sufficient means to arrange their own return. Since AVR services are thus provided to persons who are either destitute or have very limited financial means, the obligation of paying fines before departure significantly decreases the relative advantage of voluntary return over forced return. It is a best practice to make voluntary return as attractive as possible, and from this perspective it is recommended that ***thought is given to a system in which foreigners who apply for AVR automatically are relieved of their duty to pay such fines, to the extent that these are only based on their illegal entry and stay.***

## II.6. Detention procedures

Whilst the focus of this report is on reforming (assisted) voluntary return in Moldova, and not on the conditions of (imposing) immigration-related detention, there are some areas of concern in relation to the latter, which are likely to negatively impact on the effectiveness of voluntary return. As noted earlier, detention of foreigners merely on the basis of their illegal presence is allowable only if this is for the express purpose of removal. This also means that the length of legitimate detention is dependent on the existence of a reasonable prospect of removal. If such a reasonable prospect is no longer evident, the detention measure should be lifted.

From this perspective, the practice of Moldovan courts in imposing public custody on illegally resident foreigners raises questions. Moldovan legislation prescribes that such detention must be imposed by a court and that it may not exceed 6 months. Interviews have revealed, however, that courts do not only impose the placement in public custody, but also set a specific period for the length of detention, up to 6 months. As such, the illegal foreigner is “sentenced”, for example, to three months in public custody, commensurate with the judge’s estimate of the severity of his contravention of immigration law. This is without reference to the prospect of removal. Neither does the Moldovan system provide for automatic periodical review of the placement in custody; the foreigner may only appeal the decision. This means that the principle that detention may last no longer than necessary for the removal of the foreigner is not applied in practice.

Although such a review is beyond the scope of this report, it is recommended that ***a follow-up study is undertaken on the issue of immigration-related detention, with specific focus on the practices of imposing public custody, habeas corpus procedures, the extent to which detention is used as a measure of last resort, and to what extent viable alternatives are available.***

## Summary of recommendations

This report assesses the current position of the institution of assisted voluntary return and reintegration (AVRR) in the Moldovan legislative framework, as well as possibilities for strengthening that position. Based on a review of that legislative framework, and its compatibility with international and European standards and best practices, the following recommendations are made:

*Regarding the institutionalization of AVRR in the Moldovan legislative framework:*

- Incorporate in Article 61 of the Law on Foreigners a clear commitment on the part of the Government of Moldova not only to allow for voluntary departure in line with the EU Returns Directive, but also to assist such departure where necessary.
- Remove references to international and non-governmental organizations from Article 61 of the Law on Foreigners, and to provide that the Government of Moldova is responsible for maintaining AVRR out of budgetary and extra-budgetary resources
- Develop a new legal instrument setting out responsibilities, content and eligibility criteria for implementation of the Moldovan AVRR institution.

*Regarding the provision of a period for voluntary return to foreigners who are not (or no longer) allowed to stay in the Republic of Moldova:*

- amend those provisions in Article 52 of the Law on Foreigners which do not meet the minimum EU standards on the length of the period for voluntary return, and additionally to maximize that period (to 30 days) in order to allow for the most effective voluntary return assistance
- set out, in a legal instrument, the objective criteria on which the finding that a “circumvention risk” exists can be based, since this is relevant to the shortening or revoking of a period for voluntary return
- ensure that the period for voluntary return provided by the Law on Asylum is fully utilized for the possibility of exploring assisted voluntary return, inter alia, by offering information and counselling to individuals while still governed by the provisions of the Law on Asylum
- seek continuity between the Law on Asylum and the Law on Foreigners, including in relation to the accommodation of the asylum seeker, so as to avoid that AVRR activities that have already been undertaken with him/her, are unnecessarily interrupted.
- Review the provisions in the Contravention Code that allow for expulsion on the basis of illegal residence are reviewed and thus circumvent the principle that a period for voluntary return should be granted. This applies particularly in relation to Articles 332 and 333 of the Code.

*Regarding exit procedures:*

- reform exit procedures with a view to lowering barriers to spontaneous and assisted voluntary return, reducing conditions to be met before being granted permission to depart, and improve inter-agency cooperation to ensure relevant information is available to all bodies involved.

*Regarding the prohibition of entry:*

- Remove those provisions from Article 10 of the Law on Foreigners which would lead to prohibitions of entry on forced returnees exceeding 5 years (or, in the case of persons posing a danger to national security, 10 years)
- Amend Article 10(2) of the Law on Foreigners to exempt voluntary returnees from the imposition of a prohibition of entry, since the current reduction is unlikely to be a sufficient incentive to voluntary return; such exemption should preferably be automatic for those foreigners who have demonstrably left the Republic of Moldova.

*Regarding penalties imposed on illegally resident foreigners:*

- Remove from the Contravention Code reference to penalties for the mere fact of illegal entry or residence
- To the extent that this is not achievable, ensure that penalties are revoked for foreigners who voluntarily leave the Republic of Moldova, including through AVRR.

*Regarding detention:*

- Commission a follow-up study examining the issue of immigration-related detention, with specific focus on the practices of imposing public custody, habeas corpus procedures, the extent to which detention is used as a measure of last resort, and to which viable alternatives are available.



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