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The order to leave the territory of the Republic of Poland in light of Directive 2008/115 (the Return Directive)

To address illegal border crossings, [the Act of 14 October 2021 on amending the Act on foreigners and some other acts](#) (the Pushback Act) introduced a new instrument into the Polish legislation, namely an order to leave the territory of the Republic of Poland. According to [the Border Guard](#), 1860 such orders were issued to third-country nationals within a month (November 2021). The aim of this analysis is to evaluate the admissibility of using this instrument in light of the [Return Directive](#).

Pursuant to the amended wording of Art. 303¹ (9a) and 303b of the [Act on Foreigners](#), if a person was apprehended immediately after illegally crossing the border, which is an external EU border within the meaning of Art. 2 (2) of the [Schengen Borders Code](#), the competent commanding officer of the Border Guard post shall draw up a report on border crossing and issue an order for the foreigner (third-country national) to leave the territory of the Republic of Poland. The order to leave the territory of the Republic of Poland specifies the obligation to exit the territory of the Republic of Poland and the prohibition of re-entry into the territory of the Republic of Poland (re-entry ban) and other Schengen States as well as the period of the re-entry ban, which may vary from six months to three years.

The order to leave the territory of the Republic of Poland may be appealed against to the Commander in Chief of the Border Guard, which does not, however, suspend the enforcement of the order. Furthermore, the data of a foreigner who has been ordered to leave the territory of the Republic of Poland are entered on the list of foreigners whose stay on the territory of the Republic of Poland is undesirable. The order is passed on to the Head of the Office for Foreigners, who transfers the foreigner's data stored in the register to the Schengen Information System for the purpose of refusing entry.

The [explanatory memorandum to the draft law](#) states that the new procedure is intended to streamline and accelerate the return procedures. Therefore, in reality, the new procedure pertains to those who are physically present in the territory of the Republic of Poland without a legal title to stay there. This means that the situation of these persons should first be examined by reference to the Return Directive and the return procedure laid down therein, including, alternatively, with reference to the exceptions stipulated by the Directive itself. This conclusion is also supported by Art. 13 (1) of the Schengen Borders Code, pursuant to which a person who has crossed the border illegally and who has no right to stay on the territory of the Member State shall be apprehended and made subject to procedures respecting Directive 2008/115. However, the explanatory memorandum makes no reference to that directive or the Schengen Borders Code.

According to Art. 2 (1) of the Return Directive, in conjunction with Art. 3 § 2), it applies to third-country nationals who are staying illegally on the territory of a Member State, whereby illegal stay is defined as presence on the territory of a Member State of a third-country national who does not fulfil or no longer fulfils the conditions for entry into the Member State as now set out in Art. 6 of the Schengen Borders Code and who has thus in fact crossed an external border in breach of the law. For such persons, the Directive, in Art. 6 (1) provides that in the first place a return decision shall be issued to persons staying illegally, under a fair and transparent procedure that guarantees the inviolability of a number of fundamental rights. It should be noted that Directive 2008/115 should be interpreted as precluding [the use of any legal fiction](#) whereby a Member State considers that a third-country national is not present on the territory of that Member State if he or she is in a special transit zone or border area set up by that Member State, meaning that the Member State may apply special national provisions to such persons.

The Directive stipulates that certain exceptions may apply as regards the limitation of who falls within the Directive. From the point of view of this analysis, the relevant exception is set out in Art. 2 (2) (a), labelled ‘border cases’. According to this provision, Member States may decide not to apply the Directive to, inter alia, third-country nationals who are apprehended or intercepted by the competent authorities in connection with the illegal crossing of the external border of those States and who have not subsequently obtained an authorisation or a right to stay in that State. Moreover, [‘frontline’ Member States are even encouraged by the European Commission to use this exception](#) in situations of significant migratory pressure, ‘when this can provide for more effective procedures’. Indeed, the purpose of this provision, as interpreted by the Court of Justice of the EU in the [Affum ruling](#), is to permit Member States to continue to apply simplified national return procedures at their external borders, without having to follow all the procedural stages prescribed by the Directive, in order to be able to remove more swiftly third-country nationals who have been intercepted when crossing those borders. In other words, according to the [Arib judgment](#), a Member State may be justified in failing to follow all the procedural stages prescribed by the Return Directive, in order to speed up the return of third-country nationals who are unlawfully present on the territory of that Member State to a third country by immediately returning those persons to the external border that they have crossed illegally.

Thus, although the Return Directive allows for third country nationals apprehended in connection with the unlawful crossing of an external border to be excluded from its application, the possibility for Member States to invoke the above exception cannot be made in a manner that disregards some of the criteria set out in the Directive itself. Such provisions must respect the general principles of international law and the fundamental rights of third-country nationals, as well as the minimum guarantees foreseen in Art. 4 (4) of the Directive, namely to ensure a sufficient level of protection for third-country nationals excluded from the scope of the Directive which is no less favourable than the level of protection set out in the Directive’s provisions on: limitations on the use of coercive measures, postponement of removal, emergency health care and necessary medical treatment in case of illness as well as detention conditions, and respect for the principle of non-refoulement. Moreover, it follows from the European Commission’s *Return Handbook* that the decision of a Member State to make use of the derogation and not to apply the Directive to ‘border cases’ must be made clear, in advance, in the national implementing legislation, otherwise it can develop no legal effect. There are no specific formal requirements in this respect, however, it is important that it should be clear from the national legislation – directly or indirectly – whether and to what extent the Member State applies this derogation.

However, nowhere in the explanatory memorandum to the Pushback Act is the Return Directive explicitly cited, nor are the derogations to its application. Instead, the lawmakers call the new procedure ‘proceedings on crossing the border in violation of the law’ (which could be considered an indirect reference to the term ‘border cases’, if not for the fact that it is an informal term), specifying that its objective is mainly to streamline and accelerate the return procedures. The introduction of an additional item to the provision of Art. 303 of the Act on Foreigners which stipulates that ‘proceedings concerning the obligation to return shall not be initiated’ is also not a crucial factor in terms of assessing whether Art. 2 (2) (a) of the Return Directive has been correctly implemented, as Art. 303 of the Act regulates the prerequisites for not initiating such proceedings. Moreover, if there are doubts as to whether the prerequisites indicated in this provision are met at the stage prior to the proceedings, the authority should initiate them and verify the circumstances of the case in the investigation procedure. This argument is important in light of the vague concepts used in the legislation, in particular the concept of ‘apprehended immediately after crossing the border’. It is conceivable that this will refer to persons wishing to get through the wire fences currently erected on the border, crossing the Bug river or climbing the wall after it has been built.

During the application of the amended version of the Act on Foreigners, it may turn out that the boundaries between the provision of Art. 303¹ (9a) and the provision of Art. 302¹ (10), according to which a foreigner who has illegally crossed or attempted to cross the border but the circumstances referred to in Art. 303¹ (9a) do not apply, will be blurred. Under Art. 302¹ (10) – but also in other circumstances listed in Art. 302 – a return decision is issued (a third-country national is subject to the return procedure in accordance with the standards set out in the Return Directive). Moreover, there are reservations about the fact that the wording of the Pushback Act does not at any point refer explicitly to the special minimum guarantees, listed in Art. 4 (4) of the Directive, applicable to ‘border cases’. It is also alarming that it is in fact unclear how the enforcement of ‘leaving the territory of the Republic of Poland’ is carried out in practice against third-country nationals. The enforcement practice of the Act on Foreigners is unknown due to the introduction of – firstly – a state of emergency and now – a prohibition to be present (currently till 30 June 2022) in the area along the Polish-Belarusian border, to which access is extremely restricted. The frequent press conferences of the spokeswoman of the Border Guard (or information provided in posts on social networks, e.g. Twitter or Facebook), which provide basic statistics on the number of attempts to illegally cross the border and the number of orders to leave the territory of the Republic of Poland issued, are not enough to dispel these doubts. The orders to leave the territory of the Republic of Poland only refer to “bringing a person to the state border line”.

In conclusion, the Return Directive provides for the possibility of limiting the rights of third-country nationals who are de facto present on the territory of a Member State by having recourse to the exception laid down in Art. 2 (2) (a). The form of termination of the stay of such persons on the territory of the Member State concerned (form and content of the order, as well as the legal remedies) are governed by national law. However, there are serious doubts as to the manner in which this exception was introduced into the Polish legal order, to the possible inaccuracy as to whether and to what extent the Republic of Poland applies this derogation from the Return Directive, as well as to the lack of indication as to whether and how the minimum guarantees under Art. 4 (4) of the Directive are respected.