COMMISSION OF THE EUROPEAN COMMUNITIES

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Detailed comments on Proposal for a European Parliament and Council Directive on common standards on procedures in Member States for returning illegally staying third country nationals (COM(2005) 391 final)

Detailed comments

Chapter I

General Provisions

Article 1: Objectives

The starting point for the applicability of this proposed Directive is "illegal stay". The Directive aims - as a measure on illegal immigration based on Article 63(3)(b) of the Treaty - at establishing common standards on procedures in Member States for returning illegally staying third-country nationals. This Directive is applicable to any illegally staying person, whatever the reason of the illegality of the stay (e.g. expiry of a visa, expiry of a residence permit, revocation or withdrawal of a residence permit; negative final decision on an asylum application, withdrawal of refugee status or illegal entrance). This Directive does not address the grounds or procedures for ending legal residence. Such harmonization has already begun and will continue, in particular, within the context of the Directives regulating the conditions of entry, stay and ending of legal residence of third-country nationals.

Article 2: Scope

This Proposal applies to third-country nationals staying illegally in the territory of a Member State. Normally these persons do not fulfil or no longer fulfil the conditions of entry as set out in Article 5 of the Schengen Convention (possession of valid documents to cross the border; possession of valid visa if required; having sufficient means of subsistence; not being subject of an alert for the purposes of refusing entry; no threat to public policy or national security). As far as these cases are concerned, this proposal constitutes a development of provisions of the Schengen acquis. Insofar as the third-country nationals concerned are *otherwise illegally staying* in the territory of a Member State (e.g. third-country nationals holding a residence permit who – after having committed a serious crime – loose their residence permit and are at once made subject of return procedures) this proposal cannot be considered as a development of provisions of the Schengen acquis.

Persons who have been refused entry and who are present in a transit zone of a Member State are subject to special rules in several Member States. By virtue of a “legal fiction” under the national law of these Member States, these persons are sometimes not considered to be “staying in the territory” of the Member State concerned and so different rules are applied. This proposal recognises the existence of this differentiation under national law and provides for the following solution: Member States may decide not to apply the Directive to persons present in a transit zone. This should, however, not lead to a legal vacuum and minimum safeguards should be respected. If Member States opt not to apply the Directive to this category of persons, they must ensure that the level of protection for affected persons is not less favourable than that set out in the Articles of the proposal dealing with postponement of removal/return, removal, safeguards pending return and temporary custody conditions.

In line with other proposals in the field of immigration, third country nationals who are beneficiaries of Community law are excluded from the scope of this proposal.

Article 3: Definitions

This Article defines the main concepts and terms used in the provisions of the proposal.

(a) The definition of 'third-country national' is formulated in accordance with the definition already used in several other Directives adopted in the field of migration (see Articles 2(a) of Directive 2003/86/EC[1]; 2003/109/EC[2]; 2004/81/EC[3] and 2004/114/EC[4])

(b) The definition of 'illegal stay' has been formulated as broadly as possible. It covers all cases in which a third-country national is present on the territory of a Member State without fulfilling the conditions for stay or residence in that Member State. The reasons which may lead to an illegal stay are manifold: expiry of a visa, expiry of a residence permit, revocation or withdrawal of a residence permit, withdrawal of a residence permit for reasons of public policy or public security, negative final decision on an asylum application, withdrawal of refugee status, illegal entrance and so forth.

(c) The definition of 'return' was based upon the wording of annex I to the 2002 Council Return Action Programme[5]. Return always implies going to a third country. This may be voluntary or enforced. Going to another Member State cannot be considered as return within the meaning of this definition.

(d) The definition of 'return decision' focuses on two interconnected elements. A return decision has to contain a statement concerning the illegality of the stay and it must impose an obligation to return.

Given the manifold scenarios which may lead to the issuing of a return decision, this definition gives a wide discretion to Member States concerning the form (decision or act, judicial or administrative) in which it may be adopted. In this context, it should also be emphasised that return decisions can be issued in the form of a self-standing act or decision or together with a removal order (see Article 6(3)).

(e) and (f) The definitions of 'removal' and "removal order" are aligned with the wording of annex I to the 2002 Council Return Action Programme.

(g) The definition of "re-entry ban" reflects the policy approach adopted in this proposal to give a European dimension to the effects of national return measures by preventing re-entry into the territory of all Member States for a specified period.

In the context of return, the term "*expulsion*" is frequently used. This proposal does not seek to define this term for two reasons.

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1 Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification, *Official Journal L 251 , 03/10/2003 P. 0012 - 0018*

2 Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents, *Official Journal L 016 , 23/01/2004 P. 0044 - 0053*

3 Council Directive 2004/81/EC of 29 April 2004 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities, *Official Journal L 261 , 06/08/2004 P. 0019 - 0023*

4 Council Directive 2004/114/EC of 13 December 2004 on the conditions of admission of third-country nationals for the purposes of studies, pupil exchange, unremunerated training or voluntary service, *Official Journal L 375 , 23/12/2004 P. 0012 - 0018*

5 Return Action Programme (Council document 14673/02 MIGR 125 FRONT 135 VISA 172, adopted by Council during its meeting on 28-29.11.2002.)

1. The current understanding of "expulsion" differs widely between Member States. For some Member States, expulsion is an act which declares entry, stay or residence to be illegal; for other Member States, expulsion is an act which terminates the legality of a previous lawful residence e.g. in cases of criminal offences. Annex I to the 2002 Council Return Action Programme reflects this ambiguous "dual"-understanding of the term expulsion and does not arrive at a common definition.

2. Given the existence of the more specific and easily definable terms "return" and "removal", a definition of the term "expulsion" is not necessary for the purposes of this proposal.

Consequently, in order to avoid confusion or conceptual misunderstandings, the Commission has intentionally refrained from using the term "expulsion" in the operational Articles of this proposal.

Article 4: More favourable provisions

Paragraph 1 clarifies that more favourable provisions in existing international agreements shall prevail over the provisions of this Directive. This paragraph is drafted in accordance with parallel provisions already agreed in the context of other Directives adopted in the field of migration, such as Article 4(1) of Directive 2004/114/EC.

Paragraph 2 confirms that more favourable provisions contained in already existing Community legal instruments, in particular Directive 2003/109/EC concerning the status of third-country nationals who are long term residents, Directive 2004/38/EC on the right of the citizens of the Union and their family members to move and reside freely within the territory of the Member States and Directive 2004/83/EC on minimum standards for the qualification as refugees will continue to apply.

Paragraph 3 focuses on more favourable provisions adopted under national law. It is drafted in accordance with parallel provisions already agreed in the context of other Directives adopted in the field of immigration and asylum, such as Article 3 of Directive 2004/83/EC. It reinforces the express clause contained in the penultimate paragraph of Article 63 of the Treaty: "*Measures adopted by the Council pursuant to points 3 and 4 shall not prevent any Member State from maintaining or introducing in the areas concerned national provisions which are compatible with this Treaty and with international agreements."*

Article 5: Family relationships and best interest of the child

This article highlights two guiding principles which must be taken into account by Member States when implementing the provisions of the Directive: respect for the existence of family relationships and the best interest of the child.

Chapter II

Termination of illegal stay

Article 6: Return Decision

Paragraph 1 obliges Member States to issue a return decision to any third-country national staying illegally in their territory. According to the definition given in Article 2 (d), the return decision must contain a statement that the stay of the third-country national is illegal and it

must impose an obligation to return.

Paragraph 2 seeks to reinforce the principle that priority should be given to voluntary return. Unless there is a "counter indication" (the risk of absconding), Member States should always grant a period of voluntary departure to the person concerned.

Paragraph 3 expressly clarifies that Member States are free to issue both a return decision and a removal order within two separate acts/decisions or one act or decision. The substantive provisions of the Directive, in particular concerning protection against removal and the possibility for voluntary return must be respected by Member States, notwithstanding their choice of adopting return decision and removal order within two separate acts/decisions or one joint act or decision.

Paragraph 4 clarifies that in those cases in which Member States are obliged (in particular under the ECHR) to grant a protection related right to stay, all return procedures must be stopped.

Paragraph 5 clarifies that Member States may at any moment decide to grant to a third-country national staying illegally on their territory an autonomous residence permit or another authorisation offering a right to stay for compassionate, humanitarian or other reasons.

Paragraph 6 addresses a particular scenario: a third-country national staying illegally in the territory of one Member State is holding a valid residence permit issued by another Member State. In this specific case, Member States shall refrain from issuing a return decision to this person, providing that this person voluntarily goes back to the territory of that Member State.

Paragraphs 7 and 8 address cases in which third-country nationals are subject of a pending procedure for granting or renewing a residence permit or any other permit offering a right to stay. In the case of a procedure concerning renewal, Member States *shall* refrain from issuing a return decision until a decision is taken. In the case of first applications, Member States *may* do so.

Article 7: Removal order

As already set out in the context of Article 6, priority should be given to voluntary return. The removal order, ordering the "execution of the obligation to return", shall only be issued where necessary to enforce the obligation to return. Again, it is expressly clarified that Member States are free to issue both a return decision and a removal order within one act or decision. The substantive provisions of this chapter, in particular concerning protection against removal and the possibility for voluntary return will, however, have to be respected by Member States, notwithstanding their choice of adopting return decision and removal order within two separate acts/decisions or one joint act or decision.

Article 8: Postponement

Paragraph 1 allows Member States to postpone the enforcement of the return decision for an appropriate period (exceeding the period needed for voluntary departure) in certain specific circumstances linked to the situation of the individual concerned, such as personal and family reasons.

Paragraph 2 aims at providing a clear steer concerning those cases in which a removal order

shall not be executed, whilst avoiding an overly prescriptive list which would be inappropriate within the framework of a Directive. The cases highlighted in this paragraph concern circumstances linked to the physical or mental state of the person concerned (lit. a); technical reasons, such as lack of availability of appropriate transport facilities (lit.b) and – as far as the removal of minors is concerned – the need of safeguarding the best interests of the child (lit.c).

Paragraph 3 provides that - in accordance with the principle of proportionality - Member States may make the postponement of the enforcement of the return decision conditional on the fulfilment of certain obligations aimed at avoiding the risk of absconding, such as regular reporting to the authorities, the deposit of a financial guarantee, the handing over of documents or an obligation to stay at a certain place. The power to impose certain obligations may be an advantage for the third-country national concerned, since it may allow the grant of a postponement of the enforcement of the return decision in cases which would not normally otherwise qualify for such treatment.

Article 9: Re-entry ban

This Article obliges Member States to issue a "re-entry ban", preventing re-entry into the territory of all the Member States, when issuing removal orders. Member States are also allowed to issue a "re-entry ban" at the same time as they issue a return decision. Adding this European dimension to the effects of national return measures is intended to have preventative effects and to foster the credibility of a truly European return policy. The length of the re-entry ban will have to be determined with due regard to all relevant circumstances of the individual case. Normally it should not exceed 5 years. Only in cases of serious threat to public policy or public security, may the re-entry ban be issued for a longer period.

Article 10: Removal

This Article expressly binds the use of coercive force to the principle of proportionality and obliges Member States to respect the fundamental rights and the dignity of the third-country national concerned. In carrying out removals, Member States shall take into account the common Guidelines on security provisions for joint removal by air, attached to Council Decision 2004/573/EC[6] on joint flights for removals of 29 April 2004.

Chapter III

Procedural safeguards

Article 11: Form

This Article sets out minimum standards concerning the form of return decisions and removal orders as an essential pre-condition and necessary complement to the right to an effective remedy, provided for in Article 12.

Article 12: Judicial remedies

This Article provides for a right to an effective judicial remedy against return decisions and removal orders. Given that the seriousness of reasons which may lead to the issuing of return

[6] 2004/573/EC: Council Decision of 29 April 2004 on the organisation of joint flights for removals from the territory of two or more Member States, of third-country nationals who are subjects of individual removal orders, *Official Journal L 261 , 06/08/2004 P. 0028 - 0035*

decisions and removal orders may diverge substantially (risk to public policy and security, illegal entrance, overstaying of a visa or residence permit, etc.) and given that one of the main objectives of the proposal is to support effective national return efforts, it is left to Member States to determine whether an appeal should be given suspensive effect. Paragraph 2 provides that in those cases in which the appeal has no suspensive effect, the third country-national shall be permitted to apply for special leave to remain in the territory of the Member State.

Article 13: Safeguards pending return

This Article refers to the particular situations addressed in Article 8 (1) and (2). In order to avoid a legal vacuum for the persons concerned, this article provides for a minimum level of conditions of stay for those illegally staying third-country nationals for whom the enforcement of the return decision has been postponed or who cannot be removed. For this purpose, reference is made to the *substance* of a set of conditions already laid down in an existing instrument of Community law: Articles 7 to 10, Article 15 and Articles 17 to 20 of Council Directive 2003/9/EC[7] of 27 January 2003 laying down minimum standards for the reception of asylum seekers. When reading and applying these Articles in the present context, it needs to be borne in mind that these Articles will apply "*mutatis mutandis*" and that the relevant criteria for applying them in the context of the present Directive will be the level of protection afforded by these specific Articles. Those parts of the referred Articles which do not make sense in this specific context will of course not apply.

Paragraph 2 foresees that the persons covered by this Article receive a written confirmation, in order to enable these persons to demonstrate their particular situation in cases of - e.g. - administrative controls or checks.

Chapter IV

Temporary custody for the purpose of removal

Article 14: Temporary custody

This article seeks to limit the use of temporary custody and bind it to the principle of proportionality. Temporary custody shall only be used where necessary to prevent the risk of absconding and if the application of less coercive measures would not be sufficient. The reasons for maintaining a person in temporary custody must be regularly reviewed by a court or tribunal. Maximum time limits shall ensure that temporary custody cannot be unduly extended.

These procedural safeguards will ensure that an individual assessment concerning the reasons for temporary custody and the possibilities of imposing less restrictive measures will take place in each case and that this assessment will be subject to regular review by a court or tribunal. These procedural guarantees also aim at guaranteeing full compliance with Article 5 of the European Convention on Human Rights.

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[7] Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers, *Official Journal L 031 , 06/02/2003 P. 0018 - 0025*

Article 15: Temporary custody conditions

When drafting this paragraph, an effort has been made to provide a clear steer concerning the essential minimum conditions for temporary custody, whilst seeking to avoid an overly prescriptive list which would not be appropriate in the context of this proposal for a Directive.

Chapter V

Apprehension in other Member States

Article 16

This Article provides for a flexible set of rules, applicable if a third-country national who is the subject of a removal order or return decision issued in a Member State ("the first Member State") is apprehended in the territory of another Member State ("the second Member State"). Member States may choose from different options, depending on the individual circumstances of the case.

On the one hand, the second Member State may recognise the return decision or removal order issued by the first Member State. The financial compensation mechanism agreed upon in Council Decision 2004/191/EC[8] of 23 February 2004 is applied to these cases.

Alternatively, a second Member State may ask the first Member State to take back an illegally staying third-country national or decide to launch a new/autonomous return procedure under its national legislation.

Chapter VI

Final provisions

Article 17: Reporting

The Commission is to report on the application of the Directive by the Member States, in accordance with its role of monitoring the application of provisions enacted by the institutions under the Treaty. Taking into account that this proposal opens various options which need to be applied in practice by Member States for a certain period before a useful assessment can be undertaken, a monitoring period of four years before producing a first report is proposed.

Article 18: Transposition

Member States are required to transpose the Directive at the latest 24 months from the date of publication in the Official Journal. Member States are to inform the Commission of changes made to their legislation, regulations or administrative provisions. They are to make a reference to the Directive when adopting their provisions and they have to submit to the Commission correlation tables between the national implementing provisions and this Directive.

Article 19: Relation with Schengen Convention

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[8] 2004/191/EC: Council Decision of 23 February 2004 setting out the criteria and practical arrangements for the compensation of the financial imbalances resulting from the application of Directive 2001/40/EC on the mutual recognition of decisions on the expulsion of third-country nationals, *Official Journal L 060, 27/02/2004 P. 0055 - 0057*

This proposal covers issues already regulated in Article 23 (obligation to return an illegally staying third-country national, except where this person holds a valid residence permit issued by another Member State) and Article 24 (financial compensation for carrying out removals) of the Convention implementing the Schengen Agreement. With the adoption of this proposal, these two Articles will become redundant and should therefore be replaced.

Article 20: Repeal

With the adoption of this proposal, Directive 2001/40/EC will become redundant and should therefore be repealed.

Article 21: Entry into force

This Article sets the date of entry into force.

Article 22: Addressees

The proposed Directive is addressed to the Member States.