Regulation (EU) 2018/1860 of the European Parliament and of the Council of 28 November 2018 on the use of the Schengen Information System for the return of illegally staying third-country nationals

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on the use of the Schengen Information System for the return of illegally staying third-country nationals

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 79(2)(c) thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national parliaments,

Acting in accordance with the ordinary legislative procedure[(1)],

Whereas:

(1) The return of third-country nationals who do not fulfil or no longer fulfil the conditions for entry, stay or residence in the Member States, in full respect of fundamental rights and in particular the principle of non-refoulement, and in accordance with Directive 2008/115/EC of the European Parliament and of the Council[(2)], is an essential part of the comprehensive efforts to tackle irregular migration and increase the rate of return of irregular migrants.

(2) It is necessary to increase the effectiveness of the Union system to return illegally staying third-country nationals. This is essential for maintaining public trust in the Union migration and asylum policy and providing support to persons in need of international protection.

(3) Member States should take all necessary measures to return illegally staying third-country nationals in an effective and proportionate manner, in accordance with the provisions of Directive 2008/115/EC.

(4) Regulation (EU) 2018/1861[(3)] and Regulation (EU) 2018/1862[(4)] of the European Parliament and of the Council lay down the conditions for the establishment, operation and use of the Schengen Information System (SIS).

(5) A system should be established for sharing information between Member States that use SIS pursuant to Regulation (EU) 2018/1861 concerning return decisions issued in respect of third-country nationals staying illegally on the territory of the Member States and for monitoring whether third-country nationals subject to those decisions have left the territory of the Member States.

Changes to legislation: *There are currently no known outstanding effects for the Regulation (EU) 2018/1860 of the European Parliament and of the Council. (See end of Document for details)*

(6) This Regulation does not affect the rights and obligations of third-country nationals laid down in Directive 2008/115/EC. An alert entered into SIS for the purpose of return does not, in itself, constitute a determination of the status of the third-country national on the territory of Member States, especially in Member States other than the Member State which entered the alert into SIS.

(7) Alerts on return entered into SIS and the exchange of supplementary information concerning those alerts should support competent authorities to take the necessary measures to enforce return decisions. SIS should contribute to the identification of and the information sharing between Member States on third-country nationals who are subject to such a return decision, who have absconded and are apprehended in another Member State. Those measures should help prevent and deter irregular migration and secondary movements and enhance cooperation between Member States' authorities.

(8) To ensure the effectiveness of return and increase the added value of alerts on return, Member States should enter alerts into SIS in relation to return decisions they issue in respect of illegally staying third-country nationals in accordance with provisions respecting Directive 2008/115/EC. For this purpose, Member States should also enter an alert into SIS when decisions imposing or stating an obligation to return are issued in the situations described in Article 2(2) of that Directive, namely to third-country nationals who are subject to a refusal of entry in accordance with Regulation (EU) 2016/399 of the European Parliament and of the Council[(5)], or who are apprehended or intercepted by the competent authorities in connection with the irregular crossing by land, sea or air of the external border of a Member State and who have not subsequently obtained an authorisation or a right to stay in that Member State, and to third-country nationals who are subject to return as a criminal law sanction or as a consequence of a criminal law sanction, according to national law, or who are the subject of extradition procedures. In certain circumstances, Member States may refrain from entering alerts on return into SIS where the risk of the return decision not being complied with is low, namely during any period of detention or when the return decision is issued at the external border and is executed immediately, in order to reduce their administrative burden.

(9) This Regulation should set out common rules for entering alerts on return into SIS. Alerts on return should be entered into SIS as soon as the underlying return decisions are issued. The alert should indicate whether a period for voluntary departure has been granted to the third-country national concerned, including whether such period has been extended and whether the decision has been suspended or removal has been postponed.

(10) It is necessary to determine the categories of data to be entered into SIS in respect of a third-country national who is the subject of a return decision. Alerts on return should contain only those data that are necessary to identify the data subjects, to allow the competent authorities to take informed decisions without losing time and to ensure, where necessary, the protection of those authorities from persons who are, for example, armed, violent, have escaped or are involved in an activity as referred to in Articles 3 to 14 of Directive (EU) 2017/541 of the European Parliament and of the Council[(6)]. Furthermore, in order to facilitate identification and detect multiple identities, the alert

should include also a reference to the identification document of the person concerned and a copy of that document, where available.

(11) Given the reliability of identifying persons using fingerprints and photographs or facial images, they should always be inserted in alerts on return. As they may not be available, for example, when a return decision is taken in absentia, it should exceptionally be possible to derogate from this requirement in such cases.

(12) The exchange of supplementary information provided by the national competent authorities on third-country nationals subject to alerts on return, should always be carried out through the network of national offices called SIRENE Bureaux serving as point of contact and in accordance with Articles 7 and 8 of Regulation (EU) 2018/1861.

(13) Procedures should be established to enable Member States to verify that the obligation to return has been complied with and to confirm the departure of the third-country national concerned to the Member State that entered the alert on return into SIS. This information should contribute to more comprehensive monitoring of the compliance with return decisions.

(14) Alerts on return should be deleted as soon as the Member State or competent authority that issued the return decision receives confirmation that the return has taken place or where the competent authority has sufficient and convincing information that the third-country national has left the territory of the Member States. Where a return decision is accompanied by an entry ban, an alert for refusal of entry and stay should be entered into SIS in accordance with Regulation (EU) 2018/1861. In such cases Member States should take all necessary measures to ensure that no time-gap exists between the moment in which the third-country national leaves the Schengen area and the activation of the alert for refusal of entry and stay in SIS. If the data contained in SIS show that the return decision is accompanied by an entry ban, the enforcement of the entry ban should be ensured.

(15) SIS should contain a mechanism for notifying the Member States of the non-compliance of third-country nationals with an obligation to return within a given period of voluntary departure. The mechanism should support the Member States in fulfilling their obligations to enforce return decisions and their obligations to issue an entry ban in accordance with Directive 2008/115/EC with regard to third-country nationals who have not complied with an obligation to return.

(16) This Regulation should establish mandatory rules for consultation between Member States to avoid or reconcile conflicting instructions. Consultations should be carried out where third-country nationals who hold, or are being granted, a valid residence permit or a long-stay visa by a Member State are subject to an alert on return issued by another Member State, in particular if the return decision is accompanied by an entry ban, or where conflicting situations may arise at entry in the territories of the Member States.

(17) Alerts should be kept in SIS only for the time required to fulfil the purposes for which they were entered. The relevant provisions of Regulation (EU) 2018/1861 on review periods should apply. Alerts on return should be automatically deleted as soon as they expire, in accordance with the review procedure referred to in that Regulation.

(18) Personal data obtained by a Member State pursuant to this Regulation should not be transferred or made available to any third country. As a derogation to that rule, it should be possible to transfer such personal data to a third country where the transfer is subject to strict conditions and is necessary in individual cases in order to assist with the identification of a third-country national for the purposes of his or her return. The transfer of any personal data to third countries should be carried out in accordance with Regulation (EU) 2016/679 of the European Parliament and of the Council[(7)] and be conducted with the agreement of the issuing Member State. It should be noted however, that third countries of return are often not subject to adequacy decisions adopted by the Commission under Article 45 of Regulation (EU) 2016/679. Furthermore, the extensive efforts of the Union in cooperating with the main countries of origin of illegally-staying third-country nationals subject to an obligation to return has not been able to ensure the systematic fulfilment by such third countries of the obligation established by international law to readmit their own nationals. Readmission agreements that have been concluded or are being negotiated by the Union or the Member States and which provide for appropriate safeguards for the transfer of data to third countries pursuant to Article 46 of Regulation (EU) 2016/679 cover a limited number of such third countries. Conclusion of any new agreement remains uncertain. In those circumstances, and as an exception to the requirement for an adequacy decision or appropriate safeguards, transfer of personal data to third-country authorities pursuant to this Regulation should be allowed for the purposes of implementing the return policy of the Union. It should be possible to use the derogation provided for in Article 49 of Regulation (EU) 2016/679, subject to the conditions set out in that Article. Under Article 57 of that Regulation, implementation of that Regulation, including with regard to transfers of personal data to third countries pursuant to this Regulation, should be subject to monitoring by independent supervisory authorities.

(19) National authorities responsible for return might differ significantly among Member States, and such authorities might also vary within a Member State depending on the reasons for illegal stay. Judicial authorities might also issue return decisions, for instance as result of appeals against a refusal to grant an authorisation or right to stay or as a criminal sanction. All national authorities in charge of issuing and enforcing return decisions in accordance with Directive 2008/115/EC should be entitled to access SIS in order to enter, update, delete and search alerts on return.

(20) Access to alerts on return should be granted to the national competent authorities referred to in Regulation (EU) 2018/1861 for the purpose of identification and return of third-country nationals.

(21) Regulation (EU) 2016/794 of the European Parliament and of the Council[(8)] provides that Europol is to support and strengthen actions carried out by the national competent authorities and their cooperation in combating terrorism and serious crime and to provide analysis and threat assessments. In order to facilitate Europol in carrying out its tasks, in particular within the European Migrant Smuggling Centre, it is appropriate to allow Europol access to the category of alerts as provided for in this Regulation.

(22) Regulation (EU) 2016/1624 of the European Parliament and of the Council[9] provides, for the purpose of that Regulation, that the host Member State is to authorise the members of the teams referred to in point (8) of Article 2 of that Regulation deployed by the European Border and Coast Guard Agency to consult Union databases where this consultation is necessary for fulfilling operational aims specified in the operational plan on border checks, border surveillance and return. The objective of the deployment of the teams referred to in points (8) and (9) of Article 2 of that Regulation is to provide technical and operational reinforcement to the requesting Member States, especially to those facing disproportionate migratory challenges. For the teams referred to in points (8) and (9) of Article 2 of that Regulation to fulfil their tasks, they require access to alerts on return in SIS through a technical interface of the European Border and Coast Guard Agency connecting to Central SIS.

(23) The provisions on responsibilities of the Member States and the European Union Agency for the Operational Management of Large-Scale IT Systems in the Area of Freedom, Security and Justice established by Regulation (EU) 2018/1726 of the European Parliament and of the Council[10] ('eu-LISA'), on the entry and processing of alerts, on the conditions for access to and retention of alerts, on data processing, on data protection, on liability and on monitoring and statistics in Regulation (EU) 2018/1861 should also apply to data contained and processed in SIS in accordance with this Regulation.

(24) Since the objectives of this Regulation, namely to establish a system for sharing information about return decisions issued by the Member States in accordance with provisions respecting Directive 2008/115/EC in view of facilitating their enforcement and to monitor the compliance of illegally staying third-country nationals with their obligation to return, cannot be sufficiently achieved by the Member States, but can rather, by reason of its scale and effects, be better achieved at Union level, the Union may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on European Union (TEU). In accordance with the principle of proportionality as set out in that Article, this Regulation does not go beyond what is necessary in order to achieve those objectives.

(25) This Regulation respects fundamental rights and observes the principles recognised by the Charter of Fundamental Rights of the European Union.

(26) The application of this Regulation is without prejudice to the obligations deriving from the Geneva Convention relating to the Status of Refugees of 28 July 1951, as supplemented by the New York Protocol of 31 January 1967.

(27) Member States should implement this Regulation in full respect of fundamental rights, including the respect of the principle of non-refoulement, and should always take into consideration the best interests of the child, family life, and the state of health or condition of vulnerability of the individuals concerned.

(28) In accordance with Articles 1 and 2 of Protocol No 22 on the position of Denmark annexed to the TEU and to the Treaty on the Functioning of the European Union, Denmark is not taking part in the adoption of this Regulation and is not bound by it or